Aldape: Fed. Habeas & State
Trial Court Pleadings (3/96-10/96) (v.14)

TAB	DATE	DESCRIPTION	FILED BY
131.	09/09/96	Notice of Destruction of Hearing/Trial Exhibits	Court
132.	09/13/96	Defendant's Motion for Disclosure of Names, Addresses and Telephone Numbers of All the State's Witnesses, and a Proposed Order (certified mail receipt attached)	Atlas
133.	09/13/96	Defendant's Motion to Invoke Witness Rule and to Prevent the jury from Becoming Informed of the Request, and a Proposed Order	Atlas
134.	09/13/96	Defendant's Motion to Require Court Reporter to Take Notes of All Proceedings, and a Proposed Order	Atlas
135.	09/13/96	Defendant's Motion for Discovery and Inspection, and a Proposed Order	Atlas
136.	09/13/96	Defendant's Motion for Production of Grand Jury Testimony, and a Proposed Order	Atlas
137.	09/13/96	Defendant's Motion for Preservation and Production of Rough Notes, and a Proposed Order	Atlas
138.	09/13/96	Defendant's Request for Notice	Atlas
139.	10/02/96	A Copy of CJA Form 30	Atlas
140.	10/08/96	Defendant's Motion to Suppress Witness Statements and In-Court Identifications, a Memorandum in Support, and a Proposed Order	Atlas

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

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

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122.	03/22/96	Form for Appearance of Counsel for Ronald S. Flagg and Marisa A. Gomez	Sullivan
123.	03/28/96	Order of Substitution	Court
124.	04/17/96	Notice from the Court that Oral Arguments will be held on 5/1/96 at 3:30 PM	Court
125.	06/19/96	Defendant Ricardo Aldape Guerra's Motion for Return of Personal Property (Not Filed or Given to J. Voigt)	Atlas
125a.	07/30/96	Mandate	Court
126.	07/30/96	Opinion of the 5th Circuit Court	Court
127.	08/21/96	Defendant Ricardo Aldape Guerra' Motion for Protection (Given to J. Voigt 8/21/96 Not Filed)	Atlas
128.	08/21/96	Defendant's Request for a Hearing to Determine the Effect of the Opinion of the United Sates Court of Appeals for the Fifth Circuit	Atlas
129.	08/21/96	Agreed Setting	Court
130.	08/21/96	Transmittal to Dist. Clerk of Mandate	Court

F

MEMORANDUM

October 22, 1996

TO: Lisa Beck

FROM: Scott J. Atlas

RE: *Aldape Guerra*

Let me explain what I would like you to find in our habeas petition and in the State's response.

As you know from attending the hearing last week, and as you can see from the attached response to our Motion to Suppress, the State is arguing that it was denied a fair hearing in the federal habeas trial court because Judge Hoyt refused to let them amend their witness list to add eight additional witnesses, all police officers.

The reason cited by the State for Judge Hoyt's ruling being prejudicial is the claim that they were surprised by the following allegations that witnesses made at the habeas hearing:

(1) witnesses were threatened and otherwise intimidated in various ways at the scene of the crime, such as being handcuffed, arrested, threatened with removal of their child or revocation of the parole of their spouse, had guns pointed at them, had police yell and curse at them and accuse them of lying,

(2) Guerra, wearing handcuffs and paper sacks over his hands, was walked through the police station hallway in plain view of many of the other witnesses,

(3) Galvan, Flores, and Jose, Jr. were overheard saying they had not seen the shooting or did not know who the shooter was (I doubt we named names in the habeas petition),

(4) by the time Guerra was walked through the hallway in handcuffs, HPD knew that Carrasco was dead,

(5) as Guerra was walked through the hallway, a witness insisted others should pick him as the shooter,

(6) several witnesses, while they were interviewed at the police station, told police something suggesting that Carrasco, not Guerra, was the shooter (such as that Guerra had been standing with his hands empty at the time of the shooting or that they had seen Carrasco holding a gun that looked like the murder weapon shortly after the shooting),

(7) police officers told witnesses with exonerating information that they had to sign statements prepared for them, without allowing the witness to read the statement or without translating the statement or without regard to whether or not the statements were accurate,

(8) police excluded exonerating evidence from the statements or inserted incorrect inculpatory evidence,

(9) the lineup was conducted with many of the witnesses sitting together so that they could hear each other identifying Guerra (irrespective of whether they were identifying him as the shooter or merely identifying him as someone they had seen that night),

(10) one of the witnesses (Galvan) pressured the others in the lineup room to identify Guerra as the shooter,

(11) after the lineup several witnesses told the police that Guerra was not the shooter; at least one witness was asked to sign a false statement, and others were not asked to sign the statement providing the exonerating information,

(12) a week after the shooting, the prosecutors asked selected witnesses to meet at the crime scene so that they could compare stories, eliminate inconsistencies, and pick a consensus story,

(13) some of the witnesses at the reenactment told the prosecutors that Guerra was not the shooter; the prosecutors either argued with them or ignored them,

(14) at the meeting the weekend before trial (the "pretrial weekend meeting") in the prosecutors' office, witnesses for the first time were shown mannequins made to look like Guerra and Carrasco, with Carrasco wearing the bullet-riddled, blood-soaked shirt making clear that he was dead and the other one was alive,

(15) at the pretrial weekend meeting, prosecutors showed witnesses pictures of both Guerra and Carrasco, pointing to the picture of Carrasco as "the man killed that night" and pointing to the picture of Guerra as "the man who shot the cop,"

(16) some of the witnesses at the pretrial weekend meeting told the prosecutors that Carrasco, not Guerra, was the shooter, and the prosecutors either ignored them, yelled at them, or threatened them.

If you could highlight references in our habeas application and the State's response (this will show that the State knew we were making these allegations before the habeas hearing commenced), it would be extremely helpful. Please make a list of pages where you have highlighted material for each of the 16 items listed above.

I have enclosed several highlighters for your use.

If you think this assignment will take you more than two weeks, please let me know.

SJA

Enclosures
VEHOU07:25778.1

P.S. I'll send the state's brief in a day or two.
S

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FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 03:16
BY DEPUTY

October 8, 1996

VIA MESSENGER

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

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

Dear Sir:

Enclosed for filing in the captioned cause are the following:

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

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

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

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

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

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

provided to opposing counsel.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosures

c: **VIA MESSENGER**
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248th District Court
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VEHOU07:24698.1

140 (3)

CAUSE NO. 359805

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

DEFENDANT'S MOTION TO SUPPRESS
WITNESS STATEMENTS AND IN-COURT IDENTIFICATIONS

Comes now Defendant Ricardo Aldape Guerra ("Aldape Guerra") and respectfully moves this Court for an Order suppressing from use in evidence at trial the pretrial and in-court identifications and written statements of the following witnesses: Jose Armijo, Jr.; Patricia Diaz; Elvira "Vera" Flores Hernandez; Hilma Galvan; Herlinda Garcia; Jose Heredia; Armando Heredia; and Jacinto Vega. In support thereof, Defendant states the following:

1. On July 13, 1982 Houston Police Officer James D. Harris was shot and killed at the intersection of Walker and Edgewood streets in Houston, Harris County, Texas.

2. On August 21, 1996, Defendant Ricardo Aldape Guerra was arraigned in this Court in connection with this crime.

3. As set forth more fully in the attached memorandum in support of this motion and in the opinion of the federal district court in *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), *affirmed sub nom. Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996), the written and oral witness identifications of Aldape Guerra were tainted by police conduct that improperly and falsely suggested that Aldape Guerra was Officer Harris' killer. For this reason and for the reasons set forth in the attached memorandum in support of this motion, which is incorporated herein for all purposes, Guerra moves to suppress these false identifications.

WHEREFORE, Defendant respectfully urges this Court to find that the aforementioned evidence was obtained in substantial violation of defendant's rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and by pertinent provisions of the Texas Constitution, and as a result thereof, to order that such evidence by suppressed from use in evidence at trial.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: 

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by hand delivering a copy to the assistant district attorney handling the case or by sending a copy certified mail, return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 24th day of October, 1996.

Scott J. Atlas

SCOTT J. ATLAS

VEHOU07:24607.1

CAUSE NO. 359805

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS WITNESS STATEMENTS AND IN-COURT IDENTIFICATIONS

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October 8, 1996

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STATE OF TEXAS	§	IN THE DISTRICT COURT OF
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	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS WITNESS STATEMENTS AND IN-COURT IDENTIFICATIONS

I. PRELIMINARY STATEMENT

In the attached motion, Defendant Ricardo Aldape Guerra ("Aldape Guerra") moves this Court to suppress pretrial and in-court identifications and pretrial witness statements that have already been found by the United States District Court for the Southern District of Texas, following a five-day evidentiary hearing, to be false and tainted. *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), *aff'd sub nom. Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996). Such "evidence" was used at Aldape Guerra's 1982 trial only as a result of "rank" prosecutorial misconduct. *Id.* at 626.

This Memorandum of Law will discuss (i) the facts found by the federal court following its five-day evidentiary hearing; (ii) the reasons why the doctrine of collateral estoppel, under federal and state law, denies the State the right to re-litigate the federal court's findings of fact; and (iii) the reasons why, under applicable standards, these facts require the suppression of the tainted identifications and statements. For these reasons, Aldape Guerra's motion should be granted.

II. PROCEDURAL HISTORY

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

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

The Arrest. The Defendant, Ricardo Aldape Guerra, was arrested on the very same day, July 13, 1982, and indicted on July 23, 1982 for the offense of capital murder of a police officer.

The Trial. The defendant was tried in this Court. On October 12, 1982, the jury returned a verdict of guilty. Two days later, Aldape Guerra was sentenced to death. A motion for new trial was filed that day and denied on October 26, 1982.

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

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

Federal Habeas Review. On February 13, 1993, Defendant filed an Application for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas (hereinafter "federal habeas trial court"). In November 1993, that court conducted a five-day evidentiary hearing. On November 15, 1994, the court entered an order granting relief, which was amended on May 18,

1995 and published at 916 F. Supp. 620.[1] That order was affirmed on July 30, 1996 by the United States Court of Appeals for the Fifth Circuit. 90 F.3d 1075.[2] The State did not request rehearing in the Fifth Circuit. The State has not filed a petition for writ of *certiorari* in the United States Supreme Court but has until October 28, 1996 to do so.

Aldape Guerra was arraigned in this Court on August 21, 1996. At a conference with the Court preceding arraignment, the State announced its intention to use at trial certain identification evidence assembled for Aldape Guerra's 1982 trial. That evidence is the subject of this Motion.

III. INTRODUCTION

Aldape Guerra believes that the doctrine of collateral estoppel compels this Court to grant the present motion. Under state and federal law, collateral estoppel precludes the State from re-trying the facts necessarily found by the federal habeas trial court in its opinion on habeas review of Aldape Guerra's conviction. That court's findings were reached after a five-day evidentiary hearing at which the State of Texas was represented and at which its interests were identical to its interests here. The State intended and attempted to maintain its conviction and death sentence against Aldape Guerra in the federal proceeding. And as its appeal papers to the United States Court of Appeals for the Fifth Circuit demonstrate, the State fully agrees that these facts were found by the federal habeas trial court against the State. As set forth more fully below, collateral estoppel requires that the federal habeas trial court's determinations that this evidence is false and tainted prevent the State from using this false evidence against Aldape Guerra again. Once those facts are evaluated, it is clear that suppression of the tainted evidence is required.

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[1]A copy is attached as Attachment 1 hereto for the Court's convenience.

[2]A copy is attached as Attachment 2 hereto for the Court's convenience.

The evidence that Aldape Guerra seeks to suppress by this motion falls into four categories. The first category is previously recorded testimony during the 1982 trial of Aldape Guerra in Cause No. 359,805 in this Court relating to the identification of Aldape Guerra as the shooter of, possible shooter of, or pointer of a gun or anything that might have been a gun at either Houston police officer J.D. Harris or Jose Armijo, Sr. by any of the following witnesses: Jose Armijo, Jr. ("Jose Jr."), Patricia Diaz ("Diaz"), Elvira "Vera" Flores ("Flores"), Hilma Galvan ("Galvan"), Herlinda Garcia ("Garcia"), Jose Heredia ("J. Heredia"), Armando Heredia ("A. Heredia"), and Jacinto Vega ("Vega"). Each of these witnesses (except A. Heredia) claimed in 1982 to have seen Officer Harris shot, 916 F. Supp. at 627-28, and each was exposed to several improper identification procedures found by the federal habeas trial court. The federal habeas trial court found that these in-court identifications were the product of police and prosecutorial misconduct, unnecessarily suggestive procedures, taint, and witness intimidation. *Id.* at 630, 637.

The second category is new testimony, at any future trial of Aldape Guerra in Cause No. 359,805 or any other cause, relating to the identification of Aldape Guerra as the shooter of, possible shooter of, or pointer of a gun or anything that might have been a gun at either Houston police officer J.D. Harris or Jose Armijo, Sr., by any of these same witnesses.

The third category is new testimony, at any future trial of Aldape Guerra in Cause No. 359,805 in this Court or any other cause by any of these witnesses to the effect that at any previous confrontation, including but not limited to the lineup, witness meetings, or the 1982 trial itself, the witness identified Aldape Guerra as the shooter of, possible shooter of, or pointer of a gun or anything that might have been a gun at either Houston police officer J.D. Harris or Jose Armijo, Sr.

The fourth category is the witness statements from any of these witnesses taken on or after July 13, 1982 (which is when the federal habeas trial court found that the police and prosecutorial misconduct commenced) up to an including the last day of any trial in Cause No. 359,805 in connection with the shooting of either Houston police officer J.D. Harris or Jose Armijo, Sr. Such witness statements are only relevant if this Court determines to allow these witnesses to testify at Aldape Guerra's retrial. They are clearly hearsay and do not satisfy any recognized hearsay exception. The federal habeas trial court held that they are not accurate or reliable—therefore they have no probative value to weigh against the danger of unfair prejudice that they present. Moreover, they would tend to confuse the issues and mislead the jury. TEX. R. CRIM. EVID. 403.

This memorandum of law has three parts. *First*, Defendant will recite the facts actually and necessarily found by the federal habeas trial court concerning the identifications. *Second*, Defendant will show that the doctrine of collateral estoppel precludes the State from re-litigating those fact findings. *Third*, Defendant will show that the proper remedy in light of the constitutional violations is exclusion of the evidence at any retrial of Aldape Guerra.

IV. STATEMENT OF FACTS

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

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

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

Officer Harris ordered the two out of the car. They complied and approached Officer Harris' vehicle. One of the two men pulled a nine-millimeter Browning semi-automatic pistol and shot Officer Harris three times, killing him. This murder weapon belonged to Carrasco. At the time that Officer Harris was shot, the other occupant of the car had placed or was placing his hands on the hood of the police car, as Officer Harris had instructed. As the two fled the scene of the crime following the shooting, the same man who shot Officer Harris fired the same gun that had killed Officer Harris into an approaching car. The driver of that car, Jose Armijo, Sr. ("Mr. Armijo"), was shot and later died of his wounds. His two children, including Jose Jr., then age 10, were riding in the car with him. *Id.* at 623.

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

ammunition for the murder weapon. Finally, Officer Harris' service revolver, a .357 Colt Python, was found in Carrasco's waistband. *Id.* at 623.

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

Near the intersection at which these events took place were a number of bystanders. Many of them were minors at the time: Diaz (then age 17); Frank Perez ("Perez") (17); Garcia (14); J. Heredia (14); Flores (16) (now known as Elvira Hernandez); A. Heredia (18); and Jose Jr. (10). In addition to being disadvantaged in communicating with police in these circumstances by their youth, the native language of all but one of these "neighborhood witnesses," as the federal court called them, is Spanish. Moreover, at the time, many of them had no command of English. *Id.* at 624, 629.

After the bystanders were assembled by police at the crime scene, they were taken to the police station. Two of the women—Elena Holguin ("Holguin"), the mother of the two Heredia boys, and Trinidad Medina ("Medina"), the mother of Flores and Garcia—were taken there wearing handcuffs. *Id.* at 624-25. The bystanders arrived at the police station before 12:00 midnight on the night of the shooting and remained there until 6:30 a.m. the next morning. *Id.* at 624. They waited as a group in a hallway outside the Homicide Division offices. *Id.* at 629. During this time they were free to talk among themselves about the shooting and did so. In particular, the Court found that

one bystander, Galvan (age 44), spent most of her time talking to 10-year-old Jose Jr. and 16-year-old Flores. Also during this time, Aldape Guerra, wearing handcuffs and paper bags over his hands, was "walked and shoved" down the hallway past Diaz, Flores, Garcia, Jose Jr., Galvan, J. and A. Heredia, Medina, and Perez. *Id.* The paper bags presumably served to preserve any trace evidence remaining on his hands. He was led before them a second time when taken to the photo lab. *Id.* Ignoring a general instruction or warning against talking, Galvan pointed toward Aldape Guerra as he passed and said to Jose Jr., and to J. and A. Heredia, in Spanish, loud enough for all witnesses and the police to hear, that since Carrasco had died they could blame the shooting of Officer Harris on the "wetback" from Mexico, the man who "looked like God"—a reference to Aldape Guerra's long hair and beard. *Id.*[3] Although the Court found that Galvan had likely not seen the shooting, it also found that she "encouraged the minors" to identify Aldape Guerra as the shooter knowing that Aldape Guerra did not fit even her own initial description of the shooter. *Id.* at 629.

The lineup took place at 6 a.m. on July 14. The police took two sets of witness statements from several of these witnesses; one before the lineup and one afterwards. The federal habeas trial court found that none of the pre-lineup statements contained descriptions that pointed unequivocally

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

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

916 F. Supp. at 629-30.

to Aldape Guerra as the shooter. *Id.* at 627; *see id.* at 630. The court also found that the police deliberately did not transcribe accurate witness statements, specifically by excluding information exonerating Aldape Guerra. *Id.* at 631-32 (Garcia), 632 (Garcia, Diaz, Brown, Perez), 632-33 (J. Heredia, Brown).

The lineup was conducted jointly, allowing witnesses to hear one another's identifications. At the lineup, Aldape Guerra was the only subject with shoulder-length hair. Garcia told the police that the man in the number 4 position (Aldape Guerra) was not the shooter but, instead, was the man with empty hands near the front of the police car at the time Officer Harris was shot. *Id.* at 631. This information was omitted from both statements prepared for her. Diaz also told the police that the man in the number 4 position was the man who had been on the driver's side, near the front of the police car (in the position which the physical evidence proved was the position of the non-shooter), with empty hands. *Id.* at 632. As the State put it in its brief on appeal to the Fifth Circuit at 27 (hereinafter "State App. Brief"), the federal habeas trial court "found that the police doctored Diaz' post-lineup statement . . . to omit" this information. State App. Br. at 27. Perez told the police that he recognized Aldape Guerra from having seen him in the hallway, but that Aldape Guerra was not the man he had seen dropping the gun as he ran past Perez earlier that night. *Id.* at 632. J. Heredia told the police at the lineup that he recognized Aldape Guerra as the driver of the black car, but that he was not the man who shot Officer Harris. *Id.* at 633. This and other exonerating information, such as the fact that Aldape Guerra was up against the car and empty handed when Carrasco walked behind Aldape Guerra and shot Officer Harris, was omitted from the only statement J. Heredia was asked to sign. Although he tried to read the statement, he could not read English and was told to "just sign it" by the police. *Id.* at 633.

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

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

The federal habeas trial court also found that on the weekend before Aldape Guerra's 1982 trial, the prosecutors called the witnesses together yet again to review their testimony as a group at the prosecutors' offices. At that meeting, the prosecutors introduced to the witnesses two mannequins that had been created in the likenesses of Aldape Guerra and Carrasco and that were wearing the actual clothes the two men had worn on the night of the murders. Carrasco's shirt was bullet riddled and blood soaked. The Court found that the pretrial use of the mannequins in the meeting was certain to reinforce the "consensus facts" so that there would be "complete harmony" in the testimony. *Id.* at 630; *see id.* at 629. At the meeting, one of the prosecutors pointed to a picture of Carrasco and said that he was the man who died in the shootout with police, then pointed

to a picture of Aldape Guerra and said that he was the man who shot and killed Officer Harris and Mr. Armijo. *Id.* at 626. At this meeting, Garcia told one of the two prosecutors for the third time that the long-haired man wearing the green shirt (Aldape Guerra) was not the man who shot the police officer. Diaz told one of the prosecutors that she was at the crime scene at the time of the shooting and that Aldape Guerra did not appear to be holding a gun because, at the time of the shooting, his hands were open and empty with his palms down on the hood of the police car. *Id.* at 632.

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

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

The court found that responding to this pressure, the police used the methods described above to conform the bystanders' identifications, statements, and testimony to a version of events that would implicate Aldape Guerra: *namely*, the police preyed on their extreme youth; exploited their lack of formal education and their inability to speak or read or write English fluently or at all, *id.* at 624; threatened them or their relatives with unrelated prosecutions and punishments; used improper police methods such as handcuffing witnesses, conducting midnight "searches" of witnesses' homes, and informing witnesses falsely that once they had signed inaccurate statements they could be punished for correcting them, *id.* at 626; paraded a handcuffed Aldape Guerra in front of witnesses twice to make clear he was the prime suspect and thereby allowed Galvan to insist he was the shooter; and gathered the witnesses together three times—for a joint lineup, a "reenactment" or walk-through of the shooting at the scene, and a pretrial meeting at which testimony and statements could be harmonized, *id.* at 624-26, 629. Harmonization of this testimony was crucial to the prosecution's success, since the only important issue at Aldape Guerra's trial was identification: what the man who shot Officer Harris looked like, and whether Aldape Guerra fit that physical description. The trial itself constituted a fourth event at which the suggestion that Aldape Guerra was the shooter was irretrievably impressed on the witnesses. *Id.* at 630. This effort at harmonization worked. For example, the Court found that Jose Jr., the ten-year-old, was overheard in the hallway saying that he had seen neither Carrasco nor Aldape Guerra clearly enough to know which man had fired the shots (indeed he testified that his father had pushed him down below the dashboard to protect him from the shooting that ultimately took his father's life), but that Galvan's influence caused Jose Jr. to be "specific and direct" in implicating Guerra at trial. *Id.*

It would be difficult to overstate the federal habeas trial court's conviction that the evidence Aldape Guerra seeks to suppress in this motion should not have been admitted in Aldape Guerra's original 1982 trial. That court concluded its 18-page opinion as follows:

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

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

V. THE COLLATERAL ESTOPPEL DOCTRINE PRECLUDES THE STATE FROM RE-LITIGATING THE FEDERAL HABEAS TRIAL COURT'S FINDINGS OF FACT.

A. The Federal Court Necessarily Found that Certain Pretrial and In-Court Identifications and Witness Statements Were Tainted by Police and Prosecutorial Misconduct.

The issue in Aldape Guerra's 1993 habeas hearing was, of course, not his actual guilt or innocence but whether he had received a fair trial in 1982.[4] The federal habeas trial court found four separate bases for concluding Aldape Guerra's 1982 trial unfairly violated his constitutional rights: (1) pretrial intimidation of witnesses (leading to inaccurate witness statements); (2) "notably suggestive" and improper identification procedures that tainted the eyewitnesses to the crime; (3) *Brady* violations (principally, omission by the police of material exculpatory information from the witness statements and the failure to notify counsel that the witnesses had resisted identifying Guerra as the shooter); and (4) prosecutorial misconduct at trial including the use of false evidence (such as the identifications and statements). Thus, the findings on which defendant relies here were

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[4]It is clear that the federal habeas trial court believes that Aldape Guerra is innocent:

> ***The police officers and prosecutors*** had a duty to accurately record the statements of the witnesses, to fairly investigate the case, and to disclose all exculpatory evidence. Moreover, they ***had a duty to not prosecute an innocent man. They failed in these duties.***

916 F. Supp. at 633-34 (emphasis added).

> Their [the police officers' and prosecutors'] misconduct was designed and calculated to obtain a conviction and another "notch in their guns" ***despite the overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra.***

Id. at 637 (emphasis added).

a necessary predicate to the remedy the court granted, *namely*, overturning Aldape Guerra's conviction.

For the reasons provided in this section, this Court should preclude the State from re-litigating the fact of taint and the inaccuracy of the witness statements found by the federal habeas trial court.

B. Collateral Estoppel Precludes the State from Re-litigating the Taint Issues

Collateral estoppel, or "issue preclusion," bars re-litigation of all issues of fact actually determined by and essential to a final[5] judgment. 18 C.A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 4402, at 7 (1981) (quoting *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F. 2d 530, 535-36 (5th Cir. 1978)). In criminal cases, collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (describing collateral estoppel as "an awkward phrase" that "stands for an extremely important principle in our adversary system of justice").

The Texas Court of Criminal Appeals has adopted this principle and described it as "[e]mbodied within the constitutional protection that a criminal defendant cannot be twice placed in jeopardy for the same crime." *Ladner v. State*, 780 S.W.2d 247, 250 (Tex. Crim. App. 1989) (*en banc*) (quoting *Ashe*, 397 U.S. at 443); *Ex Parte Tarver*, 725 S.W.2d 195, 197 (Tex. Crim. App.

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[5]The federal court judgment in *Guerra v. Collins* is "final" even if the State belatedly determines to file a petition for writ of certiorari in the United States Supreme Court. *See TCA Bldg. Co. v. Northwestern Resources Co.*, 861 F. Supp. 1366, 1374 (S.D. Tex. 1994) (under both Texas and federal law, *res judicata* and collateral estoppel apply even if the prior judgment is appealed, unless the appeal consists of a trial *de novo*); *accord*, *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986) (Texas law).

1986) (*en banc*). In application, the doctrine means that if the State has litigated an issue of fact with a criminal defendant and that issue has necessarily been determined adversely to the State in a valid and final judgment, the State is prohibited from re-litigating the issue in a later proceeding with the same criminal defendant. *Ladner*, 780 S.W.2d at 253-54 (quoting *United States v. Mock*, 604 F.2d 341, 343 (5th Cir. 1979)). In the case at bar, Defendant believes that the State is precluded by the doctrine of collateral estoppel from re-litigating whether the United States District Court correctly found taint. Its opportunity to contest those findings came on direct appeal of the habeas ruling to the United States Court of Appeals. The State attempted to do so at that time, and lost.

Courts in several controlling cases applied collateral estoppel in a manner almost identical to that urged by Defendant here. *See, e.g., Ashe*, 397 U.S. at 445-46 (once a jury has decided that there was reasonable doubt regarding whether individual was one of several masked persons who robbed a poker party, state was barred from re-litigating that issue in trial for robbery of second victim); *Tarver*, 725 S.W.2d at 197-200 (after court specifically found allegations of assault "not true" at a probation revocation hearing, state was barred from re-litigating those facts in attempt to obtain conviction for that assault); *United States v. Evans*, 655 F. Supp. 243 (E.D. La. 1987) (where, in prior suppression hearing before another federal district court, government had full and fair opportunity to litigate issue of search of apartment and seizure of evidence, and government admitted it had no new evidence to present on issue, government was collaterally estopped from re-litigating suppression of evidence).

Here, in the federal habeas proceeding, the State litigated the reliability of certain identifications against Aldape Guerra; in a valid, final judgment, the federal court found those reliability issues adversely to the State. Accordingly, the State should be estopped from re-litigating

those issues at trial. An examination of some of those precedents will reveal how the doctrine is applied.

In *Tarver*, the defendant was already on probation for cocaine possession when he was accused of assault. One condition of his probation was that he "[c]ommit no offense against the laws of this or any other state or of the United States." 725 S.W.2d at 196. Before he was tried for the assault, the State filed a motion to revoke probation for committing the alleged assault. A probation revocation hearing was conducted in the trial court of his original cocaine conviction. A full evidentiary hearing was held, with the State calling three witnesses, among them the alleged victim of the assault. *Id.* at 198. After hearing the State's evidence, the trial court granted a defense motion "to find the allegation not true." The court denied the State's motion to revoke probation and further stated: "I find the evidence in this case to be totally incredible." *Id.* The defendant then filed, in the court where the assault charge was pending, a pretrial habeas writ based on the collateral estoppel effect of the court's findings at the probation revocation hearing. The trial court denied the writ. The Court of Appeals reversed the denial of the writ, holding that the "doctrine of collateral estoppel, recognized in *Ashe v. Swenson*, bars the State from exposing [petitioner] to jeopardy in the county court after it has once tried and failed, despite a full and fair hearing, to prove identical allegations [in the probation revocation hearing]." *Ex Parte Tarver*, 695 S.W.2d 344, 353 (Tex. App.—Houston [1st Dist.] 1985). The Court of Criminal Appeals *en banc* affirmed. 725 S.W.2d at 197.

Tarver is analogous to this case. Aldape Guerra's federal habeas evidentiary hearing is like Tarver's probation revocation hearing. At the habeas hearing, the State fully intended to prove that the in-court identifications and witness statements were accurate and that use of them at trial did not violate Aldape Guerra's constitutional rights. The State participated in a five-day evidentiary hearing

at which witnesses were called and documents introduced. At the close of the hearing, the Court issued findings far more detailed than "I find the evidence in this case to be totally incredible," which was enough to preclude re-litigation in *Tarver*. In fact, the federal habeas trial court found that the State "offered no evidence" to prove that "the intentional act of causing to be admitted tainted, unreliable and perjured testimony, identifying Guerra as the shooter, was harmless." 916 F. Supp. at 630. Thus, under the law of this state, the federal court's finding should be afforded preclusive effort.

In *Ashe*, the United States Supreme Court held that the doctrine of collateral estoppel is of constitutional dimension. In *Ashe*, four masked men were accused of robbing six poker players and stealing one of their cars. The government chose to prosecute each man in seven separate trials—one for each victim and offense. At the first such trial of one of the accused, the government lost a general verdict. The only contested issue at trial had been the identity of the defendant: *i.e.*, was he one of the masked men. At a trial of robbing a second victim, the government improved its case, calling different witnesses, eliciting stronger testimony, and not calling witnesses who had been unsure in the first trial. 397 U.S. at 440. The second time, the government won. On habeas review of the conviction, the Supreme Court concluded that the government should not be permitted a "dry run" of its case against the defendant in the failed trial and then allowed to win it after repairing its case on the second go-round. *Id.* at 447. The Supreme Court analyzed the second trial as follows:

> [T]he record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that [the victim in the second trial] had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of [a second victim] wholly impermissible.

Id. at 445. If the State were permitted to re-litigate the taint issues before this Court, the habeas hearing would turn into an impermissible "dry run"—for the State's benefit—of the taint issues.

Ashe held that in the case of a previous general verdict of acquittal the Court was required to examine the record and "conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444. Unlike in *Ashe*, here there is no need to scour the federal habeas trial court record to infer the basis for the decision of the fact finder. The judgment in Aldape Guerra's habeas action consisted of detailed findings of fact regarding, *inter alia*, the tainted identification procedures to which the witnesses were exposed. Those findings are the very issues that "defendant seeks to foreclose from consideration" here. *Id.* Thus, the instant case presents a much easier question for this Court than *Ashe* did, since the findings of the federal habeas trial court here do not require interpretation. Here the federal habeas trial court has expressly identified which facts it found, including the fact that the witness statements and identifications were inaccurate and unreliable.

VI. THE PROPER REMEDY FOR DEFENDANT BASED ON THESE FACTS IS SUPPRESSION OF ALL IDENTIFICATION TESTIMONY.

At the original 1982 trial, Aldape Guerra was found guilty of capital murder due solely to the admission of severely tainted witness testimony—testimony that changed materially over time, was materially inconsistent among the witnesses, and was, in virtually all respects, contrary to definitive physical evidence. *See* 916 F. Supp. at 635 ("The State's theory [of guilt] . . . in the face of this physical evidence, is beyond belief . . . ."). With no direct or physical evidence of Aldape Guerra's guilt, the State relied on highly improper procedures to manipulate witnesses until they finally "identified" Aldape Guerra as the shooter.

The State's proven blatant misuse of identification procedures should require the automatic suppression of the putative identifications in this case. Using the "totality of the circumstances" test articulated by the United States Supreme Court in *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977),[6] it is difficult to imagine a more compelling case requiring suppression of the tainted eyewitness testimony.

A. The *Manson* Reliability/Totality-of-Circumstances Test

The United States Supreme Court has expressly adopted a "totality of the circumstances" test that allows admission only of "reliable" identification testimony if it appears the police followed improper identification procedures. *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977). Thus, the question before this Court is whether the identifications meet the *Manson* "reliability" standard if the State elects to re-try Aldape Guerra. The question must be considered in light of the facts found by the federal habeas trial court that the police used a "host" of improper procedures and in light of that court's decision that the admission of the resulting identifications, *inter alia*, required a reversal of Aldape Guerra's conviction. 916 F. Supp. at 629, 631. For the reasons given below, Defendant urges that the question be answered in the negative.

Admissibility of identification evidence is governed by a two-step analysis enunciated in *Manson*. *Id.* at 107; *Dispensa v. Lynaugh*, 847 F.2d 211, 218-19 (5th Cir. 1988). First, was the

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[6]While *Manson* was a habeas case and involved the use of a photo array for identification purposes, the Court framed the issue more broadly, *i.e.*, whether the Fourteenth Amendment's Due Process Clause compels exclusion in a state criminal trial of "pre-trial identification evidence obtained by a police procedure that was both suggestive and unnecessary" or whether reliability should nonetheless be considered. 432 U.S. at 99. Because of the broad language "pre-trial identification evidence," *Manson* has been applied to pretrial identification procedures generally as well as to photographic identification procedures. *See United States v. Williams*, 592 F.2d 1277, 1281 (5th Cir. 1979) ("The same bipartite inquiry . . . regarding photographic spreads is applicable to other types of confrontation procedures such as the lineup.").

identification procedure unnecessarily suggestive? Second, is the resulting identification so unreliable that the defendant's due process right to fair judicial procedure precludes an identification at trial? 432 U.S. at 107, 114.

With respect to the second inquiry, to measure whether an in-court identification is reliable despite an earlier, impermissibly suggestive out-of-court identification, the Court must determine whether under the totality of the circumstances the suggestion connected with the earlier identification was so corrupting that it led to a "substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Delk v. State*, 855 S.W. 2d 700, 706 (Tex. Crim. App.), *cert. denied*, 510 U.S. 982 (1993);. *Loserth v. State*, 1996 WL 180700 at *7 (Tex. App.—San Antonio, April 17, 1996).[7] The same standard, "with the deletion of [the term] 'irreparable,'" also applies when the issue is the admissibility of testimony concerning an earlier out-of-court identification. *Neil v. Biggers,* 409 U.S. 188, 198 (1992); *Rodriguez v. Young*, 906 F.2d 1153, 1162 (7th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991). This requirement "of minimally acceptable reliability has obtained constitutional stature because of the great evidentiary impact and statistically questionable validity of an eyewitness's identification from the [witness] stand of a defendant as the perpetrator of a criminal act." *United States ex rel. Kosik v. Napoli*, 814 F.2d 1151, 1156 (7th Cir. 1987); *see United States v. Wade*, 388 U.S. 218, 228 & n.6 (1967) (noting unreliability of eyewitness testimony).

Noting that "reliability is the linchpin in determining the admissibility of identification testimony," the *Manson* Court listed several factors to be considered in determining the reliability

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[7]A copy is attached as Attachment 3 hereto for the Court's convenience.

of eyewitness testimony. 432 U.S. at 114 (citing *Neil*, 409 U.S. at 199-200). "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* When analyzing these factors, the burden is on the prosecution to establish by "clear and convincing proof"[8] that the in-court testimony is not the fruit of an earlier, unnecessarily suggestive identification procedure. *Herrera v. State*, 682 S.W.2d 313, 318 (Tex. Crim. App. 1984), *cert. denied*, 502 U.S. 1085 (1992) (state must demonstrate the independent origin of in-court identification following an improper or illegal lineup by clear and convincing evidence).

In *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Crim. App. 1989) (en banc), *cert. denied*, 498 U.S. 817 (1990), the Texas Court of Criminal Appeals in a habeas case recognized that the state's investigative procedures as a whole may be so improper that they may result in the denial of the accused's rights to due process of law. *Id.* at 891 (citing *Foster v. California*, 394 U.S. 440 (1969); *Dispensa*, 847 F.2d at 218). The *Brandley* court, reading the Supreme Court's decision in *Foster* expansively, noted that "[a]lthough *Foster* involves impermissible State conduct in an identification procedure, the Due Process Clause of the Fourteenth Amendment is not limited to the State's action in that narrow context." *Id.* The *Brandley* court added that while individual incidents of improper investigative procedures might not affect the outcome of trial, the cumulative effect of investigative procedures, judged by the totality of circumstances, may result "in a deprivation of [an] applicant's right to due process of law by suppressing evidence favorable to the accused, and by creating false testimony and inherently unreliable testimony." *Id.* at 894.

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[8]"The phrase 'clear and convincing' evidence has been defined as 'clear, explicit, and unequivocal,' 'so clear as to leave no substantial doubt,' and 'sufficiently strong to command the [petition of] unhesitating assent of every reasonable mind.'" *Martinez v. State*, 437 S.W.2d 842, 849 (Tex. Crim. App. 1969) (citing *In re Jost*, 256 P.2d 71, 74 (1953)).

B. The State's Identification Procedures Were Impermissibly Suggestive

The federal habeas trial court found that the State used "a host of improper identification procedures" in the effort to manipulate the witnesses' memories, 916 F. Supp. at 629, in particular, (i) police intimidation at the crime scene, (ii) allowing witnesses to see Aldape Guerra in handcuffs twice before the lineup, (iii) an impermissibly suggestive lineup, (iv) an impermissibly suggestive reenactment, (v) the viewing of the mannequins prior to the trial, and (vi) the use of the mannequins at trial. The following paragraphs analyzing the suggestive events can lead to only one conclusion: the state's identification procedures were unnecessarily suggestive, and defendant has met the first *Manson* prong.

1. Police Intimidation

The federal habeas trial court found that the police began intimidating witnesses at the crime scene, before the witnesses began providing their initial police statements. *Id.* at 624 (Diaz); 624-25 (Holguin); 625 (Perez); 625-26 (Garcia). Two witnesses were handcuffed at the scene, and one witness was threatened by police. *Id.* at 624-26. These facts alone raise a substantial likelihood of misidentification warranting the exclusion of identification testimony and witness statements.

2. Aldape Guerra in Handcuffs

The federal habeas trial court found that police officers allowed Aldape Guerra, handcuffed and with paper bags over his hands, to be walked and shoved down the hallway twice past the State's eyewitnesses before the lineup. *Id.* at 629. (Diaz, Flores, Garcia, Jose Jr., Galvan, Medina, Perez). The Court described this as "notably suggestive." *Id.* This suggestive viewing tainted any subsequent identification by the State's witnesses. *See Archuleta v. Kerby*, 864 F.2d 709, 710 (10th Cir.) (state conceded that allowing eyewitnesses to see defendant while "handcuffed in a police car

among uniformed police officers" was suggestive), *cert. denied*, 490 U.S. 1084 (1989); *Dispensa*, 847 F.2d at 220 (rape victim's identification of defendant at restaurant was unduly suggestive where defendant was walked through restaurant accompanied by police officer).

3. The Lineup

The federal habeas trial court found that given the undisputed facts leading up to and surrounding the lineup, the identification of Aldape Guerra at the lineup was "pre-destined." 916 F. Supp. at 630. Indeed, it would be difficult to imagine a case where lineups were more suggestive than here, where witnesses (i) were allowed to see Aldape Guerra handcuffed and in police custody, (ii) then gathered in a room for a joint viewing of the lineup, and (iii) allowed not only to share their individual opinions of the shooter's identity, but in some instances, to exert influence over each other. The practice of allowing two identifying witnesses to be present during each other's identification has been severely criticized because it is "a procedure said to be fraught with dangers of suggestion." *United States ex rel. Pierce v. Cannon*, 508 F.2d 197, 200 (7th Cir. 1974), *cert. denied*, 423 U.S. 841 (1975) (quoting *Wade*, 388 U.S. at 234). The identifications of Aldape Guerra were fundamentally unreliable because the lineup procedures used by police were irreparably tainted by the witnesses' group viewing and discussions, and any hope of reconstructing the witnesses' original perceptions remains futile.

4. The "Reenactment"

Nine days after the night of the shooting, police gathered together several of the State's witnesses to conduct a "walk-through" or "reenactment" of the shooting with chosen witnesses participating. 916 F. Supp. at 629, 631-32. The "walk-through" was another step in the State's attempt to manufacture false testimony. *See Brandley*, 781 S.W.2d at 893 (suggestive

"walk-through" contributed to due process violation by creating false testimony). The federal habeas trial court found that this procedure improperly "permitted the witnesses to overhear each others [*sic*] views and conform their views to develop a consensus view." 916 F. Supp. at 629.

5. The Mannequins and Prosecutorial Suggestiveness

The federal court found that the prosecutors conducted a second joint meeting of witnesses, this time during the weekend before trial. *Id.* at 629, 631-32. At this meeting, the witnesses were presented with two life-size mannequins, created in the images of Aldape Guerra and Carrasco.[9] *Id.* at 629. The mannequins were used at that meeting and throughout the trial to bolster and reinforce the witnesses' testimony. The Court found that the effect of the use of these mannequins was to violate Aldape Guerra's due process rights.[10] *Id.* at 630.

6. Repeated Viewings

By the start of trial, none of the State eyewitnesses had yet attended a properly conducted lineup, and all had been subjected to:

(i) intimidating and coercive police interrogation at the scene of the shooting;

(ii) exposure twice to a handcuffed Aldape Guerra at the police station only hours after the shooting;

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[9]The Carrasco mannequin's shirt had bullet holes and bloodstains while the shirt on the other mannequin did not. 916 F. Supp. at 630.

[10]Thus, the pretrial use of the mannequins for all practical purposes was the equivalent of a one-person showup, since it was clear from the bullet holes and blood on Carrasco's shirt that he was dead. The use of one-person showups has been widely condemned. *Wade*, 388 U.S. at 229; *Herrera v. Collins*, 904 F.2d 944, 947 n.2 (5th Cir.), *cert. denied*, 498 U.S. 925 (1990); *see also Babers v. Estelle*, 616 F.2d 178 (5th Cir.), *cert. denied*, 449 U.S. 985 (1980); *Rodriguez*, 906 F.2d at 1162 n.6 ("Showups . . . will almost always lead to undue suggestion."); *Jackson v. State*, 682 S.W.2d 692, 695 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd 1985) (practice of showing suspects singly to crime witnesses for identification has been widely condemned).

(iii) an impermissibly suggestive lineup that allowed witnesses to identify Aldape Guerra in each other's presence and to persuade other State witnesses to identify Aldape Guerra;

(iv) a jointly attended reenactment of the shooting; and

(v) a discussion of the case in the presence of the mannequins and a comment by one of the prosecutors branding Aldape Guerra as "the man who shot the cop."

After repeated viewings of Aldape Guerra under circumstances implicating him in the shooting, it is not surprising that several so-called "eyewitnesses" became convinced that Aldape Guerra was the shooter.

7. <u>The 1982 Trial Itself</u>

If the witnesses were to testify at the retrial of Aldape Guerra, then the 1982 trial itself must be viewed as an additional improper identification event at which the suggestion that Guerra was the shooter was irreversibly communicated to the witnesses. During trial, the life-like mannequins were placed in front of the jury and witnesses. Their positioning—with one dressed in a bullet-riddled, blood-soaked shirt—helped witnesses identify which of the men was dead. *Id.* at 630. The State's use of the mannequins dressed in the original clothes of Carrasco and Aldape Guerra grossly tainted the testimony of the State's witnesses. The inescapable non-verbal message sent to the witnesses during the trial was that Carrasco was the dead man and the witnesses were to focus on the other man, Aldape Guerra, seated at counsel table. To avoid any confusion that the witnesses' original pre-lineup statements had revealed, the prosecutors dressed and groomed the life-like mannequin of Aldape Guerra as he appeared on July 13 so that the witnesses could identify Aldape Guerra by matching him with his mannequin and could easily frame their identification testimony to correspond to that mannequin. The court found that the "corrupting" identification procedures caused witnesses

"who either knew otherwise, or did not know at all, to testify that Guerra had committed the crime." *Id.* at 630. Indeed, the Court found the State deliberately chose to taint the identification process by insisting on perjured testimony. *Id.* The State witnesses never identified Aldape Guerra in an atmosphere free from undue suggestion. As the Fifth Circuit has stated: "The identification of a defendant in a manner that suggests whom the witness should identify is a denial of the defendant's right to due process of law." *Dispensa*, 847 F.2d at 218.

C. The State Witnesses' Identifications Are Unreliable Under the *Manson* Standard

Analysis of the second "reliability" prong of the *Manson* test is facilitated by the federal court's fact finding that the identifications were "unreliable." 916 F. Supp. at 631. Specifically, the federal court found:

- that the State "deliberately chose to taint the identification process by insisting upon perjured testimony," *id.* at 630;
- that the State "caus[ed] to be admitted" at the 1982 trial tainted, *unreliable* and perjured testimony, identifying Guerra as the shooter," *id.* at 631 (emphasis added); and
- that under the "totality of the circumstances"—the *Manson* test—"the identification procedures used by the police and the prosecutors were so corrupting that [they] caused witnesses who either knew otherwise, or did not know at all, to testify that Guerra had committed the crime," *id.* at 630 (citing *Manson* test described *id.* at 627).

Thus, the federal court has already found facts that under the *Manson* "totality of the circumstances" test demonstrate the unreliability of the witness identifications.

As the totality of the circumstances show, the police and prosecutors treated these neighborhood bystander witnesses in a manner intended to produce false, damaging written statements and testimony that Aldape Guerra was the shooter even though the police and prosecutors

knew that these witnesses believed he was not, and that if anything, they had seen Carrasco shoot Officer Harris. *Id.* at 630.

Use of this false testimony would greatly prejudice Aldape Guerra if admitted at his retrial, because it is not cumulative of any damaging physical evidence. In a trial where the only evidence of guilt is eyewitness statements, the admission of false statements suggesting guilt must result in prejudice. Because of the prejudice that would result from the admission of this so-called evidence, the correct remedy for Aldape Guerra is suppression. The State must be precluded from introducing any of the following types of identifications: new, live, in-court identifications of Aldape Guerra as the shooter of, possible shooter of, or pointer of a gun or of anything that might have been a gun at either Officer Harris or Jose Armijo, Sr. by any of the eight witnesses discussed in this memorandum and motion[11] ("the witnesses"); previously-recorded testimony of the witnesses given at Aldape Guerra's 1982 trial; new, live testimony by any of the witnesses relating to the identification of Aldape Guerra at any previous confrontation, line-up, reenactment, witness meeting, or the 1982 trial itself; or witness statements taken from any of the witnesses on or after July 14, 1982.

The exclusion of new, live testimony relating to the identification of Aldape Guerra necessarily follows from the findings of the federal habeas trial court. That court found that as a result of the improper identification procedures, the witnesses gave testimony that they knew to be false. 920 F. Supp. at 637. That court also found that the improper identification procedures had served to implant images in the witnesses' minds of events that never took place. For example, the court found that Jose Jr.'s belief that Aldape Guerra was the shooter originated in the police's

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[11] Jose Armijo, Jr.; Patricia Diaz; Elvira "Vera" Flores (now Elvira Flores Hernandez); Hilma Galvan; Herlinda Garcia; Armando Heredia; Jose Heredia; and Jacinto Vega.

display of Aldape Guerra in handcuffs combined with the unfettered encouragement of Galvan. *Id.* at 630. The court also found that the "corrupting identification procedures caused" witnesses to testify falsely "that Guerra had committed the crime." *Id.* Having conducted the improper identifications that created these false memories, the State must not be permitted to benefit from any propensities on the part of these witnesses to repeat, "remember" or bolster the perjured testimony they have already given.

CONCLUSION

For all the foregoing reasons, defendant's motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was hand delivered to Casey O'Brien, 201 Fannin, Suite 200, Houston, Texas 77002 on this 8th day of October, 1996.

Scott J. Atlas

VEHOU07:24791.1

ATTACHMENT 1

Therefore, a trial will by set for 9:00 a.m. on March 25, 1996.

Ricardo Aldape GUERRA, Petitioner,

v.

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

Civil A. No. H-93-290.

United States District Court,
S.D. Texas,
Houston Division.

May 18, 1995.

After defendant's capital murder conviction was affirmed on direct appeal, 771 S.W.2d 453, defendant petitioned for writ of habeas corpus. The District Court, Hoyt, J., held that: (1) pretrial intimidation of witnesses by police violated defendant's due process rights; (2) use of suggestive trial and pretrial identification procedures by police was not harmless; (3) prosecutor's failure to disclose exculpatory identification testimony violated due process; and (4) prosecutor's use of false evidence at trial violated due process.

Petition granted.

1. Constitutional Law ⇐268(8)

Intimidation by police or prosecution to dissuade witness from testifying or to persuade a witness to change his or her testimony, when combined with showing of prejudice to the defendant, violates defendant's due process rights. U.S.C.A. Const.Amend. 14.

2. Criminal Law ⇐700(10)

Government does not have unfettered right to interfere with any witness, particularly in making choice to testify.

3. Criminal Law ⇐700(3, 10)

Where interference occurs by police, police action that intimidates witnesses may be imputed to state in its prosecution; equally so, state has duty to disclose such conduct.

4. Criminal Law ⇐700(3, 7)

State's duty to disclose police intimidation of witnesses is imposed not only upon its prosecutor, but upon state as a whole, including its investigative agencies; therefore, if confession is in possession of police officer, constructively, state's attorney has both access to and control over document.

5. Constitutional Law ⇐268(8)
Criminal Law ⇐700(10)

Evidence was sufficient to establish that police officers and prosecutors intimidated witnesses prior to trial in effort to suppress evidence favorable and material to defendant's defense, so that both defendant and another suspect who had been fatally shot could be charged with murder of police officer, in violation of defendant's right to due process and fair trial; many witnesses were children their written statements that were taken after lineup significantly contrasted with those taken before lineup, police handcuffed witnesses, threatened to revoke parole of another's common law husband, and repeatedly searched the homes of witnesses, and prosecutor had questioned witnesses in manner that stated or implied complicity by defendant. U.S.C.A. Const.Amends. 6, 14.

6. Criminal Law ⇐339.10(1)

Identification testimony is admissible if it appears reliable, even if it is flawed by improper police behavior; thus, unnecessarily suggestive identification is not subject to per se exclusion.

7. Constitutional Law ⇐266(3.1)

In determining whether to suppress unnecessarily suggestive identification, court must determine whether identification procedure constitutes denial of due process. U.S.C.A. Const.Amend. 14.

8. Constitutional Law ⇐266(3.2)

In determining whether identification procedure constitutes denial of due process, court must first determine whether pretrial identification was unnecessarily suggestive; assuming it was, court must then determine whether identification was so unreliable that defendant's due process right to fair trial would be precluded if identifications were permitted. U.S.C.A. Const.Amend. 14.

9. Criminal Law ⇐339.8(1)

Facts to be considered in evaluating reliability of identification are: witnesses' opportunity to view accused at time of crime; witnesses' degree of attention; accuracy of witnesses' prior description; level of certainty demonstrated at confrontation; and time between crime and confrontation.

10. Habeas Corpus ⇐490(2)

Where state's use of pretrial identification procedures posed substantial likelihood of tainting state witnesses' identifications of defendant and both their out-of-court and in-court identifications are not shown to be independently reliable, Court must determine if admission of identifications into evidence is harmless error.

11. Habeas Corpus ⇐705.1, 715.1

When state is beneficiary of any error, burden of proving that error was harmless beyond reasonable doubt rests at state's door.

12. Criminal Law ⇐339.8(4), 715

Use of unreliable identification procedures by police and prosecutor, causing witnesses to testify that defendant, rather than another suspect who matched their original description, fatally shot police officer was not harmless error in capital murder case; witnesses had initially placed defendant at scene, but their description matched that of other suspects, had identified defendant in line-up after viewing defendant and with paper bags over his hands, were permitted to discuss identification before, during and after lineup, and life size mannequins, created in images of defendant and other suspect were utilized by prosecutor throughout trial to reinforce and bolster witnesses' testimony. U.S.C.A. Const.Amend. 14.

13. Criminal Law ⇐715

Unrestricted, incessant presence at trial of mannequins created in image of defendant and other suspect, one wearing a bullet-riddled, blood-stained shirt that jurors and witnesses saw daily, violated constitutional guarantee of fair trial by injecting impermissibly suggestive factors into trial process in capital murder case. U.S.C.A. Const.Amend. 14.

14. Criminal Law ⇐700(2.1)

In order to establish that evidence falls within purview of *Brady*, petitioner must establish that evidence was suppressed and that it was material and favorable. U.S.C.A. Const.Amend. 14.

15. Criminal Law ⇐700(2.1)

Suppressed evidence is "material" for purposes of *Brady* claim if there is reasonable probability that had evidence been disclosed to defense, result of proceeding would have been different. U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

16. Criminal Law ⇐700(3)

Prosecutor's failure to disclose exculpatory evidence to defense regarding shooting incident in which police officer was shot, including statements by witnesses giving description of shooter that was consistent with appearance of another suspect who had been fatally shot, and failure to disclose that there were trace metal patterns on that suspect's left hand that arguably matched murder weapon, was *Brady* violation in capital murder case that violated defendant's right to fair trial. U.S.C.A. Const.Amend. 14.

17. Constitutional Law ⇐268(9)

Knowing use of false testimony by prosecutors violates defendant's due process rights under Fifth and Fourteenth Amendments. U.S.C.A. Const.Amends. 5, 14.

18. Criminal Law ⇐706(3)

Prosecutors committed misconduct in capital murder case by deliberately and knowingly putting into mouths of witnesses words that witnesses had not said and did not believe to be true by persistently cross-examining witnesses on false basis and making improper insinuations and assertions calculated to mislead jury and discredit unfavor

ATTACHMENT 1

able testimony. U.S.C.A. Const.Amends. 5, 14.

19. Criminal Law ⇐706(3)

Prosecutor engaged in improper conduct in capital murder case by asking witness who had testified contrary to prosecutor's theory if he was drunk or had "smoked anything." U.S.C.A. Const.Amends. 5, 14.

20. Criminal Law ⇐713

Prosecutor improperly informed four jurors during voir dire in capital murder case that defendant was "illegal alien" and that jurors could consider that fact when answering punishment special issues; defendant's unlawful entry was irrelevant to issue of defendant's propensity for future violent and dangerous criminal behavior, and no proof was offered that illegal aliens were more prone than citizens to commit violent crimes.

21. Criminal Law ⇐723(5)

Prosecutor impermissibly appealed to ethnic or national origin prejudice during closing argument in capital murder case by appealing to jury to let other residents in Hispanic neighborhood know what citizens of county thought about defendant's conduct; argument went beyond seeking law enforcement and improperly played to jury's prejudice by painting all residents in neighborhood with broad brush of shared responsibility for death of police officer. U.S.C.A. Const. Amend. 14.

22. Constitutional Law ⇐268(8)

Criminal Law ⇐706(3)

Prosecutor's knowing false accusation that witness had participated in robbery, even though witness was under investigation and had not been criminally charged, for purposes of impeaching witnesses' credibility in capital murder case, violated defendant's due process rights. U.S.C.A. Const.Amend. 14.

23. Constitutional Law ⇐268(1)

When errors of state infuse trial with such prejudice and unfairness as to deny defendant fair trial, due process has not been enjoyed. U.S.C.A. Const.Amend. 14.

24. Constitutional Law ⇐268(8)

Criminal Law ⇐700(3), 706(3), 715

Prosecutorial misconduct in capital murder case, including use of improper identification procedures and failure to disclose exculpatory identification evidence, rendered trial fundamentally unfair, in violation of due process. U.S.C.A. Const.Amend. 14.

Scott J. Atlas, Vinson & Elkins, Houston, TX, for Ricardo Aldape Guerra.

Bob Walt, Assistant Attorney General, Austin, TX, Mary Lou Soller, Attorney at Law, Washington, DC, for James A. Collins.

William C. Zapalac, Assistant Attorney General, Austin, TX, for Wayne A. Scott.

AMENDED ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

HOYT, District Judge.

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

I.

Factual and Procedural History

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

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

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

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

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

Guerra was tried for the offense of capital murder and was convicted on October 12, 1982. On October 14, 1982, he was sentenced to death by lethal injection. His conviction was affirmed on May 4, 1988, by the Texas Court of Criminal Appeals in *Guerra v. State*, 771 S.W.2d 453 (Tex.Crim.App.1988) (*en banc*), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3260, 106 L.Ed.2d 606 (1989).

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

II.

Petitioner's Contention:

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

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

Restated, Guerra complains that he was brought to the crime scene and location of the witnesses in handcuffs; at the police station, he was twice escorted past the witnesses with handcuffs and bags over his hands; at the lineup, he was the sole Hispanic on exhibition with long-hair; before, during, and after the lineup, the witnesses were permitted to communicate amongst themselves, with one particular witness urging the

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

others to identify Guerra as the shooter; at a reenactment of the crime and at a pretrial weekend meeting of the witnesses, the prosecutor told the witnesses that Carrasco was dead and that Guerra was the shooter; at the trial, two life-size mannequins were stationed in front of the jury from the beginning to the end of the trial. Finally, Guerra argues that the prosecution failed to disclose materially exculpatory evidence and used evidence known to be false, or half truths, to convict him. The cumulative effect of all of these actions resulted in a violation of his "due process" rights and the fundamental right to a fair procedure leading up to trial.

III.

Pretrial Intimidation of Witnesses:

III(a) The Petitioner's Contentions:

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

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

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

III(b) Federal Habeas Testimony:

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

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

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

Frank Perez testified that shortly after Harris was shot, a police officer pointed a gun at an unidentified Hispanic male, told him to lie down on the ground and yelled: "Why did you kill the cop?" The man on the ground was neither Carrasco nor Guerra. He also testified that at the pretrial weekend meeting, he told the prosecutors that, shortly after officer Harris was shot, a man who looked like Carrasco had run past him and pointed an object at him that appeared to be a nine-millimeter gun. In response, the prosecutor insisted that if Perez was less than "100%" certain that the object was a gun, he should not testify that the object pointed at him was a "gun," just an "object."

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

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

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

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

At the pretrial weekend meeting, [illegible] Garcia told one of the prosecutors that Guerra was not the man who had shot officer Harris, the prosecutor told her that she was confused and that she could not now change her mind because she had already made a statement identifying Guerra as the shooter, not only of officer Harris but also Mr. Armijo.[3]

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

> Q. "Could you see or make out, Patricia, what type of object, if anything, this man had in his hand?" (p. 314, L. 6)
> Q. "Could you see which way this man went after he pointed at the police officer like you have shown the jury . . .? (p. 315, L. 2)
> Q. "Now, could you describe this man you saw pointing at the police officer . . .?" (p. 316, L. 12)
> Q. "Does that look a lot better, like the way he looked that night he was pointing at the police officer?" (p. 318, L. 4).

The record shows that Diaz never saw either man pointing at the police officer, only at the car. Further, she never saw any object. *See also* text accompanying note 10 at pp. 40–41 *infra*.

3. The statement referred to by the prosecutor states in relevant part:

> "This evening sometime after 10:00 p.m. my sister and me (sic) were going to the store . . . My sister and I was (sic) walking down the sidewalk when I remembered that I had left my money . . . I ran home to get my money . . . When I got back to my sister we saw this black car turn off of Walker on to Lenox street rear (sic) fast . . . As the car was getting ready to back up a police car . . . pulled in behind it." " . . . [H]e told the men in the black car to get out of the car . . . Both men came out of the car on the driver's side . . . [H]e told them to put their hands on the hood . . . "
> "Before I got a chance to move I saw this guy with the blond hair reach into the front of his pants and pull out a pistol and shoot the police man . . . The man with blond hair came after me shooting at me . . . [H]e then shot the man in the read (sic) car." [Mr. Armijo]
> " . . . I did not get to see the other man and I do not know what happened to him . . . the man that shot the policeman . . . was wearing brown pants and a brown shirt that was open all the way down."

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

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

III(c) Discussion and Conclusion:

[1–4] Intimidation by the police or prosecution to dissuade a witness from testifying or to persuade a witness to change his testimony, when combined with a showing of prejudice to the defendant, violates a defendant's "due process" rights. *See United States v. Heller*, 830 F.2d 150, 152–53 (11th Cir.1987). This was the case in *Heller*, where the Court found that threats by a government agent caused a witness to give false, damaging testimony. *See also Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972). Thus, the government does not have the unfettered right to interfere with any witness, particularly, in making the choice to testify or not. *United States v. Hammond*, 598 F.2d 1008, 1012–13 (5th Cir. 1979). Where interference occurs by the police, police actions that intimidate witnesses may be imputed to the state in its prosecution. *Cf., Fulford v. Maggio*, 692 F.2d 354, 358 n. 2 (5th Cir.1982), *rev'd on other grounds*, 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983). Equally so, the state has a duty to disclose such conduct. This duty is imposed not only upon its prosecutor, but upon on the state as a whole, including its investigative agencies. Therefore, if a confession is in the possession of a police officer, constructively, the state's attorney has both access to and control over the document. *Id.*

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

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

The prosecutors' conduct was equally rank. Before and during the trial, questions to the witnesses were stated in such a manner that the questions stated or implied complicity by Guerra, irrespective of the fact that the answers did not conform. The tone of voice, as well as the artful manner in which the questions were asked, left little room for truthful answers or explanation. When the answers were not to their liking, they resorted to ridicule. Such conduct severely prejudiced Guerra's right to a fair trial and, therefore, violated his right to "due process" of law. *See Heller*, 830 F.2d at 152–53; *United States v. Smith*, 577 F.Supp. 1232, 1236–38 (S.D. Ohio 1983); *see generally Webb*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); *cf., Hammond*, 598 F.2d at 1012–13.

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

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

IV.

Improper Identification Procedures

IV(a) The Legal Standard:

[6–8] The Supreme Court has adopted a "totality of the circumstances test" to be utilized in the analysis of identification testimony. Identification testimony is admissible if it appears "reliable," even if it is flawed by improper police behavior. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). Thus, an unnecessarily suggestive identification is not subject to a "per se" exclusion. *Id.* The Court must determine whether an identification procedure constitutes a denial of "due process." In doing so it must first be determined whether the pretrial identification was unnecessarily suggestive. Assuming that it was, the Court must then determine whether the identification was so unreliable that the defendant's "due process" right to a fair trial would be precluded if the identifications were permitted. *Id.*

[9] The factors to be considered in evaluating the reliability of an identification are: (i) the witnesses' opportunity to view the accused at the time of the crime; (ii) the witnesses' degree of attention; (iii) the accuracy of the witnesses' prior description; (iv) the level of certainty demonstrated at the confrontation; and (v) the time between the crime and the confrontation. *Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

[10, 11] Where the state's use of pretrial identification procedures posed a substantial likelihood of tainting the state witnesses' identifications of the defendant and both their out-of-court and in-court identifications are not shown to be independently reliable, the Court must determine if admission of the identifications into evidence is harmless error. *See Young v. Herring*, 917 F.2d 858, 864 (5th Cir.1990), *superseded on reh'g other grounds*, 938 F.2d 543 (5th Cir.19.. (en banc), *cert. denied*, 503 U.S. 940, 112 S.Ct. 1485, 117 L.Ed.2d 627 (1992) (citing *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827–28, 17 L.Ed.2d 705 (1967)). When the state is the beneficiary of any error, the burden of proving that the error was harmless, beyond a reasonable doubt, rest at the state's door. *Thigpen v. Cory*, 804 F.2d 893, 897 (6th Cir.1986), *cert. denied*, *Foltz v. Thigpen*, 482 U.S. 918, 107 S.Ct. 3196, 96 L.Ed.2d 683 (1987) (citing *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828).

IV(b) Discussion:

[12] The facts of this case present a situation that is somewhat peculiar to the *Brathwaite* case. Here, the facts show that the petitioner was known in and around the neighborhood, therefore, it was logical th the witnesses could identify the petitioner being at the scene when officer Harris was shot. Moreover, Guerra's presence at the scene is not in dispute. Guerra gave a statement to that effect on the evening of the shootings. What is confounding is that the police took statements shortly after the shooting. Several were essentially exculpatory of Guerra, and others described the shooter in ways that blended characteristics of both men; *none* pointed unequivocally to Guerra. After learning of Carrasco's death and after the lineup, the police took additional statements that contradicted or impeached the prior statements in some subtle and oth er not so subtle ways.

In this regard, the record shows that there were at least eight witnesses who claim to have seen officer Harris shot: Hilma G. Gal

van, Herlinda Medina Garcia, Jose Francisco Armijo, Jr., Elvira Medina Flores, Patricia Ann Flores Diaz, Jacinto Vega, and Jose and Armando Heredia. When these persons gave their first written statements, between 12:00 a.m. and 1:00 a.m., they stated in relevant part the following:

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

* * * * * *

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

* * * * * *

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

* * * * * *

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

* * * * * *

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

* * * * * *

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

* * * * * *

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

* * * * * *

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

* * * * * *

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

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

* * * * * *

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

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

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

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

Before the lineup, witnesses either described the shooter in such a way that the description fit only Carrasco, i.e., he had blond-like hair and wore brown pants and a brown/maroon shirt, described a composite of both men, or described what could have been either man. While both Carrasco and Guerra had dark hair, the use of Carrasco's nickname, "Guero," which means "light-skinned" or "light colored, blond-like hair," to describe the shooter may have confused the police interviewers. Clearly, the word "blond" did not describe Guerra's dark brown hair. Jose, Jr., who was 10 years old at the time, could only identify the shooter as being left handed. This description was critical because Carrasco was left-handed. After the lineup and, with the knowledge that Carrasco was dead, several of the witnesses gave a series of second statements declaring, in spite of numerous previous assurances to the contrary, that Guerra was the shooter.

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

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

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

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aliens was, as likely as any, the motivation for the inconsistencies between Galvan's own statement and her testimony.

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

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

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

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

[13] The pretrial use of the mannequins in the meeting with witnesses at the prosecutors' office the weekend before trial was certain to reinforce the consensus facts so that there would be complete harmony in the testimony. The unrestricted, incessant presence of the mannequins, one wearing a bullet-riddled, blood-stained shirt that the jurors and witnesses saw daily, violated a constitutional guarantee of a fair trial, by injecting impermissibly suggestive factors into the trial process. *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S.Ct. 1340, 1346–47, 89 L.Ed.2d 525 (1986).

It was no mystery to the state that their entire case against Guerra rested on the witnesses identifying him. The state had to count on the eyewitnesses excluding from their testimony, facts that clearly pointed to Carrasco.[7] Therefore, the state, to seal its victory, deliberately chose to taint the identification process by insisting upon perjured testimony. The physical evidence equivocally pointed to Carrasco as the shooter. The statements taken before the lineup make it abundantly clear that the witnesses either identified Carrasco as the shooter or described a composite of both men. It was only after the unexplained misconduct by the police officers, the permitted misconduct on the part of Galvan, and the reinforcement by the prosecutors, that Guerra was chosen as the shooter.

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

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

IV(c) Conclusion:

The state has the burden of proving, beyond a reasonable doubt, that the intentional act of causing to be admitted tainted, unreliable and perjured testimony, identifying Guerra as the shooter, was harmless. *Thigpen*, 804 F.2d at 897 (citing *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828). The state has offered no evidence to contradict this point and has failed to discharge its duty.

V.

Failure to Disclose Materially Exculpatory Evidence

V(a) The Legal Standard:

[14, 15] There is long standing authority for the principle that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–97, 10 L.Ed.2d 215 (1963). In order to establish that evidence falls within the purview of *Brady*, a petitioner must establish that the evidence was suppressed and that it was material and favorable. *Id.* Suppressed evidence is "material" if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383–84, 87 L.Ed.2d 481 (1985).

V(b) Discussion:

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

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

According to Garcia, she told the police on the night of the shooting that the short haired man was the shooter. The first written statement prepared for her described the events and actor as follows:

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

She was asked to sign this written statement, which omitted her exonerating reference to the fact that the short-haired man was the shooter and that the long-haired man was the man with the empty hands near the front end of the police car at the time Officer Harris was shot. Garcia, who had attended only seven years of school, asked the police officer to read it to her because she could not read well. The police officer refused and told her to "just sign it." According to Garcia, she then signed it because of the earlier verbal threat that another police officer made concerning revoking her husband's parole for living with her, Garcia, a minor.

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

At the re-enactment, Garcia told one of the two prosecutors that the short-haired man was the one who appeared to have been the

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shooter, not the long-haired man. This exculpatory evidence was not recorded and not passed on to the defense.

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

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

According to Diaz, she told the police that when officer Harris was shot, the long-haired man was standing on the driver side of the police car near the front end, facing toward the police car with his arms extended out over the police car, feet spread apart, and that the palms of his hands were facing down toward the police car. In addition, his hands were empty and were positioned as if he were about to place his hands on the hood of the car to be searched. In spite of this, an officer prepared a statement omitting the exonerating information provided by her and inserting the incorrect information that the long-haired man pointed a gun in the direction of the police car and shot four times at the police car. Tired, she signed the statement without reading it, unaware of its true contents.

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

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

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

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

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

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

a few feet southeast of officer Harris and the long haired man (Guerra), pointed a gun at officer Harris and shot him.

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

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

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

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

V(c) Conclusion:

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

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

The police officers and prosecutors had a duty to accurately record the statements of

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

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

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

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

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

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

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

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

This evidence, even if it were concealed from the prosecution by the police, is imputed to the state prosecutors because the evidence was material and critical to the case and because an inquiry would have revealed it to them. *Williams v. Griswald*, 743 F.2d 1533, 1542 (11th Cir.1984); *United States v. Antone*, 603 F.2d 566, 569 (5th Cir.1979). By dealing in half-truths and innuendo and by suppressing evidence that was favorable and material to Guerra's defense, the prosecutors violated Guerra's right to a fair trial. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196–97.

. The Court concludes that, but for the conduct of the police officers and the prosecutors, either Guerra would not have been charged with this offense or the trial would have resulted in an acquittal. *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383–84.

VI.

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

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

[17] The Court has previously stated the facts surrounding the testimony of Garcia and Perez and will not restate the fact here. Suffice it to say that the knowing use of false testimony by the prosecutors violates a defendant's "due process" rights under the Fifth and Fourteenth Amendments. *See Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959). The Court finds that such violations are abundant in the record.

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

> Q. You say you saw this one man and your saw him "pointing." Was he pointing toward or in the direction of the police car or the police officer?
>
> A. Uh-huh, the direction of the police c

On no less than five (5) other occasions, the prosecutor included within the question, an incorrect statement of the witness' prior testimony. He repeatedly used the phrase "pointing at the police officer."[10] The use of this untrue information was material and detrimental to Guerra's defense. *United States v. Williams*, 504 U.S. 36, 59–61, 112 S.Ct. 1735, 1749, 118 L.Ed.2d 352 (1992) (quoting *Berger v. United States*, 295 U.S. 78, 84–85, 55 S.Ct. 629, 631–632, 79 L.Ed. 1314 (1935)).

[19] Regarding the questions to Heredia about alcohol and drugs, the prosecutor asked him if he was drunk or had smoked anything. These questions were designed to strike down the young boy because he would dare testify contrary to the prosecutor's case

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

10. *See also* note 2 at pp. 7–8, *supra*.

theory. In closing argument, the prosecutor argued to the jury that Heredia was under the influence of either alcohol or narcotics. This improper conduct is rank ridicule and intimidation utilized to its consummate when any witnesses did not testify to this state's liking.

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

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

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

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

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

The "offense" of unlawful entry into the United States is irrelevant to the issue of a defendant's propensity for future violent and dangerous criminal behavior. No proof was offered that illegal aliens are more prone than citizens to commit violent crimes. Guerra was entitled to have his punishment assessed by the jury based on consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he shared a characteristic. *Zant v. Stephens*, 462 U.S. 862, 878–79, 103 S.Ct. 2733, 2743–44, 77 L.Ed.2d 235 (1983).

[21] The prosecutors also appealed to the jury to "let the other residents at 4907 Rusk ... know just exactly what we citizens of Harris County think about this kind of conduct...." This appeal went beyond arguments seeking law enforcement to improperly play to the jury's prejudice by painting all the residents at 4907 Rusk with the broad brush of shared responsibility for the death of officer Harris. Thus, they were in need of being taught a lesson. This "us" against "them" argument is also nothing more than an appeal to ethnic or national origin prejudice which is constitutionally impermissible. *McCleskey v. Kemp*, 481 U.S. 279, 309 n. 30, 107 S.Ct. 1756, 1776–77 n. 30, 95 L.Ed.2d 262 (1987); *see also McFarland v. Smith*, 611 F.2d 414, 416–17 (2d Cir.1979); *United States v. Doe*, 903 F.2d 16, 24–25 (D.C.Cir. 1990); *see United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 157 (2d Cir.1973).

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

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

This type of deliberate violation of oath as a prosecutor and violation of the rules of evidence is incompatible with the rudimentary demands of justice and fair play. This principle remains true even when the state, though not soliciting false evidence, allows it to go uncorrected. *Giglio v. United States*, 405 U.S. 150, 153–54, 92 S.Ct. 763, 765–66, 31 L.Ed.2d 104 (1972).

VII.

Cumulative Effect of Prosecutorial Error

[23] Finally, the petitioner contends that the cumulative effect of the errors made by the trial court and the prosecutors resulted in an unfair trial. Because the state court, in considering the petitioner's petition for writ of habeas corpus, found no waiver of error, there is no bar to considering the errors found in a cumulative error analysis. *Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir.1992) (*en banc*), *cert. denied*, — U.S. —, 113 S.Ct. 2928, 124 L.Ed.2d 679 (1993). When the errors of the state infuse a trial with such prejudice and unfairness as to deny a defendant a fair trial, due process has not been enjoyed. *Id.*

[24] Here, the extent of the prosecutorial misconduct is legion. The number of instances of misconduct as well as the type and degree compel the conclusion that the cumulative effect of the prosecutors' misconduct rendered the trial fundamentally unfair. There is no doubt in this Court's mind that the verdict would have been different had the trial been properly conducted. *Kirkpatrick v. Blackburn*, 777 F.2d 272, 278–79 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178, 106 S. 2907, 90 L.Ed.2d 993 (1986).

CONCLUSION

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

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

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

It is ORDERED that the Writ of Habeas Corpus is conditionally granted unless the state begins retrial proceedings by arraigning the petitioner within thirty days from the

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date this order becomes final. If the state does not complete the arraignment within the allotted time, the petitioner shall be released from custody.

Irma COLLINS, Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.

No. 95-CV-72192-DT.

United States District Court,
E.D. Michigan,
Southern Division.

Nov. 29, 1995.

Former employee sought confirmation of arbitration award, finding that employer had violated Americans with Disabilities Act (ADA) and Michigan Handicappers' Civil Rights Act (MHCRA). Employer filed counterclaim seeking to vacate award. Cross-motions for summary judgment were filed. The District Court, Zatkoff, J., held that: (1) error of law standard of review expressed in arbitration agreement applied; (2) statement made by employee, threatening to kill supervisor, during psychiatric evaluation did not constitute workplace misconduct disqualifying her from employment as a matter of law under ADA and MHCRA, but were product of employee's psychiatric disability; and (3) employer failed to show that reinstating employee would violate explicit public policy.

Employee's motion granted; employer's motion denied.

1. Arbitration ⇐63.1

Federal manifest disregard of law standard and Michigan's substantial error of law standard for reviewing arbitration award are not all that different; both invoke rather deferential review.

2. States ⇐18.5

When state law actually conflicts with federal law, state law is preempted. U.S.C.A. Const. Art. 6, cl. 2.

3. Arbitration ⇐2.2

Where Federal Arbitration Act (FAA) enforces agreements to arbitrate, FAA controls and governs arbitration in question, including means of securing judicial review. 9 U.S.C.A. § 1 et seq.

4. Federal Courts ⇐403

As between Michigan's substantial error of law standard and Federal Arbitration Act's (FAA) manifest disregard of law standard for reviewing arbitration award, federal standard of review would prevail. 9 U.S.C.A. § 1 et seq.

5. Arbitration ⇐63.1

Error of law standard of review expressed in arbitration agreement applied to employee's action seeking confirmation of arbitration award, rather than Federal Arbitration Act's (FAA) manifest disregard of law standard, even though employee, as nonbargaining unit employee, did not bargain for this lowered standard; standard was not inherently unfair to either party such that arbitration agreement did not resemble adhesion contract, and, moreover, if employer's assertions were unable to overcome even this lower standard, they would certainly fail under more stringent federal standard. 9 U.S.C.A. § 1 et seq.

6. Arbitration ⇐3.3

Employee's claims under ADA can be arbitrated. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

7. Civil Rights ⇐173.1

To establish prima facie case of discrimination in violation of ADA, employee must prove: (1) that she is qualified individual; (2) with disabilities; (3) that she has suffered adverse employment action; and (4) that causal connection exists between adverse employment action and disability. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

8. Civil Rights ⇐173.1

Statements made by former employee, threatening to kill supervisor, during psychiatric evaluation did not constitute workplace misconduct disqualifying her from employment as a matter of law under ADA and Michigan Handicappers' Civil Rights Act (MHCRA), but were product of employee's psychiatric disability; neither of employee's psychiatrists concluded that statements constituted threats, but characterized statements as expressions of her thought and homicidal ideations consistent with psychiatric diagnosis, employee did not make statements directly to supervisor or to fellow employees, and psychiatrist did not believe employee had present ability to act on homicidal ideation or was threat to supervisor at time remarks were made and found that employee was capable of performing work. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; M.C.L.A. § 37.1202(1)(b).

9. Arbitration ⇐56

Employer failed to show that arbitration award, ordering employer to reinstate employee who threatened to kill supervisor, was against public policy; employer merely asserted that to threaten to kill another employee is violation of employer's policy and failed to show that arbitrator's decision violated some explicit public policy that is well defined and dominant.

10. Arbitration ⇐56

Public policy exception to general deference afforded arbitration awards is very limited, and may be exercised only where several strict standards are met: (1) decision must violate some explicit public policy that is well defined and dominant; (2) conflict between public policy and arbitration award must be explicit and clearly shown; (3) it is not sufficient that grievant's conduct for which he was disciplined violated some public policy or law, rather, relevant issue is whether arbitrator's award requiring reinstatement of grievant violated some explicit public policy.

Nelson S. Chase, Farmington Hills, MI, for Plaintiff.

James R. Murphy, Blue Cross Blue Shield of Michigan, Detroit, MI, for Defendant.

MEMORANDUM OPINION AND ORDER

ZATKOFF, District Judge.

I. INTRODUCTION

In this action, plaintiff Irma Collins seeks confirmation of an Arbitration Award pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the Michigan Arbitration Act, M.C.L. § 600.5001 *et seq.* The defendant, Blue Cross Blue Shield of Michigan ("BCBSM"), has filed a counterclaim seeking to vacate the Arbitration Award. Currently before this Court are the parties' cross-motions for summary judgement. The facts and legal arguments are adequately presented in the briefs, and the decisional process will not be aided by oral arguments. Therefore, pursuant to E.D.Mich.Local R. 7.1(e)(2), it is hereby ORDERED that the motions be resolved on the briefs submitted, without this Court entertaining oral arguments.

Binding arbitration was requested in this matter pursuant to the BCBSM Termination Arbitration Procedure for Non-Bargaining Unit Employees (the "Arbitration Agreement"). In an Opinion and Arbitration Award dated April 13, 1995, the arbitrator, Elliot I. Beitner, determined that in terminating the plaintiff, BCBSM had violated both the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101; and the Michigan Handicappers' Civil Rights ("MHCRA"), M.C.L. § 37.1101. The arbitrator awarded back pay and attorney fees and ordered BCBSM to reinstate the plaintiff.

After reviewing the motions, briefs, the Court file and the relevant case law and statutes, the Court concludes that the Arbitration Award should be confirmed. Accordingly, plaintiff's motion will be GRANTED, and defendant's motion will be DENIED.

II. BACKGROUND

The plaintiff, Irma Collins, was an employee at BCBSM with nine years of service and no disciplinary record. On November 11, 1993, plaintiff took a medical leave of absence due to stress and began psychiatric treatment with Dr. Rosalind Griffin. Dr. Griffin sent reports to BCBSM indicating that the

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D.

To conclude, the majority's economic analysis does not come close to demonstrating that the plain language of § 506(a) leads to a result that Congress could not reasonably have intended. Thus, we are not at liberty to rewrite the statute.

IV.

Turning to the case-by-case rationale, the meaning of the majority's "equitable considerations" exception is murky at best. The only example provided by the majority—valuation for the purpose of determining whether unsecured claims fall below the floor of 11 U.S.C. § 109(e) (1994)—is not an equitable consideration that a court *may* take into account; instead, that example invokes only "the purpose of the valuation," a factor that § 506(a) *requires* the court to consider. If the majority means only to convert the mandatory § 506(a) factors into permissive ones, then its exception is at least understandable, albeit wrong. If it means to replace § 506(a) altogether with *ad hoc* adjudication, then it has abdicated its responsibility to declare what the law is.

Assuming that the truth is somewhere in the middle, the court has created a fine mess. Courts engage in true "case-by-case" adjudication by applying legal standards to the facts of the case before them. When valuing collateral, we must consider a variety of facts: who owns the collateral, how he intends to use or dispose of it, his ability to do so, the effect of that disposition or use on the collateral, and so on. In conducting this analysis, however, we need a legal standard to apply.

Take, for example, *Clark Pipe*. In that chapter 7 liquidation, we needed to value collateral in order to determine whether a secured creditor had improved its position *vis-à-vis* other creditors during the 90 days preceding the debtor's filing for bankruptcy. We held that because the purpose of the valuation was to determine whether the creditor had improved its position, the value should be determined from the perspective of the creditor, not the debtor, and it was therefore necessary to deduct the creditor's hypothetical costs of sale. *Id.* at 698–99. We also found that the collateral should be valued according to its liquidation value, because the debtor was liquidating its inventory during the period in question. *Id.* at 698. In short, we determined that foreclosure valuation was appropriate in light of the purpose of the valuation and the actual use of the property, and then applied that standard to the facts of the case.

Similarly, we now need to determine how to value collateral when a debtor proposes to retain it in a chapter 13 reorganization. The majority tells us only that the legal standard is ordinarily the amount a creditor would net from a hypothetical sale of the property, but will sometimes differ. Without even an example of a true "equitable consideration," however, we are left in the dark as to when to apply that legal standard.

The majority may or may not be correct that its refusal to settle the law will encourage the settling of individual lawsuits. *See* maj. op. at 1059 n. 32. I am inclined to believe that "[t]he greater the uncertainty in the legal rule, the harder it is to settle pending cases," *see Ebbler*, 804 F.2d at 91 (Easterbrook, J., concurring), but either way, bringing darkness to light is hardly the job of an appellate court.

V.

In summary, I agree with the recent statement of one bankruptcy court:

> [D]uring cramdown . . . , a creditor's rights of foreclosure, sale, bidding-in and the like are not being delayed; rather they are being extinguished and replaced forever (if the plan is successfully completed) with lesser rights. For that purpose, the proper measure of value is not what the creditor would net in a hypothetical sale, but rather the value of the collateral "in the hands of the Debtor."

In re Freudenheim, 189 B.R. 279, 280 (Bankr.W.D.N.Y.1995). Here, the majority eloquently explains how it believes the federal bankruptcy scheme should work. That is the role of Congress, however. Adhering to the statute's plain meaning, I respectfully dissent.

Ricardo Aldape GUERRA, Petitioner–Appellee,

v.

Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent–Appellant.

No. 95–20443.

United States Court of Appeals, Fifth Circuit.

July 30, 1996.

After defendant's capital murder conviction was affirmed on direct appeal, 771 S.W.2d 453, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., 916 F.Supp. 620, granted habeas relief, and state appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that state's failure to disclose material exculpatory information to defense violated due process.

Affirmed.

1. Constitutional Law ⇐268(5)

State's failure to disclose material exculpatory information to defense is violative of due process if there is reasonable probability that, had evidence been disclosed, result of proceeding would have been different. U.S.C.A. Const.Amend. 14.

2. Habeas Corpus ⇐719

District court's finding that state's failure to disclose material exculpatory information violated due process, and thus warranted habeas relief, was not clearly erroneous, in view of evidence that one witness was intimidated by police into identifying defendant as shooter and later gave testimony indicating that defendant's companion was shooter, and that written versions of other witnesses' statements, which were prepared by police, did not conform to what witnesses told police. U.S.C.A. Const.Amend. 14.

3. Federal Courts ⇐844

Court of Appeals will declare testimony incredible as matter of law only when it is so unbelievable on its fact that it defies physical laws.

Scott J. Atlas, John Cavanaugh O'Leary, Jr., Stephanie Kathleen Crain, Michael John Mucchetti, Vinson & Elkins, Houston, TX, Richard Alan Morris, Feldman & Associates, Houston, TX, Theodore W. Kassinger, James Roger Markham, Vinson & Elkins, Washington, DC, Stanley G. Schneider, Schneider & McKinney, Houston, TX, Manuel Lopez, Solar & Fernandes, Houston, TX, J. Bernard Clayton, Houston, TX, for petitioner-appellee.

William Charles Zapalac, Asst. Atty. Gen., Office of the Attorney General for the State of Texas, Austin, TX, for respondent-appellant.

Ronald S. Flagg, Julia Elizabeth Sullivan, Marisa Andrea Gomez, Sidley & Austin, Washington, DC, for American Immigration Lawyers' Ass'n, amicus curiae.

Stephen Brooks Bright, Southern Center for Human Rights, Atlanta, GA, for Allard K. Lowenstein Human Rights Clinic, Southern Center for Human Rights and International Human Rights Law Group, amicus curiae.

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

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Contending that the district court's factual findings of numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense, are

clearly erroneous, Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, appeals the grant of habeas relief to Ricardo Aldape Guerra, who was convicted of capital murder and sentenced to death in 1982. We AFFIRM.

I.

On July 13, 1982, approximately two hours before midnight, Houston police officer J.D. Harris stopped his police car behind an automobile occupied by Guerra and Roberto Carrasco Flores (Carrasco), at the intersection of Edgewood and Walker Streets. Moments later, the Officer was shot three times in the head with a nine millimeter weapon and died shortly thereafter. Jose Francisco Armijo, who was near the intersection in an automobile with two of his children (one of whom, then ten years of age, was a key witness against Guerra at trial), was also shot in the head with a nine millimeter weapon and died later.

Witnesses informed police that the suspects might be found in the same neighborhood, at 4907 Rusk Street (Guerra's address). About one and one-half hours after Officer Harris was shot, Officer Trepagnier approached a garage next to that address. Using a nine millimeter weapon, Carrasco shot and seriously wounded the officer. Carrasco was killed in the ensuing exchange of gunfire with police. The nine millimeter weapon was found under Carrasco's body, and Officer Harris' service revolver was found under Carrasco's belt, along with another clip for the nine millimeter weapon.

Guerra was arrested moments after Carrasco was shot, when officers found him hiding nearby. A .45 caliber pistol was found within Guerra's reach.

Although the physical evidence pointed to Carrasco as Officer Harris' killer, Guerra was charged with capital murder on the basis of eyewitness identification. (The State did not seek to convict Guerra under the law of parties.)

In October 1982, three months after the murder, a jury found Guerra guilty, rejecting his defense that Carrasco shot Officer Harris; he was sentenced to death. The Texas Court of Criminal Appeals affirmed in 1988, *Guerra v. State*, 771 S.W.2d 453 (Tex.Crim. App.1988); and the next year, the Supreme Court denied Guerra's petition for a writ of certiorari. *Guerra v. Texas*, 492 U.S. 925, 109 S.Ct. 3260, 106 L.Ed.2d 606 (1989).

Guerra filed for habeas relief in the state trial court in May 1992. Following the appointment of new counsel that July, he filed an amended application in mid-September. Four days later, the trial court, without conducting an evidentiary hearing and making findings of fact or conclusions of law, recommended denial of relief. In January 1993, the Texas Court of Criminal Appeals accepted the recommendation and denied relief.

Shortly thereafter, in February, Guerra sought federal habeas relief. The district court conducted an extensive evidentiary hearing that November, and, a year later, in November 1994, entered an order granting relief. The order was amended the next May, *Guerra v. Collins*, 916 F.Supp. 620 (S.D.Tex.1995), and the respondent was ordered to release Guerra unless the State began retrial proceedings by arraigning him within 30 days. Our court stayed the judgment.

II.

As stated, the physical evidence led directly to Carrasco as Officer Harris' murderer. An obvious, critical question is why, if Guerra instead shot the Officer, the murder weapon (not to mention the Officer's service revolver) was found under Carrasco's body one and one-half hours after the Officer was shot. At oral argument, the respondent espoused the theory that, when Guerra and Carrasco exited their vehicle after the Officer pulled up behind them, they picked up each other's weapons, and then exchanged them after the murder. In light of this theory, it goes without saying that the next question that follows immediately is why, if Guerra shot the Officer, Carrasco would have been willing to take back and keep a weapon just used to kill a policeman. Among other obvious reasons for not wanting to be found with a murder weapon is the fact that it is common knowledge that anyone who kills a law enforcement officer will be quickly, vigorously, and aggressively pursued, as reflected by the events in this case.

The State relied on this exchanged weapons theory at trial. In closing argument, the prosecutor stated:

> I don't have to prove to you how ... Guerra came in possession of that nine-millimeter pistol....
>
> ....
>
> There is no way that I had any type of equipment set up inside of that vehicle to show you what was done inside that vehicle and how the weapons could have gotten into this man's [Guerra's] hands, but you know one thing from listening to the evidence, and you know one thing from listening to when Ricardo Guerra testified. He didn't always keep his pistol tucked into his belt.
>
> Do you recall, right towards the end of his testimony, I asked him, "When you went into the store to get those Cokes [before the shooting], did you still have that pistol tucked inside your belt with your shirt covering it?"
>
> "No, I put it under the seat," and I think you can use your common sense....
>
> Do you think these guys are driving around and they've got those guns tucked in their belts? They take them out and set them on the seat....
>
> Do you think perhaps when they got out of the car, they picked up the wrong gun?

The record, however, contains little, if any, evidence to support this theory. Obviously, this was a critical fact issue at trial. As discussed *infra*, the State's non-disclosure of exculpatory information concerning this issue was one of the bases upon which the district court granted habeas relief.

At trial, Guerra testified that, on the night of the shooting, he and Carrasco went to the store; that Carrasco had a nine millimeter pistol which he was carrying at his belt; that he (Guerra) also was carrying a gun; that he put his gun under the car seat when he went into the store; that he put it back in his trousers when he got back to the car; and that the gun was in his belt when he got out of the car after Officer Harris arrived at the intersection.

On cross-examination at trial, Guerra denied that he and Carrasco took their guns out of their belts and put them on the seat while they were driving around. He testified further that Carrasco, whom he referred to by the nickname "Werro" (spelled various ways in the record; according to the respondent at oral argument, it meant "the blond one" or "the light-skinned one"), shot Officer Harris and took the Officer's gun; that they ran back to Guerra's residence (4907 R Street); and that, when they arrived, Carrasco had two weapons—his own (the nine millimeter) and the Officer's.

Two of Guerra's roommates testified at trial that, shortly after Officer Harris was shot, Carrasco ran into the house and said that he had killed a policeman; and that Carrasco had the policeman's gun in his belt and another gun in his hand. One roommate testified further that, when Guerra arrived a minute or two later, Guerra said that Carrasco had just killed a policeman.

Two of the State's strongest witnesses at trial were Jose Armijo, Jr. (the then ten-year-old son of the man fatally wounded at the same intersection immediately after Officer Harris was killed), who testified that Guerra shot Officer Harris and his father, and Hilma Galvan, who testified that she saw Guerra shoot Officer Harris. Neither testified, however, at the federal evidentiary hearing.

The district court held that Guerra's due process rights were violated based on findings that, *inter alia*, (1) police and prosecutors threatened and intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense; (2) police and prosecutors used impermissibly suggestive identification procedures, such as permitting witnesses to see Guerra in handcuffs, with bags over his hands, prior to a line-up, permitting witnesses to discuss identification before, during, and after the line-up, conducting a reenactment of the shooting shortly after it occurred so that witnesses could develop a consensus view, and using mannequins of Guerra and Carrasco at trial to reinforce and bolster identification testimony; (3) police

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and prosecutors failed to disclose material, exculpatory evidence to the defense; (4) prosecutors engaged in misconduct at trial, including soliciting and encouraging witnesses to overstate or understate facts, falsely accusing a defense witness of either being drunk or having "smoked something" because he yawned during his testimony, questioning a defense witness about an extraneous murder which the prosecutors knew was a false rumor, and making improper closing argument; and (5) a court interpreter inaccurately translated witnesses' trial testimony.

Because the state habeas court did not make findings of fact, the statutory presumption of correctness for such findings is not in play. (The 28 U.S.C. § 2254(d) presumption of correctness has been redesignated as § 2254(e)(1) in the Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. No. 104–132, § 104(3), 110 Stat. 1214, 1219 (1996).) In fact, the only issue raised here is the contention that "the district court's factual findings that the police and prosecutors engaged in misconduct depriving Guerra of due process ... are clearly erroneous." As a result, the respondent conceded at oral argument that, if those findings are not clearly erroneous, then a due process violation occurred. (Inconsistent with the statement of the issue and the concession at oral argument, the respondent's brief contains assertions that certain factual findings, even if not clearly erroneous, are legally irrelevant. We conclude that habeas relief is warranted by legally relevant factual findings that are not clearly erroneous.)

To restate the well-known standard, a factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (citation omitted). Along that line, in a case such as this, which turns almost exclusively "on determinations regarding the credibility of witnesses, [FED.R.CIV.P.] 52(a) demands even greater deference to the trial court's findings." *Id.* at 575, 105 S.Ct. at 1512. Similarly, "[w]here the court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error." *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir.1993) (internal quotation marks and citation omitted). Three examples more than suffice to demonstrate why, based on our review of the record, there are sufficient legally relevant, non-clearly erroneous findings of fact to warrant habeas relief.

[1] The district court found that, in interviews with police and prosecutors, three witnesses, all then under the age of 18 (Herlinda Garcia (14), Patricia Diaz (17), and Frank Perez (17)), gave police and prosecutors material exculpatory information that was not disclosed to the defense. Such non-disclosure is violative of due process if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment); *see also Kyles v. Whitley*, — U.S. —, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). As noted, for these three examples, because, with slight exception, the respondent presents only a factual issue, our review is a most narrow one—were the findings of fact underlying a due process violation because of the non-disclosure clearly erroneous.

[2] Garcia, who identified Guerra at trial as Officer Harris' murderer, testified instead at the federal evidentiary hearing that she told police and prosecutors that she saw Carrasco pull something out of his trousers and point at Officer Harris with both hands clasped together in front of him; that Carrasco was standing a "couple of feet" away from the Officer; that she saw flames coming out of Carrasco's hands; and that, when she heard the shots, she saw Guerra leaning toward the police car, near the front, with his empty hands on the hood. This information was not included in Garcia's written statement, nor was it disclosed to the defense. Garcia, who, as noted, was 14 years of age at the time of the shooting, testified further that she was intimidated into identifying Guerra as the shooter by police warnings that her common-law husband, a parolee who was over 18 years of age, could be adversely affected if she did not cooperate.

The respondent contends that Garcia's testimony is not credible because her written statements prepared by the police were consistent with her trial testimony, even though she had not read her statements before trial, and because, if the police were trying to coerce witnesses to identify Guerra as the shooter, they would not have allowed Garcia to describe the shooter, both in her statement and at trial, as having blond hair and wearing a brown shirt and brown trousers. (Guerra had dark hair and was wearing a green shirt and blue jeans at the time of the shooting; Carrasco also had dark hair (but, as noted, was commonly referred to as "Werro", the "blond one" or "light-skinned one") and was wearing a purple or maroon shirt and brown trousers.)

[3] Finding that Garcia's habeas testimony was credible, the district court found further that she had been intimidated by police and prosecutors, and that the police omitted material exonerating information from her written statement. We will declare testimony incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." *United States v. Casteneda*, 951 F.2d 44, 48 (5th Cir.1992) (internal quotation marks and citation omitted). As the district court noted, Garcia's testimony is consistent with the physical evidence that Carrasco, rather than Guerra, shot Officer Harris. Accordingly, we cannot conclude that the court clearly erred by finding that Garcia told the truth at the evidentiary hearing.

Patricia Diaz, who, as noted, was 17 years of age when she testified at trial, testified at the evidentiary hearing that she told police and prosecutors that, an instant after she heard shots, she saw Guerra on the driver's side of the police car, near the front, facing that car, with his empty hands on its hood, as if he were about to be searched; and that she did not see anyone shoot Officer Harris. But, her description of Guerra's location and his empty hands was not included in her written statements prepared by the police. Diaz testified further that, contrary to what is included in her first written statement, she did not tell the police that she saw a man from Guerra and Carrasco's car "pointing a gun in the direction of the police car, and I saw him shoot four times at the police car"; nor, contrary to what is included in her second written statement, did she tell the police, after the line-up, that she saw Guerra "with his hands outstretched, and I guess he had a gun in his hands". Diaz testified that she signed her statements without reading them because she was tired and because she was frightened by police threats to take her infant daughter from her if she did not cooperate.

The respondent maintains that Diaz's habeas testimony is not credible because, again, her trial testimony was consistent with her statements, even though she never read them. The respondent asserts that if, as Diaz testified at the evidentiary hearing, she had demonstrated at trial how Guerra was "pointing" by stretching her arms out in front of her with her palms open and down, the prosecution would have clarified her testimony, or the defense would have capitalized on it. The district court found, however, that Diaz's trial testimony was the product of police intimidation, and was tainted by the prosecutor's inclusion in his questions of incorrect statements of Diaz's prior testimony. Again, because there is evidence in the record to support these findings, we cannot conclude that they are clearly erroneous. Restated, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74, 105 S.Ct. at 1511.

Finally, Frank Perez, who, as noted, was 17 years of age when he testified at trial, testified at the federal evidentiary hearing that it "could have been anywhere from 30 seconds to a minute and a half" after he heard gunshots that he saw two men run past his house; but, he was "not really sure exactly how long it was". Perez's statement

to the police the day after the shooting reports that he saw a Mexican American male run past his house "[j]ust a short time after the gun shots"; at trial, he testified that "it might have been a minute or less than that, or maybe a little over a minute", that he "couldn't really place the time".

Perez testified further at the federal hearing that he told the police and prosecutors that he could not identify the first man, who appeared to have been running on the south side of Walker Street (as noted, this was one of the streets forming the intersection where the shooting occurred); that the second man, whom he identified as Carrasco, appeared to have been running on the north side of that street; that, as Carrasco ran past, he pointed his left hand at Perez; that Carrasco put his left hand behind his back and then dropped an object that looked like a nine millimeter gun with a clip; that the object hit the street, making a metallic scraping sound; and that Carrasco picked up the object with his left hand and continued running down the street. Perez's written statement, prepared by the police, did not include that Carrasco appeared to be coming from the north side of Walker Street, or that the gun appeared to be a nine millimeter, or that Carrasco used his left hand both to point the gun at Perez and to pick up the gun. The word "gun" was typed in Perez's written statement, but, according to Perez, was changed to "object" after the police told him not to use the word "gun" unless he was 100% certain that the object was one.

The respondent does not challenge Perez's credibility; instead, he contends that, because the defense had Perez's written statement—with "gun" changed to "object"—when it cross-examined him at trial, the district court erred by finding that the prosecution suppressed Perez's statement that Carrasco dropped a gun. But, the respondent does not address the other information that the district court found to have been omitted from Perez's statement (that Carrasco appeared to be coming from the north side of Walker Street, that the gun appeared to be a nine millimeter, and that Carrasco used his left hand to point the gun at Perez and to pick it up after he dropped it). Obviously, that information was material, because, according to it, Carrasco had the nine millimeter murder weapon shortly after the shooting. Moreover, the information is consistent with other evidence presented at the federal evidentiary hearing that there was a scratch on the nine millimeter weapon, consistent with it having been dropped; that the shooter ran from the scene on the north side of Walker Street; and that the shooter was left-handed (there was evidence at the federal hearing that Guerra is right-handed; this was not brought out at trial). As noted, the respondent challenges neither the correctness of the district court's factual finding that this information was suppressed, nor its materiality.

These three examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief. We need not discuss further examples of the lack of clear error in the district court's detailed factual findings. In sum, we are satisfied that more than sufficient non-clearly erroneous, legally relevant findings of fact support such relief.

III.

For the foregoing reasons, the judgment is *AFFIRMED.*

QUEST MEDICAL, INC., Plaintiff—Counter Claimant—Appellee,

v.

Earl J. APPRILL, Defendant—Counter Claimant—Appellant.

No. 95-10438.

United States Court of Appeals, Fifth Circuit.

Aug. 12, 1996.

In action arising out of tender offer, seller sued buyer for misrepresentation. Following jury award to seller of actual and exemplary damages, the United States District Court for the Northern District of Texas, A. Joe Fish, J., reduced award of actual damages and denied award of exemplary damages. Seller appealed. The Court of Appeals, Duhé, Circuit Judge, held that: (1) trial court properly computed out-of-pocket and benefit-of-the-bargain measures of damages for statutory and common-law fraud; (2) district court properly calculated actual damages under Texas Securities Act (TSA); (3) exemplary damages were not recoverable under TSA; and (4) district court correctly awarded seller prejudgment interest at ten percent per annum, compounded daily.

Affirmed.

1. Damages ⇐15

In absence of statutory definition of actual damages, Texas courts generally looked to common law for guidance.

2. Fraud ⇐59(1)

Under Texas law, measure of damages recoverable in statutory fraud action is same as that under claim of common-law fraud. V.T.C.A., Bus. & C. § 27.01.

3. Judgment ⇐198

Under Texas law, when party tries case on alternative theories of recovery and jury returns favorable findings on two or more theories, party has right to judgment on theory entitling him to greatest or most favorable relief; if prior to judgment the prevailing party fails to elect between alternative theories, court should utilize findings affording the greater recovery and render judgment accordingly.

4. Federal Courts ⇐776

Court of Appeals reviews rulings on motions for judgment notwithstanding verdict (JNOV) de novo, applying same standard as district court.

5. Federal Courts ⇐765, 801

On appeal of judgment notwithstanding verdict (JNOV), Court of Appeals must view evidence in light most favorable to party opposing motion and sustain JNOV only if court finds that on all the evidence no reasonable juror could arrive at verdict contrary to district court's conclusion.

6. Trover and Conversion ⇐49

Under Texas law, measure of damage in stock conversion suit is market value of stock at time of conversion; if conversion is attended by fraud, willful wrong, or gross negligence, then measure of damages is highest market value between date of conversion and filing of suit.

7. Fraud ⇐59(3)

In determining stock seller's out-pocket damages, under Texas law, for purposes of statutory and common-law fraud claims, district court properly used closing price for stock on date of sale. V.T.C.A., Bus. & C. § 27.01.

8. Stipulations ⇐14(10), 17(3)

Under federal law, stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them, unless manifest injustice would result therefrom or evidence contrary to stipulation was substantial.

9. Federal Civil Procedure ⇐2601

District court has discretion to consider new theories raised for first time in posttrial brief.

10. Federal Courts ⇐617

Issue first presented to district court in posttrial brief is properly raised below when district court exercises its discretion to consider the issue.

11. Federal Courts ⇐612.1

Stock seller's theory that district court should have determined fair market value of stock employing by analogy valuation technique used in stock conversion cases was not properly raised below, where seller submitted this theory only after jury rendered its verdict, and Court of Appeals would not consider argument for first time on appeal.

12. Federal Courts ⇐611

Court of Appeals will not consider matters raised for first time on appeal, unless failure to do so would result in manifest injustice.

ATTACHMENT 3

Ralf LOSERTH, Appellant,
v.
The STATE of Texas, Appellee.

No. 04-94-00268-CR.

Court of Appeals of Texas,
San Antonio.

April 17, 1996.

Appeal from the 175th District Court of Bexar County Trial Court No. 92-CR-5666 Honorable Mary D. Roman, Judge Presiding

Before RICKHOFF, HARDBERGER and DUNCAN, JJ.

PHIL HARDBERGER, Justice.

***1** This is a murder case. The conviction is largely based on an eye-witness identification. The points of error are three: (1) factually insufficient evidence, (2) in-court identification and (3) excluded evidence of a civil lawsuit. All points are substantive and well-briefed by both sides.

Facts

Brenda Epperson, 24, was killed in her apartment on May 17, 1992. She was stabbed 12 times. The motive was, and is, difficult to understand. She was neither sexually molested, nor robbed. She was well-liked and successful in her work as an insurance adjuster. Her friends were many; her enemies, if any, were unknown. Because she screamed, the time of her death can be fairly closely determined: around 3:40 a.m. at the beginning of a Sunday morning. While the hour was late, and she had been out with girlfriends that night, she had neither been drinking nor using drugs. Only a few minutes before, she had been brought home by her girlfriends, who watched her until she was safely in her locked, lighted apartment.

The witness who heard the scream and called the police shortly thereafter was Lewis Devlin, a neighbor who lived in the adjacent apartment building on the second floor. His apartment faced the third-floor apartment of Epperson. It was later to be determined that it was 87 feet, 10 inches between the apartments. Not being certain as to what he should do about the scream, and seeing nothing, he did nothing. But shortly thereafter he heard a crashing noise and he looked at Epperson's apartment again. The apartment was lit, as was her balcony which faced him one story above his. This time he saw a tall, thin man come out of the apartment onto the balcony, look around and step over the railing on the outside edge of the balcony. The next thing he saw was a large object shoot toward the ground. Devlin looked back at the balcony, unable to believe that anyone would have voluntarily jumped the 26 feet from the balcony to the ground, but saw the balcony was now empty. Concluding correctly that the object he had seen falling was indeed the man he had seen on the balcony, Devlin called the Universal City police at 3:51 a.m. They arrived within one minute, while he was still talking to the dispatcher, and ran up the stairs to Epperson's front door (and the only door except the sliding entrance onto the third floor balcony). There were no signs of a forced entry. After beating on the door, they kicked it off the frame. Epperson's lifeless body was jammed up against the door, but they were able to push it open. There was much blood: on the door, on the floor, on the walls, on the rug, on the vertical venetian blinds that covered the sliding door that went onto the balcony, and blood on the railing of the balcony. The sliding door was off its rail, bent outwards; the screen behind the sliding door totally knocked off. The police then went downstairs, expecting no doubt that a person having jumped three stories might still be there, or at least somewhere nearby in an injured condition. The only thing they found, however, was an indentation in the gravel surrounding the building. There was a tree and a shrub in the vicinity but no evidence that the killer had fallen into these, or that they had broken his fall. Whatever injuries might have been expected in someone falling such a great distance, it is undisputed that the killer was still mobile enough to leave the scene. No suspects were arrested that night,

or for many weeks to come despite the best efforts of the Universal City police, the Texas Rangers and the science laboratories of the Department of Public Safety.

***2** In the latter part of September though, the defendant, Ralf Loserth, was indicted by a San Antonio grand jury. Loserth, who was an Army reserve lieutenant, then on duty in Indiana, drove back to San Antonio and turned himself in. Eventually he stood trial, testified in his own behalf that he was not guilty to no avail, and was found guilty of murder. The jury sentenced him to the extraordinarily low sentence of 25 years, considering the extreme savagery of such an innocent victim with no mitigating circumstances.

Factual Insufficiency

Loserth's first point of error is that there is factually insufficient evidence to support the verdict, and that, therefore, there must be a reversal, either with instructions to acquit, or remanded for a new trial.

The Court of Criminal Appeals has only recently decided that courts of appeals have constitutional and statutory authority to conduct factual sufficiency review in criminal cases. See Clewis v. State, No. 450-94 (Tex.Crim.App. January 31, 1996). The court first clarified that the courts of appeals do have constitutional and statutory authority to conduct factual sufficiency review in criminal cases. After having examined the evolution of appellate judicial power, the court concludes: "... from the beginning, 'appellate jurisdiction' included the power to examine 'factual sufficiency,' and further, that every appellate court with criminal jurisdiction recognized, acknowledged and utilized that power ..." Clewis, supra at 5. Further, the court held that our duty to review the facts, when properly raised, is mandatory: "When their jurisdiction to review fact questions is properly invoked, the courts of appeals cannot ignore constitutional and statutory mandates." Id. at 5.

But while the appellate courts have the authority, and the duty, to review fact questions, great deference must be given to the jury's findings:

> "In conducting a factual sufficiency review, an appellate court reviews the factfinder's weighing of the evidence and is authorized to disagree with the factfinder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's [sic] substituting its judgment for that of the jury."

Id. at 9.

As this court has previously ruled:

> "But courts of appeals should use considerable restraint in exercising their power to overturn the jury's work. The Magna Charta forced King John to give rights to juries, not appellate courts."

Peterson v. Reyna, 908 S.W.2d 472, 478-79 (Tex.App.--San Antonio 1995).

At the outset, it can be said that the question of insufficient evidence in this case, as presented to the jury, is a close one. Although the subsequent points of error seek to exclude some evidence that went to the jury, and include some evidence that did not, our review of factual insufficiency is done with a view as to what the jury actually heard without consideration of the two other points of error. The following facts were developed:

***3** The principal eyewitness, Devlin, was unable to give much of a description to the police. Both the night of the murder, as well as four days later when he gave a written statement to the police, Devlin could not do better than to say the person was (1) tall, (2) thin, and (3) wearing dark clothes like a jump suit. From then on, including several conversations with police officers and even after being hypnotized by a Texas Ranger, Devlin could not, or would not, elaborate further on this description. Two and a half months after the murder (July 27) Devlin was again called in by the Universal City police. He was shown a single color photograph of the defendant. The police explained that they did not show Devlin a traditional line-up because they were just trying to find out if the defendant had been seen around the

apartment complex. Whatever the question, Devlin's memory improved dramatically. At that moment, Devlin positively identified the defendant as the man on the balcony the night of the murder. He never again wavered, and identified Loserth as the man on the balcony (who was most certainly the murderer) in his trial testimony. Devlin's explanation of the late identification was that he had been afraid, and that he felt the defendant had seen him and might come after him. In support of his being afraid is the fact that he had moved out of his apartment the day after the murder, though less clear is why seeing the photograph would make him less afraid. In any case, the jury heard this testimony of an eyewitness making a positive identification of the killer. Cross-examination did not reveal any doubts of the witness: he was certain.

The jury obviously believed Devlin because there was no other evidence to place Loserth at the scene of the crime. Loserth, a former acquaintance, or boyfriend of the victim, depending on the viewpoint, was extraordinarily cooperative with the police. He gave statements without an attorney, he allowed the police to search his apartment, his garage and his car. He twice gave hair samples from his head, armpit and pubic areas. He gave blood samples, saliva samples, fingerprints, and palmprints. He allowed the police to take clothes from his closet to have fabric samples tested, knives from his kitchen and bedroom to see if they would correlate to the wounds on the victim. When indicted he drove more than a thousand miles back to San Antonio to turn himself in the next day, and at trial, waived his Fifth Amendment rights and took the stand in his own behalf. None of the physical items taken by the police, or tested by them, ever linked Loserth to the crime.

There was one other eyewitness that gave corroborating evidence that Loserth was in the vicinity at the time surrounding the murder. This woman was Eileen McGraff, a district manager for the local San Antonio newspaper, who was on her way to work. Between 4:15 a.m. and 4:30 a.m., while driving 25 miles per hour, she approached a pedestrian who was walking in the same direction as she was driving. This attracted her attention as it was unusual for anyone to be out walking at that time of the morning. As she passed this man, she looked at him and he at her. She continued driving, and looked in her rearview mirror, but the man was gone. At the trial she identified the man she passed that night as Loserth. The man was walking south, about a mile from the murder scene and about a mile and a half from Loserth's apartment. Both Loserth's apartment and the murder scene were back to the north, so he was walking in the opposite direction. The man was not limping.

***4** One last person that saw something was Lemuel Johnson, who also lived in the complex. He saw a "pretty tall" white man running through the apartment parking area dressed in a dark blue or black warm-up suit with a hood. The first time he saw him was at 3:15 a.m. and he was going towards the victim's apartment, and then sometime later he saw the person coming away from the apartment, but this time he was limping. Other than the above description, he could not give any greater detail.

Loserth's whereabouts from around 5 a.m. the morning of the murder are not in dispute. He was doing reserve duty in his capacity as a lieutenant at Fort Sam Houston. He testified he got there at 4:50 a.m., and his testimony was backed up by one of his superiors, Major Haas. He was cleanly dressed in the appropriate fatigue uniform. His first job was to climb an 8-foot chain link fence, with barbed wire on top, to turn on the field lights. He did this without difficulty, and came out the same way. A little later he turned them off the same way. Other reserve officers had arrived by 5:15 a.m., and confirmed Loserth was already there and working. He stayed throughout the day, voluntarily staying for a lunch cookout and volleyball games in the afternoon, in which he played. No one that day, and several people testified, noticed any limping, restriction of movement or scratches or cuts. He also didn't act out of the ordinary, either in speech or actions. The next day, Monday, he was back at work at his regular

job in the computer software business, I.Q. Software. No one noticed anything different, either in his physical, social or mental behavior. He attended the victim's funeral on Wednesday. One of Epperson's co-workers, Carol Gardner, said she saw him limping and rubbing the top of his leg at the funeral, but she was the sole witness to so testify. Numerous witnesses, including the police themselves, who talked to him the day after the murder said he was not limping, or injured in any way that could be observed. They also asked him to pull up his pants leg to see if they could see scratches, or bruising. He did so, but they saw nothing.

Loserth, 26, is a graduate of St. Mary's University where he received a commission as a second lieutenant. He has no criminal record, outside this case. He was working at the time of the murder, and until the trial in his field of computers. He was doing reserve duty on the weekend of this murder. He had just completed a series of physical tests at Fort Sam the day before the murder. He was in good, but not outstanding shape. He scored 212 out of a possible 300: enough to pass, but not excel. He is 6' 2" tall, and weighs around 190 pounds. He had been engaged since December, 1991, to a University of Texas student, Marissa Lee Gayton, and was still engaged to her at the time of the death of Epperson. Loserth had met Epperson in the fall of 1991 in the building where they both worked; they also lived close together, about .6 of a mile apart with Loserth's apartment just up the road to the north from Epperson. It was 15 to 17 miles from Loserth's apartment to Ft. Sam, and he testified it took about 20 minutes to drive it. Other witnesses said you could do it in 15 minutes.

*5 With the given time of the scream at 3:40 a.m., and Loserth arriving at work in an appropriate condition at 4:50 a.m., there was conflicting testimony as to whether it was physically possible for Loserth in that one hour and ten minutes to get from the murder scene to where he could clean up (there was a great deal of blood), change clothes and drive to work. This is further complicated by the McGraff testimony about a man walking a mile from the scene between 4:15 a.m. and 4:30 a.m. But juries have the duty to sort out conflicting facts and they did so on this occasion, and there is evidence to support that implied finding.

There was also conflicting testimony whether it was possible for Loserth to have jumped three stories and have been able to go anywhere very fast, much less to participate in physical activities without signs of being hurt. Here too though, the jury can weigh the facts, and there was some evidence to support them, especially with the eyewitness identification made by Devlin.

The implied motive was a jilted, and angry lover. But the testimony is not overly strong. There was no evidence of anger, arguments, violent incidents or that Epperson was afraid of Loserth. There is some evidence that, in the fall of 1991, a romance was desired by Loserth. He wrote her two poems, the gist of which was that he wanted to spend more time with her. They would hardly be classified as passionate though, and he testified they never had sexual intercourse at any time. How much time they spent together is unclear by the evidence. The testimony ranged from two dates (Loserth's testimony) to many times, stretching from October, 1991, until Epperson's death. (Some of her friends.)

Loserth did not always help himself. None of these things, mentioned below, proved he committed a murder, or any crime, but they did not endear him to the jury:

(1) When first questioned by the police as to where he was that night before he went to Ft. Sam, he said he was spending the night with his fiance, Ms. Gayton. This was a lie. A few days later, Loserth voluntarily admitted that he had made that up, and said that he was alone that night, and simply went to bed in his apartment.

(2) He understated his relationship with Ms. Epperson. He told the police he had only had a couple of dates with her, and those back in the fall of 1991. He explained he had gotten engaged in December of 1991 to Ms. Gayton,

and had no further relationship with Ms. Epperson except he would occasionally run into her at work as they both worked in the same building. Several witnesses testified he continued to come by and see her at her work station, and that they would talk on the phone, well into the spring of 1992. It is not clear just how long in 1992, or whether these contacts had stopped in the weeks before her murder; it is also not clear how the relationship was terminated, or whose idea it was to terminate it, if indeed it was. It is also unknown if it was a romantic relationship. Suffice it to say, it was something more than Loserth led the police to believe.

***6** (3) Loserth was cooperative with the police, but, of course, they didn't always tell him everything they did. One of the unannounced things they did was to search his garbage. Nothing was ever found of any importance. On one occasion though, they found a note. This note, written by Loserth, informed them that if they kept searching through his garbage they might find Jimmy Hoffa. The police were not amused, and it's fairly probable neither was the jury.

(4) Loserth was asked for second hair samples while he was on temporary reserve duty in Indiana. He agreed, and a Doctor Duncan was given the job of getting the hair samples. While he was doing so, and not knowing the history of the case, Duncan asked Loserth what this was all about. Loserth replied that some girl in San Antonio had gotten "hacked up." Duncan was chilled by the insensitivity of the remark, and the jury, knowing more than Duncan about the relationship, were probably more so.

The State in its brief refers to the above actions and words as describing a man "disingenuous, chameleon like and extraordinarily narcissistic." There may be evidence to support such a view.

The jury was within its rights to consider all of the evidence, including the above actions and words. In addition, they had the two eyewitnesses in-court identification of the defendant. Devlin's testimony was especially critical as it put the defendant directly at the scene of the murder. McGraff's testimony, while important, was essentially corroborative. It put the defendant in the general vicinity and time of the crime.

Considering the great powers of a jury in this state to decide factual matters, and being deferential to those findings, we find there was factual sufficiency to support the verdict. Point of error one is overruled.

The In-Court Identification
(Point of Error Three)

Loserth timely filed a motion to suppress identification testimony. During the trial, the court held a suppression hearing out of the presence of the jury. At the conclusion of the hearing, the trial court suppressed Devlin's photographic identification, but allowed him to make an in-court identification. The defendant's third point of error complains of this action.

There is a close connection between an out-of-court photographic identification and an in-court identification. This is true because an impermissibly suggestive photographic identification can also taint the in-court identification that follows. Each case must stand on its own facts, but certain guidelines have evolved to help the courts in their evaluations. The leading case in this area is Simmons v. United States, 390 U.S. 377 (1968).

> "... convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

***7** Id. at 384.

The court then goes on to discuss problems that can be induced by the police that can cause an incorrect identification.

> "This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles

> the person he saw ... Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Id. at 383.

The Supreme Court in Neil v. Biggers, 409 U.S. 188 (1972), set out factors for the trial court to consider:

> "... the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Id. at 199.

In Manson v. Brathwaite, 432 U.S. 98 (1977), the Court adopted the Biggers factors, but emphasized that "The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment." Id. at 113. The Court of Criminal Appeals in Madden v. State, 799 S.W.2d 683, 695 (Tex.Crim.App.1990), cert. denied, 499 U.S. 954 (1991) stated that "the practice of showing a single photograph to the prosecuting witness is condemned". But, the court continued, "If the totality of circumstances reveals no substantial likelihood of misidentification despite the suggestive identification procedure, then the identification testimony will be deemed reliable, and therefore admissible ..." Id. at 695. Similar language is found in Delk v. State, 855 S.W.2d 700 (Tex.Crim.App.1993), cert. denied, 114 S.Ct. 481 (1993), and Cantu v. State, 738 S.W.2d 249, cert. denied, 484 U.S. 872 (1987).

A review of the cases shows that a clear majority of the cases to consider the question of impermissibly suggestive photographs have ultimately affirmed the conviction even though they were used as a part of the state's case. The usual rationale is that there was a high reliability factor, and frequently that there was plenty of other evidence that the defendant committed the crime. Further, the law imposes a heavy burden on the defendant.

> "The burden is on the defendant to show by clear and convincing evidence that the in-court identification is unreliable."

Delk, supra at 706. For similar language, see Madden, 799 S.W.2d at 695.

The "impermissibly suggestive" standards are not always hollow words though and some cases are reversed when there is a substantial doubt raised about the reliability of the identification.

> "... convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside ... if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

***8** Simmons, supra at 971.

It was under this reasoning that the Fifth Circuit reversed the conviction in United States v. Sutherland, 428 F.2d 1152 (1970).

> "Because the District Court found that an impermissibly suggestive photographic identification created a substantial likelihood of misidentification, yet allowed the question of an in-court identification to go to the jury, we reverse and remand for a new trial."

Id. at 1154. It appears that the trial court in Loserth did the same thing. At the very least the court's ruling shows a substantial distrust of the out-of-court identification, enough to keep it out. Yet, the in-court identification, based on the sole photo shown to Devlin at the police station was allowed.

Sutherland states: "... if the picture spread in the particular case was impermissibly suggestive either in the photographs used or the manner or number of times they are displayed," then, "... If the judge makes such a determination, he then should determine if the impermissibly suggestive picture spread gives rise to a likelihood of irreparable misidentification. If both elements are found,

Simmons prohibits the use of the in-court identification." Id. at 1155. Also see United States v. King, 321 F.Supp. 614 (1970), for another, similar case in which the photo identification was held to be impermissibly suggestive and the identification was suppressed.

Dispensa v. Lynaugh, 847 F.2d 211 (5th Cir.1988) is another Fifth Circuit case arising out of a Texas conviction that held "The out-of-court identification was inadmissible and the in-court identification could not stand without it." Id. at 221. This case, while going through the Biggers/Simmons factors, said that the most important of these factors was the witness's inability to describe the criminal before the inadmissibly suggestive act. Speaking of the factors, the court said:

> "Of these, by far the most significant in this case is the lack of accuracy of the witness's prior description of the criminal."

Id. at 220. The court, in that case where the crime was rape, felt the victim's earlier inability to say whether her assailant had a moustache, was hirsute, and had a tattoo was fatal to the later identification, either in or out of court.

In our case, Devlin could never get beyond "tall and thin" for almost two and a half months. His written statements never even mention whether the criminal was Anglo, Mexican-American, or African-American. In his testimony, he explained that he was never asked, but this is hard to believe, and was disputed by the police. Common sense tells us that a hard-working police investigating unit, and there is plenty of evidence that they were hard-working, would have done everything they could have done to have a better description from the one eye-witness who put the criminal at the murder scene itself. They even tried hypnosis on Devlin in an effort to probe any suppressed subconscious memory, but this was a failure. Devlin was an Air Force policeman and certainly would have understood the need for an accurate description of a murderer. Devlin said he didn't give a better description because he was afraid. Fear is an element that courts can consider. However, he never said he was lying before his late identification of the photo, although he did say he purposely did not give a full description. His testimony seems to be a combination of (1) he wasn't asked, and (2) he suppressed the memory. The instant change from virtually no memory to complete certitude on being shown a single photograph, without any of the safeguards of a traditional lineup, raise very serious questions on the reliability of the identification. It was these very questions that, no doubt, caused a careful trial judge to suppress this out-of-court identification. The logical question that follows has to be: is the in-court identification more reliable than the out-of-court identification? There are circumstances where it could be. For example, a witness might have already given a fairly accurate description of the criminal, and then been shown a sole photograph and the out-of-court identification suppressed. The in-court identification would still be valid because it would be consistent with what was already known. The danger in a case such as the instant case is that it is far from clear what the witness could have identified before being shown the sole photograph.

***9** In the case of Jimenez v. State, 787 S.W.2d 516 (Tex.App.--El Paso 1990, no pet.), which was a rape case, the case against the defendant very substantially rested on the victim's in-court identification of the defendant as her assailant. The court first recognized the "difficult and heavy burden" that a defendant has to demonstrate by clear and convincing evidence that the trial identification was irreparably tainted by impermissible suggestive pretrial identification procedures. Id. at 519. The court then went through the Biggers/Simmons factors, as adopted by our Texas courts in Herrera v. State, 682 S.W.2d 313 (Tex.Crim.App.1984), and concluded, in a fact-intensive analysis, that the in-court identification was unreliable, and irreparably tainted by pretrial identification procedures that created a substantial likelihood of misidentification. Similar results were reached, after similar analysis of the facts, in Rawlings v. State, 720 S.W.2d 561 (Tex.App.--Austin 1986); Coleman v. State, 505 S.W.2d

878 (Tex.Crim.App.1974); and Proctor v. State, 465 S.W.2d 759 (Tex.Crim.App.1971). After reviewing all the cases, including the majority that did not reverse, and the minority of those that did, the following general conclusions can be made: (1) the defendant's burden to overturn a conviction on a tainted in-court identification is heavy; (2) the defendant usually fails, but not always and (3) every case must be considered on its own facts, (3) using the Biggers/simmons/ Herrera nonexclusive guidelines (4) considering the totality of the circumstances. We do so:

1. The opportunity to view the criminal at the time. It was night, and Devlin was almost 30 yards away. On the other hand, the apartment was lighted, there was a porch light on the balcony, and another light on the side of the building. The time for observation was brief. The criminal walked out of the apartment, stepped over the rail, looked around and jumped. The lighting was not so good that Devlin could actually tell whether something was thrown off the balcony or the man jumped. He concluded he jumped when the man was no longer there.

2. The witness's degree of attention. High. Devlin was specifically looking to see what was happening.

3. The accuracy of the prior description of the criminal. Virtually non-existent beyond "tall and thin". Unable to expand the details even under hypnosis.

4. The level of certainty demonstrated at the trial confrontation. Absolute certainty, giving no ground to cross-examination.

5. The time between the crime and the confrontation. About two and one-half months from the crime to being shown the lone color photo (May 17 to July 27 when he was shown the photo; statement given on July 28.). Almost two years from the crime to the in-court identification. (May 17, 1992 to March 4, 1994).

In evaluating the above factors we feel, as the court did in Dispensa, supra:

> "Of these, by far the most significant in this case is the lack of accuracy of the witness's prior description of the criminal."

***10** Id. at 220.

We do not overlook the testimony of Devlin that says he was afraid, and we agree that fear can be a powerful, and sometimes a logical motivator. But there is simply no evidence before being shown the lone color photograph that he was capable of being any more descriptive than "tall and thin." He testified he willfully held back some descriptive details; but the impression given was that on being shown the photo, that it brought it all back. Lighting, distance and time for observation were far from ideal: given the conditions, "tall and thin" is not unreasonable.

The police explained that they showed the photograph to Devlin to simply find out if Loserth had been seen around the apartments. The police had several other photos of similar appearing males, gathered for the purpose of a line-up which was prepared on June 8 that they did not show him. They could just as easily have asked if any of these males had been seen around the apartment complex. The police already knew from their investigation that Loserth had been around the apartments more than he originally indicated. So, it is difficult to understand the purpose of the single photograph unless it was to suggest that this was the very "tall and thin" person he had seen on the balcony. In any case, whether it is called a line-up or some other name, we feel that it was impermissible, suggestive and resulted in a substantial likelihood of irreparable misidentification. We agree with the trial court that the out-of-court identification was inadmissible. But we further think in this case, given these particular facts, the in-court identification cannot stand without the out-of-court identification.

We are acutely aware that the conclusion that we feel we must reach will cause further reliving of the pain and uncertainty for the Epperson family who are entitled to closure

and justice. Justice demands that the guilty be punished, and the innocent set free. But the determination of who is guilty, and who is not guilty must be decided by those elemental rules of fairness set forth in our Constitution, as interpreted by the Supreme Court, and our own Court of Criminal Appeals. The jury had a difficult time with this case. First they told the judge they were deadlocked. Then, after two-days deliberation, they did reach a verdict. Their assessment of such a minimal punishment of 25 years for this brutal crime, with no mitigating factors, however, reflects much uncertainty. It is not this court's job to find guilt or innocence, and we do not do so. It is our job to insure that evidence that is admitted to the jury is properly admitted, and insofar as the in-court identification, we don't think it was. Sometimes an in-court identification is nothing more than a formality. This is obviously not that kind of case.

We sustain the defendant's third point of error. In line with this decision, we do not need to reach the second point of error. We reverse and remand for a new trial.

SARAH B. DUNCAN, Justice (concurring in the judgment only).

***11** I agree that Loserth's third point of error should be sustained, the judgment reversed, and the case remanded for a new trial. I do not, however, join in the majority's dicta regarding the factual sufficiency of the evidence.

END OF DOCUMENT

CAUSE NO. 359805

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

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS WITNESS STATEMENTS AND IN-COURT IDENTIFICATIONS

On this day came on to be heard Defendant's Motion to Suppress Witness Statements and In-Court Identifications, and the Court, after reviewing the file and argument of counsel, is of the opinion that this Motion should be in all things GRANTED.

It is, therefore, ORDERED that the following documentary evidence and testimony is suppressed from use for any purpose, including but not limited to affirmative evidence and impeachment, at any trial of Defendant Ricardo Aldape Guerra (hereafter "Aldape Guerra"):

1. Previously recorded testimony during the 1982 trial of Aldape Guerra in Cause No. 359,805 relating to the identification of Aldape Guerra as the shooter of, possible shooter of, or pointer of a gun or anything that might have been a gun at either Houston police officer J.D. Harris or Jose Armijo, Sr., by any of the following witnesses:

Jose Armijo, Jr.
Patricia Diaz
Elvira "Vera" Flores
(now Elvira Flores Hernandez)
Hilma Galvan
Herlinda Garcia
Armando Heredia
Jose Heredia
Jacinto Vega

2. New testimony, at any future trial of Aldape Guerra in Cause No. 359,805 or any other cause, relating to the identification of Aldape Guerra as the shooter of, possible shooter of, or pointer of a gun or anything that might have been a gun at either Houston police officer J.D. Harris or Jose Armijo, Sr., by any of the following witnesses:

Jose Armijo, Jr.
Patricia Diaz
Elvira "Vera" Flores
(now Elvira Flores Hernandez)
Hilma Galvan
Herlinda Garcia
Armando Heredia
Jose Heredia
Jacinto Vega

3. New testimony, at any future trial of Aldape Guerra in Cause No. 359,805 or any other cause, by any of the following witnesses to the effect that at any previous confrontation, including the lineup, any witness meeting, or the 1982 trial itself, the witness identified Aldape Guerra as the shooter of, possible shooter of, or pointer of a gun or anything that might have been a gun at either Houston police officer J.D. Harris or Jose Armijo, Sr.:

Jose Armijo, Jr.
Patricia Diaz
Elvira "Vera" Flores
(now Elvira Flores Hernandez)
Hilma Galvan
Herlinda Garcia
Armando Heredia
Jose Heredia
Jacinto Vega

4. The witness statements taken from any of the following witnesses on or after July 13, 1982 up to and including the last day of any trial in Cause No. 359,805, in connection with the shooting of either Houston police officer J.D. Harris or Jose Armijo, Sr.:

Jose Armijo, Jr.
Patricia Diaz
Elvira "Vera" Flores
(now Elvira Flores Hernandez)
Hilma Galvan
Herlinda Garcia
Armando Heredia
Jose Heredia
Jacinto Vega
Trinidad Medina
Frank Perez

Signed this _____ day of _____, 1996.

_____
PRESIDING JUDGE

VEHOU07:24607.1

F
Ald. Aldape
1 cy. F. #A11

Vinson&Elkins
ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
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1001 FANNIN STREET
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WRITER'S TELEPHONE
(713) 758-2024

WRITER'S FAX
(713) 615-5399

October 2, 1996

VIA FEDERAL EXPRESS

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

Re: No. 95-20443; *Ricardo Aldape Guerra v. Gary L. Johnson* (*aff'd* July 30, 1996)

Dear Sir or Madam:

Enclosed is a copy of CJA Form 30 (the original was too messy to file) submitting our application for payment in a death penalty proceeding. I wanted to explain in this separate letter how I arrived at the dollar figures for the value of time and expenses submitted.

First, we classified each time entry according to the 10 categories provided and totaled the number of hours during those two years for all the lawyers in each category and listed them on the form.

Second, we calculated the hourly rate as follows. After calculating by computer the total amount of fees based on each person's hourly rate (with a cap of $125 per hour), we calculated the total amount of fees that we could have charged, which totaled $131,713 for Vinson & Elkins time and $10,875 for time spent by Stanley Schneider and Richard Morris, two non-Vinson &Elkins lawyers (I explain below the reason for their inclusion). We then reduced the Vinson & Elkins charge by 20% ($26,349.25), and added the time for Mr. Schneider and Mr. Morris ($10,875) back to the total, which yielded a total fee of $116,272. We divided this by the total number of hours (1,339) to derive the hourly rate of $86.83.

Third, we deleted all charges for courier services except for couriers to the courthouse, deleted all long distance charges for return calls to the media, and discounted by 10% ($879.28) all expenses.

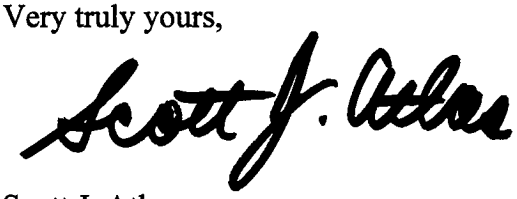
In sum, recognizing the limited amount of court resources that are available for capital habeas appeals, we reduced the amount for which we sought reimbursement by reducing Vinson & Elkins' total fees by 20% (a discount of $26,349.25) and total expenses by 10% (a discount of $819.28).

I recognize that these calculations are a bit complicated and would be happy to answer any questions.

I included time for Richard Morris and Stanley Schneider even though they are not Vinson & Elkins attorneys for the following reasons. Mr. Morris was included because he began working on this case while he was employed at Vinson & Elkins, taking substantial responsibility for legal research on the issue of identification procedures. He continued working on this after leaving the Firm. I felt that his continued involvement required less time than it would have taken to have someone else familiarize themself from scratch with this case and the legal issue for which he took responsibility.

Mr. Schneider's time was included because I had asked him to assist by providing criminal law expertise. He assisted as co-counsel during the habeas hearing in November 1993 before U.S. District Court Judge Kenneth Hoyt and was intimately familiar with those proceedings. He provided invaluable advice on criminal law and procedural issues as well as participated in oral argument preparation.

Very truly yours,



Scott J. Atlas

Enclosure
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bc: Stanley Schneider
Richard A. Morris

f:\sa0399\aldape\pleadings\5th cir\washing8.ltr

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—660-42

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

CJA 30 (3/94) D 21990

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

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

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

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

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

10. COURT ORDER

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

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

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

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

Name of Co-Counsel: _____

Appointment Date: _____ Voucher No.: _____

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

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

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

6/12/95
Date of Order

Nunc Pro Tunc Date

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

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

12. WORK PHONE: 713 758-2024

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

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

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

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

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

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

CLAIM FOR SERVICES OR EXPENSES

14. STAGE OF PROCEEDING

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

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

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

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

15. HOURS, BY CATEGORY

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

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

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

SUBTOTALS:
In Court (a) 1.00
Out of Court (b thru j) 1338.00
× Hourly Rate $ 86.83
15A. TOTAL AMOUNT CLAIMED: $ 116,272.00

16. EXPENSES

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

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

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

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

If yes, give details on additional sheets. _____

Has compensation and/or reimbursement for work in this case previously been applied for? ☒ YES ☐ NO

Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? ☒ YES ☐ NO

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

► 9/30/96
DATE

APPROVED FOR PAYMENT

19. COMPENSATION	20. TRAVEL EXPENSE	21. OTHER EXPENSES	22. TOTAL AMOUNT APPROVED
$	$	$	$

Vinson & Elkins
ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
HOUSTON DALLAS WASHINGTON, D.C. AUSTIN MOSCOW LONDON SINGAPORE
I.R.S. NO. 74-1183015

September 30, 1996

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
Billing Attorney Scott J. Atlas
Invoice Number 1264077

Re: Guerra, Ricardo Aldape

Fees for services posted through August 13, 1996

Re: Fifth Circuit Appeal

	Init		Hours
1/10/95	RELS	ANNOTATE HABEAS HEARING MEMORANDUM.	7.50
1/13/95	SJA	DETERMINE ISSUES TO OMIT ON APPEAL.	2.75
1/16/95	SJA	REVIEW WITNESS OUTLINES TO SELECT INFORMATION FOR APPEAL.	3.75
	SLBR	OFFICE CONFERENCE WITH SCOTT ATLAS REGARDING PETITIONER'S EXHIBITS.	.25
1/18/95	SJA	PREPARE OUTLINE FOR APPEAL BASED ON REVIEW OF COURT OPINION AND NOTES FROM 11/93 HEARING.	3.75
2/22/95	SJA	PREPARE TRIAL TESTIMONY SUMMARY.	2.75
2/24/95	SJA	PREPARE SUMMARY OF TESTIMONY.	2.50
2/27/95	SJA	PREPARE SUMMARY OF HEARING TESTIMONY.	3.75
2/28/95	SJA	PREPARE SUMMARY OF HEARING TESTIMONY; REVIEW AND REVISE SAME.	5.25
3/01/95	SJA	PREPARE SUMMARY OF HEARING TESTIMONY.	6.50
3/02/95	SJA	PREPARE SUMMARY OF TRIAL TESTIMONY.	5.00
3/06/95	SJA	PREPARE SUMMARY OF HEARING TESTIMONY.	5.75
3/07/95	SJA	TEAM MEETING TO MAKE RESEARCH ASSIGNMENTS FOR APPEAL.	1.50
	SJA	REVIEW AND REVISE SUMMARY OF HEARING TESTIMONY.	5.75
	TWK	TELEPHONE CONFERENCE CALL WITH TEAM REGARDING STATUS AND BRIEF.	1.00
	MM	ATTEND TEAM MEETING.	1.50
	ML	ATTEND TEAM MEETING.	1.50
	SLBR	ATTEND TEAM MEETING; CONFERENCE WITH SCOTT ATLAS REGARDING EXHIBIT NOTEBOOK.	2.00
3/08/95	SJA	SUMMARIZE TESTIMONY FROM 11/93 HEARING.	7.00
	TWK	ATTEND MEETING WITH JIM MARKHAM; REVIEW SCOTT ATLAS MEMORANDUM REGARDING BRIEF.	.50
	JRM	MEET WITH TED KASSINGER.	.25

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
Billing Attorney Scott J. Atlas
Invoice Number 1264077

Re: Guerra, Ricardo Aldape

	Init		Hours
3/08/95	SLBR	ARRANGE FOR DUPLICATION OF STATEMENT OF FACTS.	.25
3/09/95	SJA	WORK ON HEARING SUMMARY; CONFERENCES WITH SUSAN BROWN.	7.00
	JJSH	QUALITY CHECK NOTEBOOKS FROM DUPLICATING; ADD SPINE LABELS TO NOTEBOOKS; OBTAIN DOCKET SHEET FROM THE FEDERAL COURTHOUSE; OBTAIN DOCKET SHEET FROM THE CRIMINAL COURTHOUSE AND RETURN TO SUSAN BROWN; TELEPHONE CONFERENCE WITH THE COURT CLERK REGARDING LOCATION OF FILE; CONFERENCE WITH SUSAN BROWN.	3.50
	SLBR	CONFERENCE WITH SCOTT ATLAS REGARDING OBTAINING DOCKET SHEETS FROM RESPECTIVE COURTS; INSTRUCT JEFF SHANK REGARDING OBTAIN SAME FROM FEDERAL AND STATE DISTRICT COURTS; TELEPHONE CONFERENCE WITH AUSTIN OFFICE REGARDING OBTAINING DOCKET SHEETS FROM COURT OF CRIMINAL APPEALS; TELEPHONE CONFERENCE WITH U. S. SUPREME COURT REGARDING SAME; REVIEW DOCKET SHEET FROM STATE DISTRICT COURT; CONFERENCE WITH SCOTT ATLAS REGARDING SAME.	1.50
3/10/95	SJA	PREPARE SUMMARY OF 11/93 HEARING TESTIMONY; CONFER WITH TED KASSINGER.	6.50
	TWK	REVIEW SCOTT ATLAS MEMORANDA AND CONFER WITH SCOTT ATLAS AND JIM MARKHAM ON SAME.	1.00
	JRM	CONFER WITH TED KASSINGER REGARDING ATLAS MEMORANDA.	.25
3/13/95	SJA	PREPARE SUMMARY OF 11/93 HEARING.	7.50
3/14/95	SJA	MEET WITH STANLEY SCHNEIDER; REVIEW MEMO REGARDING WITNESSES RELEVANT TO EACH ISSUE.	5.00
	MM	CONFER WITH MANUEL LOPEZ REGARDING RESEARCH.	.25
	ML	CONFERENCE WITH MICHAEL MUCCHETTI REGARDING RESEARCH ASSIGNMENTS.	.25
	ML	REVIEW SUMMARIES OF HEARING ON HABEAS PETITION.	1.00
3/15/95	SJA	COMPARE HEARING SUMMARY TO ISSUES MEMO; RESEARCH MISCELLANEOUS ISSUES.	4.75
	JRM	ANNOTATE OUTLINE.	5.00

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
Billing Attorney Scott J. Atlas
Invoice Number 1264077

Re: Guerra, Ricardo Aldape

	Init		Hours
3/15/95	SLBR	TELEPHONE CONFERENCES WITH WASHINGTON OFFICE REGARDING OBTAIN DOCKET SHEET FROM U. S. SUPREME COURT.	.25
3/16/95	SJA	COMPARE HEARING SUMMARY TO ISSUES MEMO.	4.25
	ML	REVIEW SUMMARIES OF HEARING ON HABEAS PETITION.	.50
	JRM	REVIEW OF TRANSCRIPTS AND TRIAL NOTEBOOKS.	4.00
3/17/95	SJA	OFFICE CONFERENCES WITH ROBERT SUMMERLIN AND ELIZABETH WHILDEN REGARDING TESTIMONY SUMMARIES NEEDED; TELEPHONE CONFERENCE WITH SUSAN BROWN REGARDING SAME.	1.00
	SJA	COMPARE HEARING SUMMARY TO ISSUES MEMO.	3.75
	ECWH	OFFICE CONFERENCE WITH SCOTT ATLAS AND ROBERT SUMMERLIN REGARDING TESTIMONY SUMMARIES.	.50
	SLBR	TELEPHONE CONFERENCE WITH SCOTT ATLAS REGARDING TESTIMONY SUMMARIES.	.50
	RELS	OFFICE CONFERENCE WITH SCOTT ATLAS AND ELIZABETH WHILDEN REGARDING TESTIMONY SUMMARIES.	.50
3/20/95	SJA	REVISE ISSUES MEMO.	2.50
	ML	REVIEW SUMMARIES OF HEARINGS ON HABEAS PETITION.	1.00
	JRM	CONTINUE ANNOTATING OUTLINE.	3.75
3/21/95	RELS	REVIEW 3/13/95 SCOTT ATLAS MEMORANDUM REGARDING TRIAL TESTIMONY; BEGIN RICHARD BAX TRIAL TESTIMONY SUMMARY.	2.50
3/22/95	RELS	CONTINUE BAX TRIAL TESTIMONY SUMMARY.	2.00
3/23/95	SJA	COMPARE 11/93 HEARING SUMMARY WITH ISSUES MEMO.	4.75
	JRM	CONTINUE ANNOTATING OUTLINE.	5.00
3/27/95	JRM	WORK ON MEMORANDUM RELATING TO FALSE EVIDENCE ISSUES ANNOTATING TO RECORD.	3.50
	RELS	CONTINUE SUMMARY OF BAX TESTIMONY.	3.00
3/28/95	JRM	CONTINUE PREPARATION FOR APPEAL -- ANNOTATING OUTLINE.	3.25
	RELS	CONTINUE BAX TRIAL TESTIMONY SUMMARY.	1.50
3/29/95	SJA	COMPARE HEARING SUMMARY TO ISSUES MEMO.	3.50
4/06/95	ECWH	BEGIN SUMMARY OF ROBERT MOEN HEARING TESTIMONY.	2.50
	RELS	CONTINUE BAX HEARING SUMMARY.	5.00

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
Billing Attorney Scott J. Atlas
Invoice Number 1264077

Re: Guerra, Ricardo Aldape

	Init		Hours
4/07/95	RELS	CONTINUE DEPOSITION SUMMARY OF BAX.	4.50
4/19/95	MM	RESEARCH ON PRETRIAL INTIMIDATION OF WITNESSES; DRAFT MEMO REGARDING SAME.	4.00
4/20/95	SJA	TELEPHONE CONFERENCE WITH STAN SCHNEIDER REGARDING NEW SUPREME COURT OPINION ABOUT BRADY; OBTAIN AND REVIEW SAME DURING CALL.	1.50
	MM	RESEARCH ON PRETRIAL INTIMIDATION OF WITNESSES; DRAFT MEMO REGARDING SAME.	2.50
4/21/95	ECWH	SUMMARIZE TESTIMONY OF MOEN.	1.50
4/24/95	ECWH	SUMMARIZE TESTIMONY OF MOEN.	3.00
4/27/95	SJA	REVIEW NEW SUPREME COURT CASE; COMPARE TO BRIEF; TELEPHONE CONFERENCE WITH STANLEY SCHNEIDER REGARDING SAME.	2.75
	ECWH	SUMMARIZE TESTIMONY OF MOEN.	2.00
5/02/95	JRM	FINALIZE MEMORANDUM REGARDING TESTIMONY TO SCOTT ATLAS.	.50
	ECWH	SUMMARIZE TESTIMONY OF MOEN.	1.00
5/03/95	ECWH	SUMMARIZE TESTIMONY OF MOEN.	4.00
5/04/95	ECWH	SUMMARIZE TESTIMONY OF MOEN.	4.00
	RELS	CONTINUE BAX SUMMARY.	2.00
5/05/95	ECWH	SUMMARIZE TESTIMONY OF MOEN.	2.00
5/08/95	ECWH	SUMMARIZE TESTIMONY OF MOEN.	4.00
5/09/95	ECWH	SUMMARIZE TESTIMONY OF MOEN.	4.50
5/17/95	ECWH	SUMMARIZE TESTIMONY.	1.00
5/19/95	JRM	REVISE MEMORANDUM; PREPARE MEMORANDUM ON VICTIM IMPACT CITES FROM TRIAL.	1.25
5/23/95	TWK	REVIEW SCOTT ATLAS' MEMORANDUM REGARDING STATUS OF CASE.	.25
5/24/95	GCBO	CONFERENCE WITH ROBERT SUMMERLIN REGARDING RETRIEVAL OF SPECIFIC PAGES FOR JAMES MARKHAM.	.25
	RELS	CONTINUE BAX TESTIMONY SUMMARY; CONFERENCE WITH GEORGE BOUDREAU.	5.50
5/25/95	GCBO	RETRIEVE SPECIFIC PAGES FOR JAMES MARKHAM, ACCORDING TO MEMOS OF MAY 1 AND 19.	6.50
	RELS	COMPILE VICTIM IMPACT DOCUMENTS FOR JAMES MARKHAM.	1.00

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Re: Guerra, Ricardo Aldape

	Init		Hours
5/26/95	GCBO	COMPLETE LOCATION OF CITED DOCUMENTS FOR JAMES MARKHAM.	.50
	RELS	COMPILE VICTIM IMPACT DOCUMENTS FOR JAMES MARKHAM.	2.00
6/08/95	SJA	TRAVEL TO HUNTSVILLE, TEXAS; VISIT WITH CLIENT; RETURN FROM HUNTSVILLE; REVIEW STATE'S MOTION TO STAY; TELEPHONE CONFERENCE WITH STAN SCHNEIDER REGARDING SAME; REVIEW COURT MAILING REGARDING COURT REPORTER; LEAVE VOICE MAIL MESSAGES FOR MANUEL LOPEZ REGARDING MOTION TO STAY.	6.75
	ML	LISTEN TO OCTELS FROM SCOTT ATLAS REGARDING POSSIBLE RESPONSE TO MOTION TO STAY JUDGMENT; REVIEW MOTION TO STAY JUDGMENT.	1.00
6/09/95	SJA	LEAVE VOICE MAIL MESSAGE FOR MANUEL LOPEZ REGARDING MOTION TO STAY.	.25
	ML	LISTEN TO OCTEL FROM SCOTT ATLAS REGARDING POSSIBLE RESPONSE TO MOTION TO STAY JUDGMENT.	.25
	JCHU	FIND PAGE CITES FOR SUMMARY OF BAX'S 11/93 TESTIMONY.	2.50
6/10/95	TWK	REVIEW VARIOUS MOTIONS FILED BY STATE OF TEXAS AND MATERIALS FROM SCOTT ATLAS.	.25
6/11/95	SJA	RESEARCH ON MOTION FOR STAY.	3.50
	ML	RESEARCH STANDARDS FOR OBTAINING A STAY OF FINAL JUDGMENT PENDING APPEAL.	4.00
6/12/95	MM	CONFER WITH MANUEL LOPEZ REGARDING STAY.	.25
	ML	RESEARCH STANDARDS FOR OBTAINING A STAY OF FINAL JUDGMENT PENDING APPEAL; OFFICE CONFERENCE WITH MICHAEL MUCCHETTI REGARDING STAY.	5.25
	JCHU	FIND PAGE CITES FOR SUMMARY OF BAX'S 11/93 TESTIMONY.	2.50
6/13/95	SJA	PREPARE OPPOSITION TO MOTION TO STAY; RESEARCH REGARDING SAME.	3.75
	ML	RESEARCH STANDARDS FOR OBTAINING A STAY OF FINAL JUDGMENT PENDING APPEAL.	8.75
	JCHU	FIND PAGE CITES FOR SUMMARY OF BAX AND MOEN.	6.50
6/14/95	SJA	REVIEW AND REVISE DRAFT OPPOSITION TO MOTION TO STAY; RESEARCH REGARDING STAY; TELEPHONE	3.75

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HOUSTON DALLAS WASHINGTON, D.C. AUSTIN MOSCOW LONDON SINGAPORE
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Re: Guerra, Ricardo Aldape

	Init		Hours
		CONFERENCE WITH MANUEL LOPEZ REGARDING STANDARDS FOR STAY.	
6/14/95	ML	TELEPHONE CONFERENCE WITH SCOTT ATLAS REGARDING STANDARDS FOR OBTAINING STAY OF FINAL JUDGMENT; RESEARCH REGARDING SAME.	6.00
	JCHU	FIND PAGE CITES FOR SUMMARY OF MOEN'S 11/93 TESTIMONY.	2.00
	JCHU	REVIEW WRIT.	4.00
6/15/95	SJA	REVIEW AND REVISE OPPOSITION TO MOTION TO STAY; TELEPHONE CONFERENCES WITH COURT CLERK AT SOUTHERN DISTRICT OF TEXAS AND FIFTH CIRCUIT REGARDING SAME; TELEPHONE CONFERENCES WITH SHIRLEY CORNELIUS, TROY MCKINNEY AND RICARDO ALDAPE GUERRA REGARDING POSSIBLE 6/19 ARRAIGNMENT; REVIEW TRANSCRIPT ITEMS FOR RECORD; LEAVE VOICE MAIL MESSAGE FOR MICHAEL MUCCHETTI REGARDING SAME.	3.25
	MM	REVIEW VOICE MAIL MESSAGE FROM SCOTT ATLAS REGARDING 6/19 ARRAIGNMENT.	.25
	ML	RESEARCH STANDARDS FOR OBTAINING STAY OF FINAL JUDGMENT.	5.75
	PDGO	CITE CHECK MOTION REGARDING STAY.	1.25
6/16/95	SJA	REVIEW AND REVISE MOTION TO STAY; TELEPHONE CONFERENCES WITH STAN SCHNEIDER AND MANUEL LOPEZ REGARDING SAME.	3.50
	MM	READ RESPONSE TO MOTION TO STAY.	.25
	ML	RESEARCH STANDARDS FOR OBTAINING STAY OF FINAL JUDGMENT; REVISE OPPOSITION TO MOTION FOR STAY FOR FILING IN THE FIFTH CIRCUIT; TELEPHONE CONFERENCE WITH SCOTT ATLAS REGARDING MOTION TO STAY.	6.75
6/17/95	SJA	REVIEW AND REVISE MOTION TO STAY.	3.00
	ML	TELEPHONE CONFERENCE WITH STAN SCHNEIDER REGARDING NEW ARGUMENT FOR OPPOSITION TO MOTION FOR STAY; REVISE OPPOSITION TO MOTION FOR STAY; FILE SAME WITH FIFTH CIRCUIT.	6.50
6/19/95	SJA	REVIEW VOICE MAIL MESSAGE FROM MANUEL LOPEZ REGARDING HIS TELEPHONE CONFERENCE WITH 5TH	.25

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Re: Guerra, Ricardo Aldape

	Init		Hours
		CIRCUIT.	
6/19/95	MM	DRAFT DESIGNATION OF ADDITIONAL PARTS OF RECORD; SEND FLOYD MCDONALD TRANSCRIPT TO SCOTT ATLAS.	.75
	ML	TELEPHONE CONFERENCES WITH MONICA WASHINGTON; LEAVE VOICE MAIL MESSAGE FOR SCOTT ATLAS REGARDING SAME.	.50
6/20/95	SJA	REVIEW VOICE MAIL MESSAGE FROM MANUEL LOPEZ REGARDING WORK ON PRETRIAL MOTIONS.	.25
	MM	TELEPHONE CONFERENCE WITH MANUEL LOPEZ REGARDING WORK ON PRETRIAL MOTIONS.	.25
	ML	TELEPHONE CONFERENCES WITH MICHAEL MUCCHETTI AND RICK MORRIS REGARDING WORK ON PRETRIAL MOTIONS; LEAVE VOICE MAIL MESSAGE FOR SCOTT ATLAS REGARDING SAME.	1.00
	JLPI	REVIEW AND PROOF INDEX OF DOCUMENTS FOR INCLUSION IN APPELLATE RECORD.	.25
6/21/95	SJA	REVIEW VOICE MAIL MESSAGE FROM MICHAEL MUCCHETTI REGARDING DESIGNATION OF RECORD.	.25
	MM	CALL TO STAN SCHNEIDER AND SCOTT ATLAS VIA OCTEL REGARDING DESIGNATION OF RECORD; EDIT TRANSCRIPT DESIGNATION LIST.	1.50
	ML	REVIEW VOICE MAIL MESSAGE FROM SCOTT ATLAS' OFFICE REGARDING DECISION OF THE FIFTH CIRCUIT; TELEPHONE CONFERENCE WITH SANTIAGO ROEL REGARDING FIFTH CIRCUIT DECISION.	.50
	JRM	BEGIN REVIEW OF TRIAL TRANSCRIPTS.	3.00
	JCHU	FIND PAGE CITES FOR SUMMARY OF MCDONALD'S 11/93 TESTIMONY.	2.00
	JLPI	CONTINUE TO REVIEW INDEX OF DOCUMENTS FOR INCLUSION IN APPELLATE PROCEDURES.	1.75
6/22/95	MM	FIND DEADLINES FOR FILING MOTION FOR REHEARING AND PETITION FOR CERT; FILE DESIGNATIONS OF ADDITIONAL PORTIONS OF THE TRANSCRIPT; TELEPHONE CONFERENCE WITH MANUEL LOPEZ REGARDING 5TH CIRCUIT DECISION.	.50
	ML	TELEPHONE CONFERENCE WITH MICHAEL MUCCHETTI REGARDING APPEALING THE DECISION OF THE FIFTH	.25

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	Init		Hours
		CIRCUIT.	
6/26/95	ML	RESEARCH TIME RECORD CLOSES WHEN DECISION IS APPEALED.	2.00
6/27/95	MM	DISCUSSION WITH FIFTH CIRCUIT CLERK REGARDING EXPEDITED APPEAL.	.25
6/28/95	MM	EDIT FORM FOR APPEARANCE OF COUNSEL; DISCUSSION WITH CLERK REGARDING SAME.	.25
	RELS	CONTINUE RICHARD BAX'S TESTIMONY SUMMARY; REVIEW MEMO ON SALIENT TRIAL TESTIMONY ISSUES.	4.50
6/29/95	MM	FILE FORM FOR APPEARANCE OF COUNSEL.	.25
7/06/95	JLPI	ASSEMBLE DOCUMENTS FOR MICHAEL MUCCHETTI.	.50
7/10/95	MM	FILL OUT TRANSCRIPT FORMS; TALK WITH COURT REPORTER'S OFFICE REGARDING SAME; EDIT SAME; TALK WITH DISTRICT CLERK'S OFFICE REGARDING SAME.	.75
	ML	RESEARCH CHANGES IN THE LAW OF DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	1.75
	RELS	JIMS RESEARCH CONCERNING 248TH COURT ORDER.	1.50
7/11/95	SJA	REVIEW REQUEST FOR TRANSCRIPT.	.25
	MM	EDIT TRANSCRIPT FORMS.	.25
	ML	RESEARCH CHANGES IN THE LAW OF DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	7.00
7/12/95	ML	RESEARCH CHANGES IN THE LAW OF DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	6.50
	RELS	CONTINUE RICHARD BAX TESTIMONY SUMMARY; REVIEW SCOTT ATLAS TRIAL TESTIMONY MEMO.	2.00
7/17/95	ML	RESEARCH CHANGES IN THE LAW OF DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	5.75
7/19/95	SJA	REVIEW AND REVISE SUMMARY OF JUDGE HOYT'S REVISED OPINION.	.75
7/21/95	ML	RESEARCH CHANGES IN THE LAW OF THE DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	4.25
7/24/95	ML	RESEARCH CHANGES IN THE LAW OF THE DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	2.50
	JCHU	FIND PAGE CITES FOR SUMMARY OF ACHESON TESTIMONY.	1.00
	RELS	LOCATE 1982 TRIAL EXHIBITS.	.25

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Re: Guerra, Ricardo Aldape

	Init		Hours
7/25/95	JCHU	FIND PAGE CITES FOR SUMMARY OF ACHESON AND PEREZ TESTIMONY.	3.00
7/26/95	SKC	REVIEW SCOTT ATLAS' SUMMARY OF WITNESS TESTIMONY AT HABEAS PROCEEDING.	.75
	ML	RESEARCH CHANGES IN THE LAW OF THE DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	2.50
	JCHU	FIND PAGE CITES FOR SUMMARY OF PEREZ TESTIMONY.	3.00
7/27/95	SKC	REVIEW SCOTT ATLAS' SUMMARY OF WITNESS TESTIMONY AT HABEAS PROCEEDING AND JUDGE HOYT'S AMENDED ORDER ON PETITION FOR HABEAS RELIEF; REVIEW PETITIONER'S EXHIBITS INTRODUCED AT HABEAS PROCEEDING.	2.50
	MM	SEARCH FOR CASES CONCERNING ISSUES RELATING TO PRE-TRIAL INTIMIDATION OF WITNESSES.	3.50
	ML	RESEARCH CHANGES IN THE LAW OF THE DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	5.00
	JCHU	READ TRANSCRIPT OF THE PROCEEDINGS; FIND PAGE CITES FOR SUMMARY OF MONROE'S AND PEREZ'S TESTIMONY.	4.50
7/28/95	SKC	REVIEW FIRST APPLICATION FOR WRIT OF HABEAS CORPUS.	2.75
	ML	RESEARCH CHANGES IN THE LAW OF THE DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	1.50
7/31/95	SKC	REVIEW FIRST APPLICATION FOR WRIT OF HABEAS CORPUS & APPENDIX.	2.50
	ML	RESEARCH CHANGES IN THE LAW OF THE DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	7.25
	JCHU	FIND PAGE CITES FOR SUMMARY OF GARCIA'S TESTIMONY.	5.50
8/01/95	ML	RESEARCH CHANGES IN THE LAW OF THE DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	3.75
	JCHU	FIND PAGE CITES FOR SUMMARY OF HOLGUIN, GARCIA, RODRIQUEZ, AND HERNANDEZ TESTIMONY.	4.00
8/02/95	ML	RESEARCH CHANGES IN THE LAW OF THE DUTY TO DISCLOSE EXCULPATORY EVIDENCE.	1.00
	JCHU	FIND PAGE CITES FOR SUMMARY OF HOLGUIN, HEREDIA, MONTERO AND BROWN TESTIMONY.	6.50

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	Init		Hours
8/03/95	JCHU	FIND PAGE CITES FOR SUMMARY OF BROWN'S TESTIMONY.	7.50
8/04/95	JCHU	FIND PAGE CITES FOR SUMMARY OF BROWN'S TESTIMONY.	1.00
8/15/95	ECWH	SUMMARIZE TESTIMONY OF MOEN.	2.00
8/22/95	ECWH	SUMMARIZE TRANSCRIPT.	2.00
8/23/95	ECWH	SUMMARIZE TRANSCRIPT.	2.50
8/24/95	ECWH	SUMMARIZE TRANSCRIPT.	2.00
8/25/95	ECWH	CONTINUE TRANSCRIPT SUMMARY.	3.00
9/25/95	ECWH	SUMMARIZE TRIAL TRANSCRIPT.	1.50
9/26/95	MM	REVIEW TRANSCRIPT EXCERPTS AND SUMMARY OF HEARING FOR QUESTIONS RAISED BY PREVIOUS EDITOR.	1.00
	ECWH	CONTINUE TO SUMMARIZE TRANSCRIPT.	2.00
9/27/95	ECWH	SUMMARIZE TRANSCRIPT.	.50
9/29/95	ECWH	REVIEW AND CONTINUE SUMMARIZING TRANSCRIPT.	1.00
10/03/95	MM	REVIEW EDITS AND MAKE CORRECTIONS TO OUTLINE OF HABEAS CORPUS HEARING.	4.50
10/09/95	MM	PROOF TYPEWRITTEN CHANGES MADE TO SUMMARY OF HABEAS CORPUS HEARING.	3.50
10/13/95	SJA	REVIEW AND REVISE SUMMARY OF HABEAS HEARING.	2.00
	SJA	TELEPHONE CONFERENCES WITH RON TABAK, CAROL WOLCHOK AND BILL ROBINSON REGARDING AMICUS BRIEFS.	.50
	ECWH	SUMMARIZE TESTIMONY.	2.50
10/16/95	SJA	REVIEW AND REVISE NOVEMBER, 1993 HEARING SUMMARY; TELEPHONE CONFERENCE WITH RICK MORRIS REGARDING REVIEW OF TRANSCRIPT.	2.75
10/17/95	SJA	TELEPHONE CONFERENCE WITH MANUEL LOPEZ REGARDING RESEARCH NEEDED ON MISCELLANEOUS ISSUES; TELEPHONE CONFERENCE WITH STAN SCHNEIDER REGARDING NEW CASE ON BRADY ISSUE; PREPARE MEMOS TO TED KASSINGER AND MANUEL LOPEZ REGARDING REVIEW OF 11/93 TRANSCRIPT SUMMARY	.75
10/21/95	JCO	MAKE LIST OF CASES FROM BRIEF TO SHEPERDIZE.	.75
10/27/95	JRM	BEGIN REVIEW OF TRANSCRIPT.	5.00
10/31/95	SJA	TELEPHONE CONFERENCE WITH ZAPALAC REGARDING BRIEF FILING DATE.	.25
11/01/95	JRM	WORK ON TRIAL TRANSCRIPT SUMMARY.	6.00

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	Init		Hours
11/07/95	JRM	FINISH TRANSCRIPT SUMMARY REVISIONS.	1.75
11/19/95	MM	PROOF EDITS FROM HABEAS CORPUS HEARING OUTLINE.	1.00
11/20/95	MM	EDIT OUTLINE FOR HABEAS CORPUS HEARING.	1.50
11/21/95	MM	REVIEW CHANGES TO HEARING SUMMARY.	.25
11/28/95	JRM	BEGIN REVIEW OF MATERIALS FOR 5TH CIRCUIT BRIEF.	4.00
11/29/95	JRM	CONTINUE REVIEW OF MATERIALS FOR 5TH CIRCUIT BRIEFS.	4.00
12/05/95	JRM	BEGIN UPDATE OF PROSECUTORIAL MISCONDUCT CASE LAW FOR 5TH CIRCUIT BRIEF.	6.50
12/06/95	JRM	WORK ON UPDATE OF PROSECUTORIAL MISCONDUCT LAW FOR 5TH CIRCUIT BRIEF.	6.50
12/07/95	JRM	WORK ON PROSECUTORIAL MISCONDUCT RESEARCH.	2.00
12/08/95	JRM	CONTINUE WORK ON PROSECUTORIAL MISCONDUCT RESEARCH.	3.00
12/13/95	JRM	FURTHER RESEARCH ON PROSECUTORIAL MISCONDUCT CASE LAW.	2.50
12/28/95	SKC	REVIEW BRIEF OF RESPONDENT-APPELLANT.	.75
	JRM	FINISH PROSECUTORIAL MISCONDUCT CASE LAW UPDATE.	6.00
1/02/96	RELS	ANNOTATE HABEAS HEARING MEMORANDUM; REVIEW TRANSCRIPTS FOR THE SAME.	3.00
1/04/96	RELS	ANNOTATE HABEAS HEARING MEMORANDUM; REVIEW TRIAL TRANSCRIPTS FOR THE SAME.	5.00
1/05/96	SJA	REVIEW VOICE MAIL MESSAGE FROM MICHAEL MUCCHETTI REGARDING AVAILABILITY FOR PROJECT.	.25
	MM	LEAVE MESSAGE FOR SCOTT ATLAS REGARDING AVAILABILITY TO WORK ON PROJECT.	.25
	RELS	ANNOTATE HABEAS HEARING MEMORANDUM; REVIEW TRIAL TRANSCRIPTS FOR THE SAME.	4.50
1/08/96	SJA	TELEPHONE CONFERENCES WITH FIFTH CIRCUIT AND WILLIAM ZAPALAC REGARDING EXTENSION OF TIME TO FILE BRIEF; PREPARE LETTER REGARDING SAME; PREPARE OUTLINE FOR FIRST PART OF BRIEF.	2.50
	RELS	ANNOTATE HABEAS HEARING MEMORANDUM; REVIEW TRANSCRIPTS FOR THE SAME.	7.50
1/09/96	SJA	COMPLETE OUTLINE OF STATE'S BRIEF.	3.50

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	Init		Hours
1/09/96	TWK	REVIEW STATE'S BRIEF AND PREPARE FOR CONFERENCE CALL.	1.00
1/10/96	SJA	TEAM MEETING TO ANALYZE STATE'S BRIEF AND GIVE ASSIGNMENTS; OFFICE CONFERENCE WITH LISA BECK REGARDING SAME; TELEPHONE CONFERENCE WITH ANNE CLAYTON REGARDING SAME.	2.75
	TWK	CONFERENCE CALL REGARDING PREPARATION OF BRIEF; DISCUSS WORK WITH JIM MARKHAM.	1.50
	JCO	TEAM MEETING TO DISCUSS REPLY BRIEF; REVIEW STATE'S BRIEF, EVIDENTIARY HEARING SUMMARY AND APPLICANT'S BRIEF TO DISTRICT COURT.	3.50
	SKC	CONFERENCE WITH ALL ATTORNEYS ON TEAM REGARDING STATE'S BRIEF OF APPELLANT AND DRAFTING BRIEF OF APPELLEE.	1.75
	RELS	ANNOTATE HABEAS HEARING MEMORANDUM.	7.50
	RELS	ATTEND TEAM MEETING.	1.50
1/11/96	SKC	RESEARCH REGARDING APPELLATE COURT DEFERENCE TO DISTRICT COURT'S CREDIBILITY DETERMINATIONS.	.50
	RELS	ANNOTATE HABEAS HEARING MEMORANDUM; REVIEW TRANSCRIPT FOR THE SAME.	8.50
1/12/96	SKC	RESEARCH AND DRAFT MEMORANDUM REGARDING AUTHORITIES DISCUSSING DEFERENCE AFFORDED GIVEN TO TRIAL COURT'S DETERMINATION OF CREDIBILITY OF WITNESS.	1.75
	RELS	REVISE HABEAS HEARING MEMORANDUM ANNOTATIONS.	9.00
1/13/96	SJA	LEAVE VOICE MAIL MESSAGE FOR MICHAEL MUCCHETTI REGARDING PROPOSAL TO DRAFT SECTION OF BRIEF.	.25
	MM	REVIEW MESSAGE FROM SCOTT ATLAS REGARDING PROPOSAL TO DRAFT WITNESS INTIMIDATION SECTION OF BRIEF.	.25
1/15/96	SJA	REVIEW BRIEF SUMMARY.	.25
	JCO	REVIEW TRANSCRIPT OF EVIDENTIARY HEARING REGARDING TESTIMONY ON REFERENCES TO "ILLEGAL ALIEN".	.50
	SKC	SEARCH FOR CASES ON THE CLEARLY ERRONEOUS STANDARD.	1.00
1/16/96	SKC	RESEARCH REGARDING DEFERENCE THAT APPELLATE COURT MUST GIVE DISTRICT COURT'S DETERMINATIONS BASED ON	.25

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	Init		Hours
		THE CREDIBILITY OF THE WITNESSES.	
1/16/96	JRM	REVIEW UPDATED OUTLINE OF HABEAS TESTIMONY.	.50
1/17/96	SJA	MEET WITH CAVANAUGH O'LEARY REGARDING BRIEF.	.25
	JCO	MEET WITH SCOTT ATLAS REGARDING BRIEF.	.25
	SKC	TELEPHONE CONFERENCE WITH EDEN HERRINGTON AT THE TEXAS RESOURCE CENTER REGARDING BRIEFS THAT SHE MAY HAVE ON THE CLEARLY ERRONEOUS STANDARD.	.50
	MM	READ MATERIALS TO PREPARE PORTION OF APPELLEE'S BRIEF; DRAFT SAME.	6.00
	JRM	WORK ON PROSECUTORIAL MISCONDUCT PART OF BRIEF.	5.00
1/18/96	JCO	BEGIN DRAFTING PORTION OF BRIEF.	5.00
	SKC	RESEARCH REGARDING LEADING CASES EXPLAINING CLEARLY-ERRONEOUS STANDARD OF REVIEW AND DEFERENCE THAT IT AFFORDS TO DISTRICT COURT'S FINDINGS OF FACT.	2.00
1/22/96	SKC	REVIEW REGARDING CLEARLY ERRONEOUS STANDARD OF REVIEW.	1.00
1/23/96	JCO	CONTINUE DRAFTING PORTION OF BRIEF.	1.00
	JRM	CASE RESEARCH; DRAFTING ON PROSECUTORIAL MISCONDUCT BRIEF SECTION.	6.00
1/24/96	SKC	DRAFT MEMORANDUM REGARDING CLEARLY ERRONEOUS STANDARD OF REVIEW.	2.50
	JRM	DRAFTING WORK ON PROSECUTORIAL MISCONDUCT SECTION OF BRIEF.	7.00
1/25/96	JRM	CONTINUE DRAFTING PROSECUTORIAL MISCONDUCT SECTION OF BRIEF.	5.00
1/26/96	JRM	CONTINUE WORK ON PROSECUTORIAL MISCONDUCT SECTION OF BRIEF; WORK ON VICTIM IMPACT PAPER.	5.00
1/29/96	SJA	TELEPHONE CONFERENCE WITH TED KASSINGER.	.25
	TWK	TELEPHONE CONFERENCE WITH SCOTT ATLAS; CONFERENCE WITH JAMES MARKHAM.	.25
	TWK	BEGIN REVIEW OF DRAFT INSERT FOR BRIEF.	.50
	MM	REVIEW MEMO BY STEPHANIE CRAIN ON WITNESS CREDIBILITY.	.25
	JRM	CONFERENCE WITH TED KASSINGER.	.25

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
Billing Attorney Scott J. Atlas
Invoice Number 1264077

Re: Guerra, Ricardo Aldape

	Init		Hours
1/30/96	SJA	WORK ON BRIEF.	3.00
	SJA	MISCELLANEOUS TELEPHONE CONFERENCES REGARDING AMICUS BRIEFS; TELEPHONE CONFERENCE WITH TED KASSINGER REGARDING BRIEF.	2.50
	TWK	TELEPHONE CONFERENCE WITH SCOTT ATLAS REGARDING BRIEF.	.25
	MM	EDIT BRIEF TO FIFTH CIRCUIT CONCERNING WITNESS INTIMIDATION.	1.75
	RELS	REVIEW H.P.D. INVOLVEMENT FILE NOTEBOOK; CREATE TABLE OF CONTENTS OF WITNESS STATEMENTS.	1.50
1/31/96	SJA	TELEPHONE CONFERENCE WITH ANNE CLAYTON REGARDING QUESTIONS ON BRIEF.	.50
	MM	EDIT FIFTH CIRCUIT BRIEF ON WITNESS INTIMIDATION.	3.00
	RELS	REVISE TABLE OF CONTENTS OF WITNESSES FROM THE H.P.D. INVESTIGATION FILE NOTEBOOK.	2.00
2/01/96	SJA	WORK ON BRIEF.	3.50
	MM	DRAFT PORTION OF BRIEF ON WITNESS INTIMIDATION.	8.00
2/02/96	MM	DRAFT PORTION OF BRIEF ON WITNESS INTIMIDATION.	2.00
2/05/96	SJA	WORK ON BRIEF.	2.50
	MM	EDIT SECTION ON WITNESS INTIMIDATION.	4.00
2/06/96	SJA	WORK ON BRIEF.	4.25
	MM	EDIT WITNESS INTIMIDATION SECTION FOR FIFTH CIRCUIT BRIEF.	8.50
2/07/96	SJA	WORK ON BRIEF.	6.50
	SJA	TELEPHONE CONFERENCES WITH JULIA SULLIVAN REGARDING AMICUS BRIEF; OFFICE CONFERENCES WITH BEVERLY PALMER REGARDING CITE CHECKING.	.75
	MM	EDIT WITNESS INTIMIDATION SECTION.	6.00
	JRM	WORK ON PROSECUTORIAL MISCONDUCT PART OF BRIEF.	4.00
	BLP	CITE CHECK APPEALS BRIEF; OFFICE CONFERENCES WITH SCOTT ATLAS REGARDING SAME.	6.50
	RELS	REVIEW SCOTT ATLAS HABEAS MEMORANDUM AND COMPARE WITH TRANSCRIPTS.	2.50
2/08/96	SJA	WORK ON BRIEF.	8.75
	SJA	TELEPHONE CONFERENCES WITH JULIA SULLIVAN REGARDING AMICUS; TELEPHONE CONFERENCE WITH A.	.75

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
Billing Attorney Scott J. Atlas
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Re: Guerra, Ricardo Aldape

	Init		Hours
		STAPLES REGARDING AMICUS BRIEF; TELEPHONE CONFERENCES WITH STEPHANIE CRAIN REGARDING EDITING BRIEF.	
2/08/96	SKC	TWO TELEPHONE CONFERENCES WITH SCOTT ATLAS REGARDING EDITING SEGMENTS OF BRIEF OF APPELLEE.	.25
	BLP	CITE CHECKING APPEALS BRIEF.	2.50
	RELS	REVIEW HABEAS HEARING TESTIMONY MEMORANDUM AND COMPARE TO COURT TRANSCRIPTS; UPDATE ANNOTATIONS AND CROSS REFERENCES.	7.50
2/09/96	SJA	WORK ON BRIEF.	6.75
	SKC	REVIEW DRAFT OF SECTION OF BRIEF OF APPELLEE REGARDING IDENTIFICATION PROCEDURES; REVISE SECTION OF BRIEF OF APPELLEE REGARDING CLEARLY ERRONEOUS STANDARD OF REVIEW.	3.50
	JRM	WORK ON VICTIM IMPACT SECTION OF BRIEF.	1.00
	JRM	WORK ON PROSECUTORIAL MISCONDUCT DRAFT.	2.00
	RELS	REVIEW HABEAS HEARING TESTIMONY MEMORANDUM AND COMPARE WITH COURT TRANSCRIPTS; UPDATE ANNOTATIONS AND CROSS REFERENCES.	7.50
2/11/96	SJA	WORK ON BRIEF.	10.25
	SKC	REVIEW DRAFT OF WITNESS INTIMIDATION SECTION OF BRIEF OF APPELLEE.	.50
2/12/96	SJA	WORK ON BRIEF.	6.50
	MM	EDIT BRIEF SECTION ON WITNESS INTIMIDATION.	.25
	RELS	REVIEW HABEAS HEARING TESTIMONY MEMORANDUM AND COMPARE WITH COURT TRANSCRIPTS.	5.00
2/13/96	SJA	WORK ON BRIEF.	8.00
	SJA	OFFICE CONFERENCES WITH MICHAEL MUCCHETTI REGARDING BRIEF; LEAVE VOICE MAIL MESSAGE FOR TED KASSINGER REGARDING SAME.	.50
	TWK	REVIEW AND REVISE DRAFT SECTION OF APPELLATE BRIEF.	1.00
	SKC	REVIEW DRAFT OF IMPROPER IDENTIFICATION PROCEDURES SECTION OF BRIEF OF APPELLEE.	1.50
	MM	EDIT WITNESS INTIMIDATION SECTION OF FIFTH CIRCUIT BRIEF; OFFICE CONFERENCES WITH SCOTT ATLAS	.50

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
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Invoice Number 1264077

Re: Guerra, Ricardo Aldape

	Init		Hours
		REGARDING SAME.	
2/14/96	SJA	WORK ON BRIEF; OFFICE CONFERENCE WITH STEPHANIE CRAIN REGARDING REVISING PORTION OF BRIEF.	8.25
	SKC	CONFERENCE WITH SCOTT ATLAS REGARDING REVISION OF IDENTIFICATION PROCEDURES SECTION OF BRIEF OF APPELLEE; REVIEW DISTRICT COURT'S AMENDED ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS; REVIEW STATE'S BRIEF OF APPELLANT.	1.25
	MM	EDIT FIFTH CIRCUIT BRIEF SECTION ON WITNESS INTIMIDATION; OTHER TASKS INVOLVING REVISION OF INSERTS IN FIFTH CIRCUIT BRIEF.	.75
	JRM	WORK ON PROSECUTORIAL MISCONDUCT DRAFT.	4.00
	RELS	REVIEW HABEAS HEARING TESTIMONY MEMORANDUM AND COMPARE WITH COURT TRANSCRIPTS.	4.00
2/15/96	SJA	WORK ON BRIEF.	8.25
	SKC	REVISE IDENTIFICATION PROCEDURES SECTION OF BRIEF OF APPELLEE; RESEARCH REGARDING TRIER OF FACT INFERRING IMPROPER MOTIVE FROM CIRCUMSTANTIAL EVIDENCE.	4.00
	RELS	CITE CHECK BRIEF.	7.50
2/16/96	SJA	WORK ON BRIEF.	9.25
	SKC	LOCATE CRIMINAL CASE STATING THAT INTENT CAN BE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE; REVIEW SCOTT ATLAS' REVISIONS TO MICHAEL MUCCHETTI'S DRAFT OF SECTION OF BRIEF OF APPELLEE; TELEPHONE CONFERENCE WITH RICK MORRIS REGARDING LEGAL STANDARD FOR DETERMINING WHETHER IDENTIFICATION PROCEDURES ARE IMPROPER; REVISE DRAFT OF IDENTIFICATION PROCEDURES SECTION OF BRIEF OF APPELLEE.	3.00
	JRM	FINAL REVIEW OF BRIEF SECTION ON PROSECUTORIAL MISCONDUCT.	.50
2/17/96	SJA	WORK ON BRIEF.	9.75
2/19/96	SJA	WORK ON BRIEF.	9.50
	SKC	LOCATE CASES REGARDING DISTRICT COURT INFERRING IMPROPER MOTIVE FROM CIRCUMSTANTIAL EVIDENCE;	8.50

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Account Number PRO127 29000
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Invoice Number 1264077

Re: Guerra, Ricardo Aldape

	Init		Hours
		REVISE DRAFT OF IDENTIFICATION PROCEDURES SECTION OF BRIEF OF APPELLEE.	
2/19/96	MM	REVIEW WITNESS INTIMIDATION SECTION AFTER SCOTT ATLAS EDITED IT.	1.25
	JRM	SEARCH FILES FOR LETTER TO JUDGE HOYT REGARDING MOEN'S CREDIBILITY; MEMO TO SCOTT ATLAS REGARDING SAME.	.50
	BLP	CITE CHECKING APPEALS BRIEF.	4.00
	RELS	REVIEW HABEAS HEARING TESTIMONY MEMORANDUM AND COMPARE WITH ORIGINAL TRANSCRIPTS; UPDATE ANNOTATIONS AND CROSS REFERENCES.	5.00
2/20/96	SJA	WORK ON BRIEF; OFFICE CONFERENCE WITH STEPHANIE CRAIN REGARDING IDENTIFICATION SECTION OF BRIEF.	7.00
	SKC	CONFERENCE WITH SCOTT ATLAS REGARDING IMPROPER IDENTIFICATION SECTION OF BRIEF OF APPELLEE; DRAFT AND REVISE THAT SECTION OF BRIEF.	7.50
	JRM	RE-WRITE BRIEF SECTION ON PROSECUTORIAL MISCONDUCT.	6.00
	BLP	CITE CHECKING APPEALS BRIEF	3.00
	RELS	REVIEW HABEAS HEARING MEMORANDUM CITES.	1.50
	RELS	CITE CHECK BRIEF.	6.00
2/21/96	SJA	WORK ON BRIEF.	10.25
	SKC	DRAFT IMPROPER IDENTIFICATION PROCEDURE SECTION OF BRIEF OF APPELLEE.	8.00
	BLP	CITE CHECKING APPEALS BRIEF.	7.00
	RELS	REVIEW HABEAS HEARING MEMORANDUM AND COMPARE WITH COURT TRANSCRIPTS.	3.50
	RELS	CITE CHECK BRIEF; SEARCH CASES ON WESTLAW.	3.00
2/22/96	SJA	WORK ON BRIEF.	9.50
	SKC	REVISE DRAFT OF IMPROPER IDENTIFICATION PROCEDURES SECTION OF BRIEF OF APPELLEE; REVISE DRAFT OF BRIEF OF APPELLEE.	4.50
	MM	EDIT INTRODUCTION AND FACTUAL RECITATION IN FIFTH CIRCUIT BRIEF.	1.75
	BLP	CITE CHECKING APPEALS BRIEF.	8.00

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Re: Guerra, Ricardo Aldape

	Init		Hours
2/22/96	RELS	CITE CHECK BRIEF.	5.00
2/23/96	SJA	WORK ON BRIEF.	8.50
	SKC	REVISE VARIOUS SECTIONS OF BRIEF OF APPELLEE.	6.00
	BLP	CITE CHECKING APPEALS BRIEF.	8.00
	RELS	CITE CHECK BRIEF.	5.00
2/25/96	TWK	REVIEW JIM MARKHAM'S DRAFT INSERT FOR BRIEF REGARDING VICTIM IMPACT TESTIMONY AND RESEARCH ON SAME.	1.25
2/26/96	SJA	WORK ON BRIEF.	6.50
	TWK	RESEARCH, DRAFT AND REVISE INSERTS FOR BRIEF.	10.50
	SKC	REVISE BRIEF OF APPELLEE.	5.75
	BLP	CITE CHECKING APPEALS BRIEF.	3.25
	RELS	CITE CHECK BRIEF.	5.00
2/27/96	SJA	WORK ON BRIEF.	13.75
	TWK	CONFERENCES WITH JIM MARKHAM REGARDING FURTHER RESEARCH ON VICTIM IMPACT TESTIMONY CASES.	.50
	SKC	REVISE BRIEF OF APPELLEE.	4.00
	JRM	RESEARCH ON VICTIM IMPACT PART OF BRIEF; OFFICE CONFERENCES WITH TED KASSINGER REGARDING SAME.	6.00
	BLP	CITE CHECKING APPEALS BRIEF.	6.75
	RELS	CITE CHECK BRIEF.	5.50
2/28/96	SJA	TELEPHONE CONFERENCE WITH 5TH CIRCUIT CLERK.	.25
	SJA	WORK ON BRIEF.	10.75
	SKC	DRAFT SUMMARY OF THE ARGUMENT SECTION OF BRIEF OF APPELLEE.	2.25
	BLP	CITE CHECKING APPEALS BRIEF.	4.00
	RELS	CITE CHECK BRIEF.	3.50
2/29/96	SJA	PREPARE MOTION TO FILE BRIEF EXCEEDING 40 PAGES; TELEPHONE CONFERENCES WITH 5TH CIRCUIT CLERK'S OFFICE REGARDING SAME.	.50
	SJA	COMPLETE DRAFT BRIEF; TELEPHONE CONFERENCE WITH TED KASSINGER.	9.50
	TWK	TELEPHONE CONFERENCE WITH SCOTT ATLAS.	.25
	TWK	REVIEW, RESEARCH, AND REVISE DRAFTS OF BRIEF.	2.25
	SKC	REVIEW AND REVISE FINAL DRAFT OF BRIEF OF APPELLEE.	2.00

September 30, 1996 Page: 19

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
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Re: Guerra, Ricardo Aldape

	Init		Hours
2/29/96	BLP	PROOFING FINAL DRAFT OF APPEALS BRIEF.	5.00
	RELS	REVIEW AND REVISE BRIEF; UPDATE CITATIONS AND CROSS-REFERENCES.	5.50
3/01/96	SJA	ORGANIZE INFORMATION AFTER COMPLETION OF DRAFT BRIEF; BEGIN REVIEW OF BRIEF TO SELECT ITEMS FOR RECORD EXCERPTS AND TO SELECT APPROACH IF NEED TO REDUCE BRIEF LENGTH.	4.25
3/04/96	MM	READ COMPLETE BRIEF DRAFT BEFORE FILING.	.75
3/05/96	SJA	TELEPHONE CONFERENCE WITH MONICA WASHINGTON REGARDING RULING ON MOTION FOR LEAVE TO FILE EXTRA-LENGTH BRIEF; TELEPHONE CONFERENCES WITH OF COUNSEL REGARDING NEED TO ENTER APPEARANCE.	.50
3/06/96	SJA	TELEPHONE CONFERENCES WITH SEVERAL AMICI.	.25
3/07/96	SJA	TELEPHONE CONFERENCES WITH 5TH CIRCUIT CLERK REGARDING MISCELLANEOUS ISSUES; TELEPHONE CONFERENCE WITH STEPHANIE CRAIN TO VERIFY CONTENTS OF ENVELOPES; TELEPHONE CONFERENCES WITH AMICI ATTORNEYS AT LOWENSTEIN CLINIC AND AT MARY LOU SOLLER'S OFFICE; REVIEW MARY LOU SOLLER'S BRIEF; REVIEW PROFESSOR HAROLD KOH'S BRIEF; TELEPHONE CONFERENCES WITH PROFESSOR HAROLD KOH AND BECKY NOONAN REGARDING SAME.	2.75
	SJA	REVIEW BRIEF LAST TIME BEFORE FILING; TELEPHONE CONFERENCE WITH STEPHANIE CRAIN.	1.50
	SKC	REVIEW FILING TO THE FIFTH CIRCUIT AND SERVICE TO THE ATTORNEY GENERAL'S OFFICE; TELEPHONE CONFERENCE WITH SCOTT ATLAS.	.25
3/08/96	SJA	TELEPHONE CONFERENCES WITH PROFESSOR HAROLD KOH REGARDING AMICUS BRIEF.	.25
	RELS	REVIEW BOXES TO BE SHIPPED TO WILLIAM ZAPALAC.	1.00
3/13/96	TWK	REVIEW AMICUS BRIEFS AND PREPARE APPEARANCE OF COUNSEL FORM.	.75
3/15/96	SJA	REVIEW FORM OF APPEARANCE FOR EIGHT ATTORNEYS; TELEPHONE CONFERENCE WITH MONICA WASHINGTON REGARDING SAME; PREPARE LETTER TO MONICA WASHINGTON REGARDING SAME.	.50

Account
Of Pro Bono (Contingent)

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Re: Guerra, Ricardo Aldape

	Init		Hours
4/05/96	MM	READ AMICI CURIAE BRIEF IN SUPPORT OF APPELLEE FILED BY INTERNATIONAL HUMAN RIGHTS CLINIC IN SOUTHERN CENTER FOR HUMAN RIGHTS.	.50
4/21/96	MM	READ TRANSCRIPT VOLUME 3.	1.00
4/22/96	MM	CREATE OUTLINE AND INDEX OF TRANSCRIPT VOLUMES 3 AND 4 FOR USE IN ORAL ARGUMENT.	7.00
4/23/96	MM	EDIT INDEX FOR VOLUMES 3 AND 4 OF TRANSCRIPT; PREPARE FOR ORAL ARGUMENT.	4.00
4/24/96	SJA	TELEPHONE CONFERENCE WITH MONICA WASHINGTON REGARDING PANEL; REVIEW VOICE MAIL MESSAGE FROM STANLEY SCHNEIDER; TELEPHONE CONFERENCE WITH ANNE CLAYTON; PREPARATION FOR ORAL ARGUMENT.	6.75
	MM	PREPARE FOR ORAL ARGUMENT BY REVIEWING RECORD.	6.00
4/25/96	SJA	TELEPHONE CONFERENCE WITH STANLEY SCHNEIDER REGARDING PREPARATION; TELEPHONE CONFERENCE WITH COURT CLERK REGARDING MISCELLANEOUS ISSUES; EXCHANGE VOICE MAIL MESSAGES WITH MARIE R. YEATES REGARDING EXHIBIT SIZE; TELEPHONE CONFERENCE WITH JANE JABARI REGARDING SAME; PREPARATION FOR ORAL ARGUMENT; PREPARE DRAFT OUTLINE; RECEIPT AND REVIEW DRAFT OUTLINE.	8.50
	MM	PREPARE FOR ORAL ARGUMENT BY PREPARING AND EDITING INDEX TO VOLUMES 3 AND 4.	3.00
4/26/96	SJA	PREPARE FOR FIFTH CIRCUIT ARGUMENT; TELEPHONE CONFERENCE WITH STEPHANIE CRAIN; EXCHANGE VOICE MAIL MESSAGES WITH MICHAEL MUCCHETTI; TELEPHONE CONFERENCE WITH STANLEY SCHNEIDER.	5.75
	SKC	TELEPHONE CONFERENCE WITH SCOTT ATLAS.	.25
	MM	PREPARE FOR ORAL ARGUMENT BY REVIEWING RECORD; EXCHANGE VOICE MAIL MESSAGES WITH SCOTT ATLAS.	4.00
4/28/96	SJA	PREPARE FOR FIFTH CIRCUIT ARGUMENT; MEET WITH STANLEY SCHNEIDER REGARDING SAME.	7.75
	MM	REVIEW RECORD IN PREPARATION FOR ORAL ARGUMENT.	1.00
4/29/96	SJA	PREPARE FOR FIFTH CIRCUIT ARGUMENT; OFFICE CONFERENCE WITH MICHAEL MUCCHETTI REGARDING MISCONDUCT ISSUE.	3.50

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Account Number PRO127 29000
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Re: Guerra, Ricardo Aldape

	Init		Hours
4/29/96	SKC	REVIEW VOLUME 5 OF TRANSCRIPT OF THE HABEAS HEARING IN PREPARATION FOR ORAL ARGUMENT.	3.50
	MM	RESEARCH REGARDING PROSECUTORIAL MISCONDUCT; DISCUSS SAME WITH SCOTT ATLAS.	.50
4/30/96	SJA	PREPARE FOR ORAL ARGUMENT; OFFICE CONFERENCE WITH STEPHANIE CRAIN; MICHAEL MUCCHETTI AND TELEPHONE CONFERENCE WITH ANNE CLAYTON REGARDING SAME.	11.75
	SKC	OFFICE CONFERENCE WITH SCOTT ATLAS, MICHAEL MUCCHETTI AND TELEPHONE CONFERENCE WITH ANNE CLAYTON IN PREPARATION FOR ORAL ARGUMENT.	1.00
	SKC	RESEARCH REGARDING REQUIREMENT UNDER CUMULATIVE ERROR DOCTRINE THAT ERROR NOT BE PROCEDURALLY WAIVED.	2.50
	SKC	REVIEW RECORD OF ORIGINAL STATE TRIAL TO DETERMINE WHICH TRIAL ERRORS WERE OBJECTED TO.	1.50
	MM	OFFICE CONFERENCE WITH SCOTT ATLAS AND STEPHANIE CRAIN PREPARING FOR ORAL ARGUMENT.	1.00
	MM	RESEARCH VARIOUS ISSUES.	8.50
	MM	REVIEW RECORD.	1.75
5/01/96	SJA	PREPARE FOR ORAL ARGUMENT.	6.00
	SJA	ORAL ARGUMENT.	1.00
	SJA	TRAVEL TO AND FROM NEW ORLEANS FOR ORAL ARGUMENT.	4.25
	SKC	ASSIST SCOTT ATLAS IN PREPARATION FOR ORAL ARGUMENT.	3.00
	MM	ASSIST SCOTT ATLAS IN PREPARATION FOR ORAL ARGUMENT.	3.00
5/02/96	SJA	REORGANIZE MATERIALS FROM FIFTH CIRCUIT ARGUMENT; TELEPHONE CONFERENCES WITH TEAM MEMBERS REGARDING ORAL ARGUMENT.	1.00
5/06/96	MM	READ RECENT FIFTH CIRCUIT CASE ON CUMULATIVE ERROR AND BRADY VIOLATIONS; SEND MEMO TO SCOTT ATLAS REGARDING SAME.	.50
5/08/96	SJA	REVIEW RESEARCH TO DETERMINE WHETHER TO FILE SUPPLEMENTAL LETTER BRIEF.	1.50
6/19/96	SJA	REVIEW VOICE MAIL MESSAGE FROM MANUEL LOPEZ REGARDING HIS TELEPHONE CONFERENCE WITH 5TH	.25

Account
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Re: Guerra, Ricardo Aldape

	Init		Hours
		CIRCUIT.	
6/21/96	SJA	REVIEW VOICE MAIL MESSAGE FROM MICHAEL MUCCHETTI REGARDING DESIGNATION OF RECORD.	.25
	MM	LEAVE VOICE MAIL MESSAGE FOR SCOTT ATLAS REGARDING DESIGNATION OF RECORD.	.25
8/01/96	SJA	TELEPHONE CONFERENCE WITH OFFICE REGARDING FIFTH CIRCUIT DECISION; REVIEW SAME; TELEPHONE CONFERENCE WITH RICARDO ALDAPE GUERRA'S FAMILY AND TEAM MEMBERS.	1.75
8/02/96	SJA	TELEPHONE CONFERENCE WITH CLIENT REGARDING FIFTH CIRCUIT DECISION.	.50
	MM	READ FIFTH CIRCUIT OPINION; DISCUSSION OF SAME WITH TEAM MEMBERS.	.50
8/12/96	SJA	TELEPHONE CONFERENCE WITH STANLEY SCHNEIDER REGARDING POSSIBLE STATE EFFORT TO SEEK REHEARING.	.75
8/13/96	SJA	TELEPHONE CONFERENCE WITH STANLEY SCHNEIDER REGARDING CERTIORARI STRATEGY.	.25

Current fees, total $131,746.25

Disbursements & other charges posted through August 13, 1996

Re: Fifth Circuit Appeal

COMPUTER RESEARCH

6/26/95	MM	WESTLAW	46.11
7/06/95	MM	WESTLAW	12.06
7/10/95	ML	WESTLAW	32.85
7/11/95	ML	WESTLAW	173.12
7/12/95	ML	WESTLAW	85.78
7/21/95	ML	WESTLAW	1.81
7/21/95	ML	WESTLAW	12.42
7/27/95	MM	WESTLAW	396.52

September 30, 1996

Account
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Re: Guerra, Ricardo Aldape

7/27/95	ML	WESTLAW	3.50
7/28/95	ML	WESTLAW	3.01
7/31/95	ML	WESTLAW	25.74
7/31/95	ML	WESTLAW	26.16
11/03/95	KTG	LEXIS	87.57
12/05/95	JRM	LEXIS	162.42
1/11/96	SKC	WESTLAW	38.71
1/12/96	SKC	WESTLAW	14.13
1/15/96	SKC	WESTLAW	74.19
1/16/96	SKC	WESTLAW	2.30
1/16/96	SKC	WESTLAW	9.93
1/18/96	SKC	WESTLAW	41.83
1/24/96	SKC	WESTLAW	16.84
2/08/96	MM	WESTLAW	76.19
2/15/96	SKC	WESTLAW	.72
2/15/96	SKC	WESTLAW	80.54
2/16/96	SKC	WESTLAW	123.49
2/19/96	SKC	WESTLAW	40.86
2/22/96	BLP	WESTLAW	29.29
2/23/96	BLP	WESTLAW	17.31
2/23/96	RELS	WESTLAW	78.54
2/26/96	BLP	WESTLAW	18.64
2/26/96	RELS	WESTLAW	39.63
2/26/96	TWK	LEXIS	311.62
2/27/96	BLP	WESTLAW	4.30
2/28/96	BLP	WESTLAW	81.10
4/29/96	MM	WESTLAW	66.25
4/30/96	SKC	WESTLAW	74.44
5/01/96	MM	WESTLAW	15.26
8/01/96		WESTLAW	25.72
		COMPUTER RESEARCH	$2,350.90

PHOTOCOPY

6/09/95	SJA	UNIT-28	8 PGS. @ $.15/PG.	1.20
6/09/95	SJA	UNIT-40	21 PGS. @ $.15/PG.	3.15
6/11/95	SJA	UNIT-50	29 PGS. @ $.15/PG.	4.35

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6/11/95	ML	UNIT-50	49 PGS. @ $.15/PG.	7.35
6/13/95	SJA	UNIT-28	12 PGS. @ $.15/PG.	1.80
6/13/95	SJA	UNIT-40	28 PGS. @ $.15/PG.	4.20
6/13/95	ML	UNIT-51	31 PGS. @ $.15/PG.	4.65
6/14/95	ML	UNIT-29	15 PGS. @ $.15/PG.	2.25
6/14/95	ML	UNIT-30	11 PGS. @ $.15/PG.	1.65
6/14/95	ML	UNIT-51	21 PGS. @ $.15/PG.	3.15
6/15/95	SJA	UNIT-27	222 PGS. @ $.15/PG.	33.30
6/15/95	SJA	UNIT-28	191 PGS. @ $.15/PG.	28.65
6/16/95	SJA	UNIT-22	2242 PGS. @ $.15/PG.	336.30
6/16/95	SJA	UNIT-28	238 PGS. @ $.15/PG.	35.70
6/16/95	SJA	UNIT-29	30 PGS. @ $.15/PG.	4.50
6/16/95	SJA	UNIT-60	179 PGS. @ $.15/PG.	26.85
6/16/95	ML	UNIT-29	12 PGS. @ $.15/PG.	1.80
6/17/95	SJA	UNIT-28	574 PGS. @ $.15/PG.	86.10
6/20/95	SJA	UNIT-28	9 PGS. @ $.15/PG.	1.35
6/20/95	MM	UNIT-52	20 PGS. @ $.15/PG.	3.00
6/21/95	SJA	UNIT-28	16 PGS. @ $.15/PG.	2.40
6/22/95	MM	UNIT-32	86 PGS. @ $.15/PG.	12.90
6/22/95	MM	UNIT-52	197 PGS. @ $.15/PG.	29.55
6/26/95	SJA	UNIT-28	43 PGS. @ $.15/PG.	6.45
6/26/95	ML	UNIT-60	70 PGS. @ $.15/PG.	10.50
6/29/95	MM	UNIT-52	154 PGS. @ $.15/PG.	23.10
6/30/95	SJA	UNIT-28	42 PGS. @ $.15/PG.	6.30
7/06/95	SJA	UNIT-28	10 PGS. @ $.15/PG.	1.50
7/07/95	SJA	UNIT-28	9 PGS. @ $.15/PG.	1.35
7/11/95	SJA	UNIT-21	321 PGS. @ $.15/PG.	48.15
7/11/95	MM	UNIT-52	8 PGS. @ $.15/PG.	1.20
7/11/95	ML	UNIT-40	60 PGS. @ $.15/PG.	9.00
7/12/95	ML	UNIT-40	12 PGS. @ $.15/PG.	1.80
7/12/95	ML	UNIT-51	19 PGS. @ $.15/PG.	2.85
7/14/95	SJA	UNIT-28	59 PGS. @ $.15/PG.	8.85
7/17/95	SJA	UNIT-28	90 PGS. @ $.15/PG.	13.50
7/21/95	SJA	UNIT-22	1313 PGS. @ $.15/PG.	196.95
7/21/95	SJA	UNIT-28	109 PGS. @ $.15/PG.	16.35
7/21/95	SJA	UNIT-48	12 PGS. @ $.15/PG.	1.80
7/21/95	ML	UNIT-51	16 PGS. @ $.15/PG.	2.40

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Invoice Number 1264077

Re: Guerra, Ricardo Aldape

7/24/95	RELS	UNIT-28	16 PGS. @ $.15/PG.	2.40
7/27/95	SJA	UNIT-48	51 PGS. @ $.15/PG.	7.65
7/31/95	MH	UNIT-29	28 PGS. @ $.15/PG.	4.20
7/31/95	SKC	UNIT-21	267 PGS. @ $.15/PG.	40.05
7/31/95	MM	UNIT-40	27 PGS. @ $.15/PG.	4.05
7/31/95	MM	UNIT-50	22 PGS. @ $.15/PG.	3.30
7/31/95	ML	UNIT-24	558 PGS. @ $.15/PG.	83.70
7/31/95	ML	UNIT-50	7 PGS. @ $.15/PG.	1.05
8/02/95	ML	UNIT-51	19 PGS. @ $.15/PG.	2.85
8/17/95	SJA	UNIT-28	34 PGS. @ $.15/PG.	5.10
8/18/95	SJA	UNIT-28	16 PGS. @ $.15/PG.	2.40
8/30/95	SJA	UNIT-28	16 PGS. @ $.15/PG.	2.40
9/05/95	SJA	UNIT-21	222 PGS. @ $.15/PG.	33.30
9/05/95	SJA	UNIT-23	61 PGS. @ $.15/PG.	9.15
9/05/95	SJA	UNIT-28	198 PGS. @ $.15/PG.	29.70
9/20/95	SJA	UNIT-17	414 PGS. @ $.15/PG.	62.10
9/20/95	SJA	UNIT-28	30 PGS. @ $.15/PG.	4.50
9/27/95	SJA	UNIT-28	38 PGS. @ $.15/PG.	5.70
9/29/95	SJA	UNIT-48	7 PGS. @ $.15/PG.	1.05
10/10/95	SJA	UNIT-28	100 PGS. @ $.15/PG.	15.00
10/12/95	SJA	UNIT-28	38 PGS. @ $.15/PG.	5.70
10/13/95	SJA	UNIT-28	325 PGS. @ $.15/PG.	48.75
10/16/95	SJA	UNIT-28	38 PGS. @ $.15/PG.	5.70
10/17/95	SJA	UNIT-28	17 PGS. @ $.15/PG.	2.55
10/17/95	SJA	UNIT-28	37 PGS. @ $.15/PG.	5.55
10/18/95	SJA	UNIT-22	1061 PGS. @ $.15/PG.	159.15
10/18/95	SJA	UNIT-28	216 PGS. @ $.15/PG.	32.40
10/19/95	SJA	UNIT-28	11 PGS. @ $.15/PG.	1.65
10/20/95	SJA	UNIT-28	38 PGS. @ $.15/PG.	5.70
10/20/95	SJA	UNIT-48	21 PGS. @ $.15/PG.	3.15
10/24/95	SJA	UNIT-48	57 PGS. @ $.15/PG.	8.55
10/25/95	SJA	UNIT-28	32 PGS. @ $.15/PG.	4.80
10/26/95	SJA	UNIT-28	60 PGS. @ $.15/PG.	9.00
10/31/95	SJA	UNIT-28	11 PGS. @ $.15/PG.	1.65
11/03/95	SJA	UNIT-22	217 PGS. @ $.15/PG.	32.55
11/06/95	SJA	UNIT-17	414 PGS. @ $.15/PG.	62.10
11/07/95	SJA	UNIT-48	13 PGS. @ $.15/PG.	1.95

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11/08/95	AJL	UNIT-29	25 PGS. @ $.15/PG.	3.75
11/10/95	SJA	UNIT-28	16 PGS. @ $.15/PG.	2.40
11/13/95	SJA	UNIT-28	24 PGS. @ $.15/PG.	3.60
11/13/95	SJA	UNIT-48	7 PGS. @ $.15/PG.	1.05
11/20/95	SJA	UNIT-28	7 PGS. @ $.15/PG.	1.05
11/21/95	SJA	UNIT-28	28 PGS. @ $.15/PG.	4.20
11/22/95	SJA	UNIT-17	16 PGS. @ $.15/PG.	2.40
11/22/95	SJA	UNIT-28	35 PGS. @ $.15/PG.	5.25
11/28/95	SJA	UNIT-28	96 PGS. @ $.15/PG.	14.40
12/07/95	SJA	UNIT-28	704 PGS. @ $.15/PG.	105.60
12/12/95	SJA	UNIT-20	963 PGS. @ $.15/PG.	144.45
12/13/95	SJA	UNIT-28	67 PGS. @ $.15/PG.	10.05
12/15/95	SJA	UNIT-28	219 PGS. @ $.15/PG.	32.85
12/18/95	SJA	UNIT-28	67 PGS. @ $.15/PG.	10.05
12/20/95	SJA	UNIT-28	64 PGS. @ $.15/PG.	9.60
12/22/95	SJA	UNIT-28	45 PGS. @ $.15/PG.	6.75
12/27/95	SJA	UNIT-28	86 PGS. @ $.15/PG.	12.90
12/28/95	SJA	UNIT-17	1670 PGS. @ $.15/PG.	250.50
12/28/95	SJA	UNIT-34	24 PGS. @ $.15/PG.	3.60
1/06/96	SJA	UNIT-28	100 PGS. @ $.15/PG.	15.00
1/09/96	SJA	UNIT-28	169 PGS. @ $.15/PG.	25.35
1/10/96	SJA	UNIT-50	36 PGS. @ $.15/PG.	5.40
1/11/96	SJA	UNIT-17	1208 PGS. @ $.15/PG.	181.20
1/11/96	SJA	UNIT-28	61 PGS. @ $.15/PG.	9.15
1/11/96	RELS	UNIT-28	288 PGS. @ $.15/PG.	43.20
1/11/96	RELS	UNIT-29	67 PGS. @ $.15/PG.	10.05
1/12/96	SJA	UNIT-28	20 PGS. @ $.15/PG.	3.00
1/12/96	SKC	UNIT-50	98 PGS. @ $.15/PG.	14.70
1/12/96	RELS	UNIT-17	2574 PGS. @ $.15/PG.	386.10
1/15/96	SKC	UNIT-50	8 PGS. @ $.15/PG.	1.20
1/15/96	RELS	UNIT-28	62 PGS. @ $.15/PG.	9.30
1/16/96	SJA	UNIT-21	213 PGS. @ $.15/PG.	31.95
1/16/96	SJA	UNIT-24	326 PGS. @ $.15/PG.	48.90
1/16/96	SJA	UNIT-28	14 PGS. @ $.15/PG.	2.10
1/16/96	SJA	UNIT-50	7 PGS. @ $.15/PG.	1.05
1/16/96	SJA	UNIT-73	49 PGS. @ $.15/PG.	7.35
1/16/96	SKC	UNIT-50	22 PGS. @ $.15/PG.	3.30

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1/17/96	SJA	UNIT-28	83 PGS. @ $.15/PG.	12.45
1/17/96	SJA	UNIT-50	133 PGS. @ $.15/PG.	19.95
1/17/96	SJA	UNIT-51	22 PGS. @ $.15/PG.	3.30
1/17/96	SJA	UNIT-73	321 PGS. @ $.15/PG.	48.15
1/17/96	SKC	UNIT-50	35 PGS. @ $.15/PG.	5.25
1/18/96	SKC	UNIT-40	33 PGS. @ $.15/PG.	4.95
1/19/96	SKC	UNIT-50	71 PGS. @ $.15/PG.	10.65
1/22/96	SJA	UNIT-28	48 PGS. @ $.15/PG.	7.20
1/23/96	SJA	UNIT-17	488 PGS. @ $.15/PG.	73.20
1/23/96	SJA	UNIT-28	11 PGS. @ $.15/PG.	1.65
1/24/96	SJA	UNIT-28	64 PGS. @ $.15/PG.	9.60
1/24/96	SJA	UNIT-50	10 PGS. @ $.15/PG.	1.50
1/29/96	SJA	UNIT-24	1479 PGS. @ $.15/PG.	221.85
1/30/96	SJA	UNIT-28	317 PGS. @ $.15/PG.	47.55
1/30/96	MM	UNIT-32	44 PGS. @ $.15/PG.	6.60
1/31/96	SJA	UNIT-17	1253 PGS. @ $.15/PG.	187.95
1/31/96	SJA	UNIT-24	1104 PGS. @ $.15/PG.	165.60
1/31/96	SJA	UNIT-28	76 PGS. @ $.15/PG.	11.40
2/05/96	SJA	UNIT-21	218 PGS. @ $.15/PG.	32.70
2/06/96	SJA	UNIT-22	469 PGS. @ $.15/PG.	70.35
2/06/96	SJA	UNIT-24	194 PGS. @ $.15/PG.	29.10
2/07/96	SJA	UNIT-28	46 PGS. @ $.15/PG.	6.90
2/08/96	SJA	UNIT-28	304 PGS. @ $.15/PG.	45.60
2/08/96	SJA	UNIT-60	68 PGS. @ $.15/PG.	10.20
2/09/96	SJA	UNIT-60	38 PGS. @ $.15/PG.	5.70
2/12/96	SJA	UNIT-28	49 PGS. @ $.15/PG.	7.35
2/14/96	SJA	UNIT-28	43 PGS. @ $.15/PG.	6.45
2/15/96	SJA	UNIT-28	132 PGS. @ $.15/PG.	19.80
2/15/96	SJA	UNIT-60	12 PGS. @ $.15/PG.	1.80
2/15/96	SKC	UNIT-51	10 PGS. @ $.15/PG.	1.50
2/15/96	RELS	UNIT-28	204 PGS. @ $.15/PG.	30.60
2/16/96	SJA	UNIT-28	94 PGS. @ $.15/PG.	14.10
2/16/96	SJA	UNIT-60	26 PGS. @ $.15/PG.	3.90
2/16/96	SKC	UNIT-51	21 PGS. @ $.15/PG.	3.15
2/17/96	SJA	UNIT-28	47 PGS. @ $.15/PG.	7.05
2/19/96	SKC	UNIT-51	26 PGS. @ $.15/PG.	3.90
2/19/96	BLP	UNIT-60	26 PGS. @ $.15/PG.	3.90

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2/22/96	BLP	UNIT-48	19 PGS. @ $.15/PG.	2.85
2/26/96	RELS	UNIT-49	47 PGS. @ $.15/PG.	7.05
2/28/96	SJA	UNIT-28	70 PGS. @ $.15/PG.	10.50
2/29/96	SJA	UNIT-20	2928 PGS. @ $.15/PG.	439.20
2/29/96	SJA	UNIT-28	576 PGS. @ $.15/PG.	86.40
3/06/96	SJA	UNIT-22	39 PGS. @ $.15/PG.	5.85
3/07/96	SJA	UNIT-17	15 PGS. @ $.15/PG.	2.25
3/07/96	SJA	UNIT-20	976 PGS. @ $.15/PG.	146.40
3/07/96	SJA	UNIT-28	177 PGS. @ $.15/PG.	26.55
3/07/96	RELS	UNIT-28	21 PGS. @ $.15/PG.	3.15
3/08/96	SJA	UNIT-28	27 PGS. @ $.15/PG.	4.05
3/11/96	SJA	UNIT-22	408 PGS. @ $.15/PG.	61.20
3/15/96	SJA	UNIT-28	42 PGS. @ $.15/PG.	6.30
3/20/96	SJA	UNIT-22	264 PGS. @ $.15/PG.	39.60
3/29/96	SJA	UNIT-28	340 PGS. @ $.15/PG.	51.00
4/10/96	SJA	UNIT-28	114 PGS. @ $.15/PG.	17.10
4/12/96	SJA	UNIT-22	107 PGS. @ $.15/PG.	16.05
4/15/96	SJA	UNIT-21	130 PGS. @ $.15/PG.	19.50
4/16/96	SJA	UNIT-24	809 PGS. @ $.15/PG.	121.35
4/16/96	SJA	UNIT-28	14 PGS. @ $.15/PG.	2.10
4/17/96	SJA	UNIT-22	26 PGS. @ $.15/PG.	3.90
4/22/96	SJA	UNIT-28	45 PGS. @ $.15/PG.	6.75
4/23/96	SJA	UNIT-28	8 PGS. @ $.15/PG.	1.20
4/29/96	SKC	UNIT-24	274 PGS. @ $.15/PG.	41.10
4/29/96	MMKN	UNIT-51	8 PGS. @ $.15/PG.	1.20
4/30/96	SJA	UNIT-23	59 PGS. @ $.15/PG.	8.85
4/30/96	SJA	UNIT-28	302 PGS. @ $.15/PG.	45.30
4/30/96	SKC	UNIT-28	104 PGS. @ $.15/PG.	15.60
4/30/96	SKC	UNIT-40	43 PGS. @ $.15/PG.	6.45
5/03/96	SJA	UNIT-28	24 PGS. @ $.15/PG.	3.60
5/06/96	SJA	UNIT-60	167 PGS. @ $.15/PG.	25.05
5/06/96	MM	UNIT-52	50 PGS. @ $.15/PG.	7.50
5/08/96	SJA	UNIT-28	8 PGS. @ $.15/PG.	1.20
5/10/96	SJA	UNIT-28	12 PGS. @ $.15/PG.	1.80
5/14/96	SJA	UNIT-60	26 PGS. @ $.15/PG.	3.90
5/15/96	SJA	UNIT-28	16 PGS. @ $.15/PG.	2.40
5/21/96	SJA	UNIT-60	24 PGS. @ $.15/PG.	3.60

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6/05/96	SJA	UNIT-28	66 PGS. @ $.15/PG.	9.90
6/25/96	SJA	UNIT-28	8 PGS. @ $.15/PG.	1.20
7/22/96	SJA	UNIT-28	18 PGS. @ $.15/PG.	2.70
8/01/96	SJA	UNIT-28	54 PGS. @ $.15/PG.	8.10
8/01/96	MM	UNIT-52	30 PGS. @ $.15/PG.	4.50
8/05/96	SJA	UNIT-28	14 PGS. @ $.15/PG.	2.10
8/05/96	SJA	UNIT-48	62 PGS. @ $.15/PG.	9.30
8/06/96	SJA	UNIT-28	90 PGS. @ $.15/PG.	13.50
			PHOTOCOPY	$5,563.50

COURIER SERVICES

7/14/95	SJA	COURT MESSENGER SERVICE	5.00
7/14/95	SJA	COURT MESSENGER SERVICE	5.00
7/14/95	SJA	07/14/95 HE#0714165 U.S. DISTRICT COURT CLERK	6.13
7/14/95	SJA	07/14/95 HE#0714097 U.S. DISTRICT COURT CLERK	2.25
7/14/95	SJA	07/14/95 HE#0714098 HON. KEN HOYT	1.50
7/21/95	SJA	07/21/95 HE#0721042 FEDERAL COURTHOUSE	1.50
		COURIER SERVICES	$21.38

OUTSIDE PROF. SVCS.

6/19/95	MM	FLOYD MCDONALD TESTIMONY-TRANSCRIPT	52.50
		OUTSIDE PROF. SVCS.	$52.50

LONG DIST. TELEPHONE

6/05/95	SJA	MEXICO		SANTIAGO ROEL	1.78
6/06/95	SJA	HUNTSVILLETX		ELLIS UNIT FOR VISIT	1.64
6/07/95	SJA	HUNTSVILLETX		ELLIS UNIT PRISON	.82
6/16/95	ML	NEWORLEANSLA		MONICA WASHINGTON	.82
6/16/95	ML	ARVADA	CO	SCOTT ATLAS	6.15
6/21/95	ML	MEXICO		SANTIAGO ROEL	19.95
6/27/95	MM	NEWORLEANSLA		ALDAPE GUERRA	2.05
6/28/95	MM	NEWORLEANSLA		ALDAPE GUERRA	1.23
7/12/95	SJA	AUSTIN	TX	WILLIAM ZAPALAC	.82
7/12/95		HUNTSVILLETX		ELLIS UNIT	.82

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7/12/95		HUNTSVILLETX	ELLIS UNIT	2.05
7/13/95		HUNTSVILLETX	ELLIS UNIT	.82
7/31/95		WASHINGTONDC	JULIA SULLIVAN	4.51
10/04/95	SJA	WASHINGTONDC	JULIA SULLIVAN	1.71
10/13/95	SJA	WASHINGTONDC	BILL ROBINSON	9.43
10/20/95	SJA	MEXICO	SANTIAGO ROEL	15.75
10/31/95	SJA	AUSTIN TX	BILL ZAPALAC	.82
11/15/95	SJA	WASHINGTONDC	MARY LOU SOLLER	3.69
12/14/95	SJA	AUSTIN TX	BILL ZAPALAC	1.64
12/20/95	SJA	AUSTIN TX	BILL ZAPALAC	2.05
12/21/95	SJA	NEWORLEANSLA	MONICA WASHINGTON	1.64
12/21/95	SJA	MEXICO	SANTIAGO ROEL	4.55
12/21/95	SJA	AUSTIN TX	BILL ZAPALAC	1.64
12/21/95	SJA	NEWORLEANSLA	BARRY STIEBING	4.92
12/21/95	SJA	NEWORLEANSLA	BARRY STIEBING	.82
12/22/95		AUSTIN TX	STEPHANIE-V&E	.82
12/22/95		AUSTIN TX	STEPHANIE-V&E	.82
12/22/95		MEXICO	SANTIAGO ROEL	5.95
12/22/95	SJA	AUSTIN TX	BILL ZAPALAC	1.64
12/27/95	SJA	AUSTIN TX	BILL ZAPALAC	.82
1/08/96	SJA	NEWORLEANSLA	MONICA WASHINGTON	2.05
1/08/96	SJA	AUSTIN TX	BILL ZAPALAC	2.05
1/16/96	SJA	WASHINGTONDC	JULIA SULLIVAN	6.97
1/29/96	SJA	CSI-CONF CALL 1/10/96		95.68
1/29/96	SJA	MEXICO	SANTIAGO ROEL	11.55
1/29/96	SJA	AUSTIN TX	JAY AGUILAR	2.46
1/29/96	SJA	MEXICO	SANTIAGO ROEL	18.55
1/29/96	SJA	AUSTIN TX	JAY AGULAR	.82
1/30/96	SJA	WASHINGTONDC	TED KASSINGER	.82
2/05/96	SJA	WASHINGTONDC	JULIA SULLIVAN	1.23
2/07/96	SJA	WASHINGTONDC	JULIA SULLIVAN	2.05
2/08/96	SJA	NEWORLEANSLA	MONICA WASHINGTON	4.92
2/08/96	SJA	NEWORLEANSLA	MONICA WASHINGTON	.82
2/08/96	SJA	NEWORLEANSLA	MONICA WASHINGTON	.82
2/09/96	SJA	WASHINGTONDC	JULIA SULLIVAN	1.23
2/29/96	SJA	AUSTIN TX	BILL ZAPALAC	2.05
2/29/96	SJA	NEWORLEANSLA	BARRY STIEBING	2.87

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2/29/96	SJA	WASHINGTONDC	TED KASSINGER	2.87
2/29/96	SJA	AUSTIN TX	BILL ZAPALAC	1.23
2/29/96	SJA	WASHINGTONDC	TED KASSINGER	2.05
3/01/96	SJA	NEWORLEANSLA	CLERK	.82
3/05/96	SJA	NEWORLEANSLA	BARRY STIEBING	2.05
3/05/96	SJA	NEWORLEANSLA	BARRY STIEBING	.82
3/06/96		WASHINGTONDC	MARY LOU SOLLER	2.05
3/06/96	SJA	NEWORLEANSLA	BARRY STIEBING	.82
3/07/96	SJA	NEW HAVEN CT	HAROLD KOH	.80
3/07/96	SJA	NEW HAVEN CT	HAROLD KOH	.85
3/07/96	SJA	NEWORLEANSLA	MONICA WASHINGTON	.89
3/07/96	SJA	NEW HAVEN CT	RON SWY	1.15
3/07/96	SJA	NEW HAVEN CT	BECKY NOONAN	2.28
3/07/96	SJA	MEXICO MX	SANTIAGO ROEL	6.57
3/08/96	SJA	NEWORLEANSLA	BARRY STIEBING	1.23
3/09/96	SJA	NEW HAVEN CT	HAROLD KOH	.66
3/14/96	SJA	WASHINGTONDC	KATHLEEN-KASSINGER'S SEC	.82
3/14/96	SJA	NEWORLEANSLA	CLERK	1.23
3/15/96	SJA	NEWORLEANSLA	CLERK	1.23
4/10/96	SJA	MEXICO	SANTIAGO ROEL	3.15
4/10/96	SJA	NEWORLEANSLA	CLERK	2.05
4/10/96	SJA	MEXICO	SANTIAGO ROEL	4.55
4/11/96	SJA	MEXICO	SANTIAGO ROEL	3.15
4/22/96	SJA	WASHINGTONDC	JULIA SULLIVAN	.82
4/24/96	SJA	NEWORLEANSLA	MONICA WASHINGTON	.82
4/25/96	SJA	NEWORLEANSLA	MONICA WASHINGTON	3.28
4/30/96		NEWORLEANSLA	MONICA WASHINGTON	1.23
5/02/96	SJA	WASHINGTONDC	JULIA SULLIVAN	.82
5/02/96	SJA	WASHINGTONDC	MARY LOU SOLLER	.82
5/02/96	SJA	HOUSTON TX	RICARDO ALDAPE	7.43
5/03/96	SJA	MEXICO	SANTIAGO ROEL	3.15
5/03/96	SJA	MEXICO	SANTIAGO ROEL	3.15
5/06/96		MEXICO	SANTIAGO ROEL	3.15
5/06/96		MEXICO	SANTIAGO ROEL	4.55
5/07/96	SJA	CHICAGO IL	SCOTT ATLAS	.82
5/28/96	SJA	MEXICO	SANTIAGO ROEL	10.15
6/21/96		MEXICO	SANTIAGO ROEL	3.15

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6/26/96	SJA	NEWORLEANSLA BARRY STEIBING	2.05
8/02/96	SJA	HUNTSVILLETX WARDEN	1.23
8/13/96	SJA	NEWORLEANSLA MONICA WASHINGTON	1.64
		LONG DIST. TELEPHONE	$350.69

TRAVEL

6/08/95	SJA	HUNTSVILLE, TX	55.90
5/01/96	SJA	NEW ORLEANS	171.00
		TRAVEL	$226.90
		Total disbursements and other charges	$8,565.87
		Invoice total	$140,312.12

Total amount (payable in U.S. dollars) due by November 4, 1996

Vinson & Elkins
ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
HOUSTON DALLAS WASHINGTON, D.C. AUSTIN MOSCOW LONDON SINGAPORE
I.R.S. NO. 74-1183015

September 30, 1996

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
Billing Attorney Scott J. Atlas
Invoice Number 1264077

Re: Guerra, Ricardo Aldape

Summary of services on this invoice

	Name	Hours	Amount
SJA	Scott J. Atlas	414.50	$51,812.50
GCBO	George C. Boudreau	7.25	$181.25
SLBR	Susan Leigh Brown	4.75	$356.25
JCHU	Janie A. Chuang	55.50	$832.50
SKC	Stephanie B. Crain	95.00	$11,875.00
PDGO	Patricia Diane Goode	1.25	$118.75
TWK	Theodore Kassinger	23.00	$2,875.00
ML	Manuel Lopez	101.50	$12,687.50
JRM	James R. Markham	129.75	$16,218.75
MM	Michael J. Mucchetti	116.75	$14,593.75
JCO	J. Cavanaugh O'Leary	11.00	$1,375.00
BLP	Beverly L. Palmer	58.00	$5,220.00
JLPI	Jason L. Pierce	2.50	$125.00
JJSH	Jeff J. Shank	3.50	$122.50
RELS	Robert Summerlin	178.75	$11,392.50
ECWH	Elizabeth C. Whilden	49.00	$1,960.00
		1,252.00	$131,746.25

Vinson & Elkins
ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
HOUSTON DALLAS WASHINGTON, D.C. AUSTIN MOSCOW LONDON SINGAPORE
I.R.S. NO. 74-1183015

September 30, 1996

Account
Of Pro Bono (Contingent)

Account Number PRO127 29000
Billing Attorney Scott J. Atlas
Invoice Number 1264077

Re: Guerra, Ricardo Aldape

-> Remittance Copy <-

Fees for services posted through August 13, 1996	$131,746.25
Disbursements & other charges posted through August 13, 1996	$8,565.87
Invoice total	$140,312.12

-> Please return this page with your payment <-

Total amount (payable in U.S. dollars) due by November 4, 1996

Please reference account and invoice numbers when remitting.

PLEASE REMIT TO: P.O. BOX 200113
HOUSTON, TEXAS 77216-0113

Vinson & Elkins L.L.P. 9/24/96

INVOICE CONFIRMATION ACKNOWLEDGEMENT

To: Billing Department
Room: 3672

Invoice: 1264077
September 30, 1996

____ Confirm* invoice. Indicate whether the invoice is:

____ System generated invoice

____ Manual invoice (a file copy must be attached or the invoice cannot be confirmed)

____ Void invoice

Billed thru August 13, 1996
Type of Billing: Fee/Disbursements and other charges
Billing Attorney: Scott J. Atlas Room: 2819

Client: PRO127 Pro Bono (Contingent)
Matter: 29000 Guerra, Ricardo Aldape

For services through August 13, 1996	$131,746.25
Disbursements and other charges through August 13, 1996	$8,565.87
Invoice total	$140,312.12

*Confirmation and signature acknowledge that (1) the invoice is dated within 7 calendar days of the date of confirmation; and (2) the invoice has been sent to the Billing Department for mailing to the client (attach an envelope prepared for mailing and any copies, with envelopes, if applicable).

*Signature:_____

Vinson & Elkins L.I. P.

Billing Allocation Report

Room: 2819
Scott J. Atlas

Invoice: 1264077
September 30, 1996

Billed thru August 13, 1996

Client: PRO127 Pro Bono (Contingent)
Matter: 29000 Guerra, Ricardo Aldape

ID #	Timekeeper	Hours	Amount Billed
399	Scott J. Atlas	414.50	51,812.50
716	Theodore Kassinger	23.00	2,875.00
951	J. Cavanaugh O'Leary	11.00	1,375.00
1084	Stephanie B. Crain	95.00	11,875.00
1097	Michael J. Mucchetti	116.75	14,593.75
1154	Manuel Lopez	101.50	12,687.50
1157	James R. Markham	129.75	16,218.75
5078	Jeff J. Shank	3.50	122.50
5251	Janie A. Chuang	55.50	832.50
5539	Beverly L. Palmer	58.00	5,220.00
5703	Elizabeth C. Whilden	49.00	1,960.00
5733	George C. Boudreau	7.25	181.25
6503	Susan Leigh Brown	4.75	356.25
6557	Patricia Diane Goode	1.25	118.75
7442	Robert Summerlin	178.75	11,392.50
7794	Jason L. Pierce	2.50	125.00
	Total	1,252.00	131,746.25

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

SOUTHWEST AIRLINES
SEGMENT TRIP RECORD
TL

FLT 0898
DESTINATION HOU
ORIGIN MSY
DATE 01MAY96

SOUTHWEST AIRLINES ®
TICKETLESS TRAVEL℠
NON TRANSFERABLE. POSITIVE IDENTIFICATION REQUIRED

Receipt and Itinerary as of 04/26/96 03:15PM

Confirmation Number: WDB7RD Arc no: 45625775 Received: TRAVEL
Confirmation Date: 26 APR 1996

MR SCOTT J ATLAS
CC 0000000011815 15
EXP DATE 1097

Passenger(s):
ATLAS/SCOTT 526-2711889052-2

RETAIN FOR YOUR RECORDS

Itinerary:	Flt#	Date	Depart	Arrive
Houston Hobby/New Orleans	898 Y	01MAY96	10:30AM	11:25AM
New Orleans/Houston Hobby	302 L	01MAY96	08:55PM	09:55PM

Total for 1 Passenger(s)	AIR:	168.00
	TAX:	0.00
	PFC:	3.00
	Flight Totals:	$171.00

Payment(s)/Exchange(s):
26APR1996 AX 378770381893009 Ref 526-2711889052-2 171.00

Fare Calculation:
ADT- 1 HOUWNMSY YL 89.00 MSYWNHOU LW 79.00 $168.00 XFMSY3 $171.00

Fare Rule(s):
VALID ONLY ON WN

BOARDING PASS DISTRIBUTION AT GATE.

ID CHECKED

CONDITIONS OF CONTRACT

Southwest Airlines Co. - Notice of Incorporated Terms - This notice is part of the Conditions of contract. Air Transportation by Southwest Airlines is subject to Southwest Airlines' Passenger Contract of Carriage, the terms of which are herein incorporated by reference. Incorporated terms include, but are not restricted to: (1) Limits on liability for baggage, including fragile or perishable goods, and availability of excess valuation coverage. Baggage liability is limited to $1250 per Customer unless you purchase excess valuation liability. Exception: Carrier will not be responsible for money, jewelry, cameras, video and electronic equipment, silverware, negotiable papers, securities, business documents, samples, paintings, antiques, artifacts, manuscripts, furs, irreplaceable books or publications, and similar valuables contained in checked and unchecked baggage. (2) Claims restrictions, including time periods in which Customers must file a claim or sue Southwest. (3) Our rights and limits of liability for delay or failure to perform service, including schedule changes, substitution of alternate air carriers or aircraft and rerouting. (6) Overbooking: We overbook. If we deny you boarding due to an oversale and you have checked in at the gate at least 10 minutes before scheduled departure, with few exceptions, we compensate you. (7) Southwest reserves the right to refuse carriage to any person who is not able to produce positive identification. You may inspect the Contract of Carriage, or obtain a copy by sending a request to: Southwest Airlines Co., Director Customer Relations, P.O. Box 36611, Love Field, Dallas, Texas 75235-1611.

TEN-MINUTE RULE - Passengers who do not claim their reservations at the departure gate desk at least ten minutes prior to scheduled departure time will have their reserved space cancelled and will not be eligible for denied boarding compensation.

REFUNDS AND EXCHANGES - Unless otherwise noted, if you do not travel on this itinerary, you may qualify for a refund or exchange. To apply for a refund, please call 1-800-I-FLY-SWA. Written requests should include a copy of this document and be addressed to: Southwest Airlines Refunds Department 6RF, P.O. Box 36611 Dallas, TX 75235-1611.

PRO02/001 : PRO02/001
Vinson & Elkins L.L.P.
1001 Fannin
Houston, TX 77002
Attn: Scott Atlas
In reference to : Guerra, Ricardo Aldape
Pro Bono
Rounding : None
Full Precision : No

Last bill : 12/27/94 Last aging : 09/16/96
Last charge : 02/29/96
Last payment : 07/24/95 Amount : $10,723.06

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
05/26/95	RM /	0.25	31.25	
#26712	Review memo regarding Amended Order on Application for Writ of Habeas Corpus.	125.00		
06/06/95	RM /	0.25	31.25	
#27432	Review Notice of Appeal.	125.00		
06/20/95	RM /	0.25	31.25	
#27475	Review Opposition to Response to Motion to Stay.	125.00		
07/03/95	RM /	0.25	31.25	
#28570	Review Notice of Appearance and documents forwarded by Mr. Atlas.	125.00		
07/10/95	RM /	0.50	62.50	
#29378	Research for recent 5th Circuit cases regarding witness identification issues.	125.00		
08/18/95	RM /	0.25	31.25	
#30063	Review correspondence from Mr. Atlas regarding filing of brief by Amicus Curaie.	125.00		
10/16/95	RM /	0.25	31.25	
#32181	Attorney conference with Mr. Atlas regarding review of transcript and revising summary of same.	125.00		
10/25/95	RM /	1.50	187.50	
#32316	Review transcript and prepare summary of same.	125.00		
11/06/95	RM /	0.25	31.25	
#33375	Review memo from Mr. Schneider regarding standard of appellate	125.00		

PRO02/001 :PRO02/001 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
#33375..	review.			
11/10/95	RM /	2.00	250.00	
#33400	Revise summary of trial summary.	125.00		
11/13/95	RM /	3.00	375.00	
#33406	Continue to prepare summary of transcript.	125.00		
11/14/95	RM /	0.50	62.50	
#33416	Revise and proof summary of transcript; forward same to Mr. Atlas.	125.00		
12/06/95	RM /	0.50	62.50	
#35038	Additional revisions to summary of testimony; forward same to Mr. Atlas.	125.00		
01/10/96	RM /	0.50	62.50	
#35825	Review memo regarding appellate review of judicial findings of fact.	125.00		
01/25/96	RM /	5.00	625.00	
#36014	Research new caselaw in the Fifth Circuit regarding pretrial identification procedures.	125.00		
01/26/96	RM /	3.00	375.00	
#36241	Research, draft and revise outline for Pretrial identification procedures portion of brief.	125.00		
02/01/96	RM /	6.50	812.50	
#36954	Research and draft witness identification portion of brief.	125.00		
02/02/96	RM /	6.00	750.00	
#36960	Continue research and drafting of witness identification portion of brief.	125.00		
02/05/96	RM /	6.75	843.75	
#36961	Continue drafting portion of brief regarding witness identification issues.	125.00		
02/06/96	RM /	2.00	250.00	
#38264	Continue drafting and revising	125.00		

PRO02/001 :PRO02/001 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
#38264..	segment of brief regarding witness identification issues.			
02/07/96	RM /	7.25	906.25	
#36969	Continue to draft and revise brief.	125.00		
02/08/96	RM /	5.00	625.00	
#36977	Continue to draft and revise brief; forward same to Mr. Atlas.	125.00		
02/16/96	RM /	0.25	31.25	
#37324	Discussion with Ms. Crane regarding revisions to brief.	125.00		
02/29/96	RM /	0.50	62.50	
#37871	Review final version of brief regarding improper identification procedures.	125.00		
TOTAL BILLABLE TIME CHARGES		52.50		$6,562.50
TOTAL BILLABLE COSTS				$0.00
TOTAL NEW CHARGES				$6,562.50
PREVIOUS BALANCE				
120 days overdue			10,723.06	
TOTAL PREVIOUS BALANCE				$10,723.06
TOTAL overdue : $10,723.06				
PAYMENTS/REFUNDS/CREDITS				
07/24/95	Payment - thank you		(10,723.06)	
TOTAL PAYMENTS/REFUNDS/CREDITS				($10,723.06)
NEW BALANCE				
New Current period			6,562.50	
TOTAL NEW BALANCE				$6,562.50

SCHNEIDER & McKINNEY, P.C.

ATTORNEYS AT LAW

Eleven Greenway Plaza, Suite 3112
Houston, Texas 77046
(713) 961-5901
Telecopier: (713) 961-5954

Stanley G. Schneider
W. Troy McKinney
Thomas D. Moran

September 27, 1996

Ricardo Aldape Guerra
c/o Scott Atlas
Vinson & Elkins
1001 Fannin
Houston, TX 77002

Invoice #314

			Hrs/Rate	Amount
		Professional services		
03/07/95	SGS	Attended team meeting.	1.50 125.00/hr	187.50
03/14/95	SGS	Meeting with Scott Atlas.	5.00 125.00/hr	625.00
03/16/95	SGS	Review hearing summary.	1.00 125.00/hr	125.00
03/21/95	SGS	Review hearing transcript.	2.00 125.00/hr	250.00
03/22/95	SGS	Review hearing transcript.	2.00 125.00/hr	250.00
03/23/95	SGS	Review hearing transcript.	2.00 125.00/hr	250.00
04/20/95	SGS	Conference with Scott Atlas Re: Kyles.	1.50 125.00/hr	187.50
04/27/95	SGS	Review Kyles v. Whitley and underlying 5th Circuit Opinion; Conference with Scott Atlas.	4.00 125.00/hr	500.00
06/16/95	SGS	Conference with Scott Atlas regarding Stay and review of Stay Application for response.	1.00 125.00/hr	125.00

			Hrs/Rate	Amount
06/17/95	SGS	Conversation with Manuel Lopez.	1.00 125.00/hr	125.00
06/21/95	SGS	Conversation with Mike Muchetti.	0.50 125.00/hr	62.50
10/17/95	SGS	Telephone conference with Scott Atlas.	0.50 125.00/hr	62.50
12/29/95	SGS	Review State's brief.	1.25 125.00/hr	156.25
01/10/96	SGS	Attended team meeting regarding State's brief.	1.50 125.00/hr	187.50
02/27/96	SGS	Review Brief.	5.00 125.00/hr	625.00
03/05/96	SGS	Telephone call with Scott Atlas regarding designation of counsel.	0.25 125.00/hr	31.25
03/13/96	SGS	Review amicus brief.	1.00 125.00/hr	125.00
04/26/96	SGS	Telephone conversation with Scott Atlas regarding oral arguments.	0.50 125.00/hr	62.50
04/28/96	SGS	Meeting with Scott Atlas Re: Oral Arguments.	2.00 125.00/hr	250.00
08/12/96	SGS	Telephone conversation with Scott Atlas Re: Rehearing.	0.75 125.00/hr	93.75
08/13/96	SGS	Telephone conversation with Re: Scott Atlas Re: certiorari.	0.25 125.00/hr	31.25
		For professional services rendered	34.50	$4,312.50
		Balance due		$4,312.50

SCHNEIDER & McKINNEY, P.C.

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Houston, TX 77002

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		Hrs/Rate	Amount
	Professional services		
03/07/95 SGS	Attended team meeting.	1.50 125.00/hr	187.50
03/14/95 SGS	Meeting with Scott Atlas.	5.00 125.00/hr	625.00
03/16/95 SGS	Review hearing summary.	1.00 125.00/hr	125.00
03/21/95 SGS	Review hearing transcript.	2.00 125.00/hr	250.00
03/22/95 SGS	Review hearing transcript.	2.00 125.00/hr	250.00
03/23/95 SGS	Review hearing transcript.	2.00 125.00/hr	250.00
04/20/95 SGS	Conference with Scott Atlas Re: Kyles.	1.50 125.00/hr	187.50
04/27/95 SGS	Review with Scott Atlas - Kyles v. Whitley and underlying 5th Circuit Opinion; Conference with Scott Atlas.	4.00 125.00/hr	500.00
06/16/95 SGS	Conference with Scott Atlas regarding Stay and review of Stay Application for response.	1.00 125.00/hr	125.00

			Hrs/Rate	Amount
06/17/95	SGS	Conversation with Scott Atlas.	1.00 125.00/hr	125.00
06/21/95	SGS	Conversation with Scott Atlas.	0.50 125.00/hr	62.50
10/17/95	SGS	Telephone conference with Scott Atlas.	0.50 125.00/hr	62.50
12/29/95	SGS	Review State's brief.	1.25 125.00/hr	156.25
01/10/96	SGS	Attended team meeting regarding State's brief..	1.50 125.00/hr	187.50
02/27/96	SGS	Review Brief.	5.00 125.00/hr	625.00
03/05/96	SGS	Telephone call with Scott Atlas regarding designation of counsel.	0.25 125.00/hr	31.25
03/13/96	SGS	Review amicus brief.	1.00 125.00/hr	125.00
04/26/96	SGS	Telephone conversation with Scott Atlas regarding oral arguments.	0.50 125.00/hr	62.50
04/28/96	SGS	Meeting with Scott Atlas Re: Oral Arguments.	2.00 125.00/hr	250.00
08/12/96	SGS	Telephone conversation with Scott Atlas Re: Rehearing.	0.75 125.00/hr	93.75
08/13/96	SGS	Telephone conversation Re: certiorari.	0.25 125.00/hr	31.25
		For professional services rendered	34.50	$4,312.50
		Balance due		$4,312.50

F –
Aldpldg

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P
2300 FIRST CITY TOWER
1001 FANNIN STREET
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
FAX (713) 758-2346

WRITER'S TELEPHONE
(713) 758-2024

WRITER'S FAX
(713) 615-5399

September 13, 1996

VIA MESSENGER

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

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

Dear Sir:

Enclosed for filing in the captioned cause are the following pleadings:

1. Defendant's Motion for Disclosure of Names, Addresses and Telephone Numbers of All the State's Witnesses, and a proposed Order,

2. Defendant's Motion to Invoke Witness Rule and to Prevent the Jury from Becoming Informed of the Request, and a proposed Order,

3. Defendant's Motion to Require Court Reporter to Take Notes of All Proceedings, and a proposed Order,

4. Defendant's Motion for Discovery and Inspection, and a proposed Order,

5. Defendant's Motion for Production of Grand Jury Testimony, and a proposed Order,

6. Defendant's Motion for Preservation and Production of Rough Notes, and a proposed Order, and

7. Defendant's Request for Notice.

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

Very truly yours,

Scott J. Atlas

Enclosures

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

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

VEHOU07:23225.1

CAUSE NO. 359805

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

DEFENDANT'S REQUEST FOR NOTICE

TO: The State of Texas by and through the Harris County District Attorney's Office, 201 Fannin, Suite 200, Houston, Texas 77002.

Pursuant to TEX. R. CRIM. EVID. 404(b), Ricardo Aldape Guerra, Defendant, requests notice of extraneous acts, crimes or other wrongs that the State intends to introduce into evidence in the above numbered and styled cause.

Pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(g) (Vernon Supp. 1996), Defendant requests notice of extraneous acts, crimes or other wrongs that the State intends to introduce into evidence in the above numbered and styled cause.

Pursuant to TEX. R. CRIM. EVID. 609(f), Defendant requests notice of the State's intent to use evidence of prior convictions to impeach the following witness and the offenses involved:

Defendant Ricardo Aldape Guerra.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: _____

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No.: 01418400
Sarah Cooper
Stephanie K. Crain
Theodore W. Kassinger
J. Cavanaugh O'Leary
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 758-2024 - telephone
(713) 615-5399 - telecopy

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

ATTORNEYS DEFENDANT,
RICARDO ALDAPE GUERRA

OF COUNSEL:

ANNE B. CLAYTON
Texas Bar No.: 02211200
4006 University
Houston, Texas 77009
(713) 667-2654

MANUEL LOPEZ
Texas Bar No.: 00784495
SOLAR & FERNANDES, L.L.P.
2800 Post Oak Blvd., Ste. 6400
Houston, Texas 77056
(713) 850-1212

RICHARD A. MORRIS
Texas Bar No.: 14497750
FELDMAN & ROGERS
12 Greenway Plaza, Suite 1202
Houston, Texas 77046
(713) 960-6019

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by sending a copy certified mail, return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 13th day of September, 1996.

_____
SCOTT J. ATLAS

VEHOU07:23046.1

F –
Aldpldg

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P
2300 FIRST CITY TOWER
1001 FANNIN STREET
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
FAX (713) 758-2346

WRITER'S TELEPHONE
(713) 758-2024

WRITER'S FAX
(713) 615-5399

September 13, 1996

VIA MESSENGER

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

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

Dear Sir:

Enclosed for filing in the captioned cause are the following pleadings:

1. Defendant's Motion for Disclosure of Names, Addresses and Telephone Numbers of All the State's Witnesses, and a proposed Order,

2. Defendant's Motion to Invoke Witness Rule and to Prevent the Jury from Becoming Informed of the Request, and a proposed Order,

3. Defendant's Motion to Require Court Reporter to Take Notes of All Proceedings, and a proposed Order,

4. Defendant's Motion for Discovery and Inspection, and a proposed Order,

5. Defendant's Motion for Production of Grand Jury Testimony, and a proposed Order,

6. Defendant's Motion for Preservation and Production of Rough Notes, and a proposed Order, and

7. Defendant's Request for Notice.

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

Very truly yours,

Scott J. Atlas

Enclosures

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

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

VEHOU07:23225.1

CAUSE NO. 359805

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

DEFENDANT'S MOTION FOR PRESERVATION AND PRODUCTION OF ROUGH NOTES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Ricardo Aldape Guerra, Defendant in the above entitled and numbered cause, by and through his Attorneys of Record, Scott J. Atlas and Stanley G. Schneider, and files this Motion for Preservation and Production of Rough Notes, and in support thereof would respectfully show this Court the following:

I.

Defendant moves this Court to order the State to preserve and produce all handwritten notes of all cooperating witnesses and/or all law enforcement officers and agents, as well as any statements attributed to Defendant. *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976); *Brady v. Maryland*, 373 U.S. 83 (1963); TEX. R. CRIM. EVID. 611, 614.

MEMORANDA OF AUTHORITIES

The notes of agents and other cooperating witnesses that have been used in conjunction with the preparation of final reports of such witnesses are subject to required disclosure along with other materials. *United States v. Harris,* 543 F.2d 1247 (9th Cir. 1976); TEX. R. CRIM. EVID. 614.

The circuits have held such "rough notes" producible. *See United States v. Harrison*, 524

F.2d 421 (D.C. Cir. 1975). In *Harrison*, the court emphasized that the discoverability of the "rough notes" is a decision for the court, not for the State. The preparation of witness interview reports does not justify destruction of the "rough notes."

WHEREFORE, PREMISES CONSIDERED, Defendant, Ricardo Aldape Guerra, respectfully requests that this Court issue its order directing the State to preserve all of the handwritten notes prepared by its agents and other State witnesses and to produce those statements along with other Jencks Act material heretofore requested, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: Scott J. Atlas

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No.: 01418400
Sarah Cooper
Stephanie K. Crain
Theodore W. Kassinger
J. Cavanaugh O'Leary
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
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STANLEY G. SCHNEIDER
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OF COUNSEL:

ANNE B. CLAYTON
Texas Bar No.: 02211200
4006 University
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MANUEL LOPEZ
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RICHARD A. MORRIS
Texas Bar No.: 14497750
FELDMAN & ROGERS
12 Greenway Plaza, Suite 1202
Houston, Texas 77046
(713) 960-6019

ATTORNEYS DEFENDANT,
RICARDO ALDAPE GUERRA

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by hand delivering a copy to the assistant district attorney handling the case or by sending a copy certified mail, return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 13th day of September, 1996.

Scott J. Atlas

SCOTT J. ATLAS

CAUSE NO. 359805

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

ORDER

Before the Court is Defendant's Motion for Preservation and Production of Rough Notes. The Court is of the opinion that the motion is well taken and should be GRANTED.

It is therefore ORDERED that, on or before 5:00 p.m. on the tenth date after the date of this Order, the State shall present and produce, along with other Jencks Act material as ordered by this Court, the original handwritten "rough notes" of all cooperating witnesses, state law enforcement officers and agents, as well as all of the witnesses who have created such "rough notes."

SIGNED and ENTERED this ___ day of _____, 1996.

_____
JUDGE PRESIDING

VEHOU07:23044.1

F –
Aldpldg

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
2300 FIRST CITY TOWER
1001 FANNIN STREET
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
FAX (713) 758-2346

WRITER'S TELEPHONE
(713) 758-2024

WRITER'S FAX
(713) 615-5399

September 13, 1996

VIA MESSENGER

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

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

Dear Sir:

Enclosed for filing in the captioned cause are the following pleadings:

1. Defendant's Motion for Disclosure of Names, Addresses and Telephone Numbers of All the State's Witnesses, and a proposed Order,

2. Defendant's Motion to Invoke Witness Rule and to Prevent the Jury from Becoming Informed of the Request, and a proposed Order,

3. Defendant's Motion to Require Court Reporter to Take Notes of All Proceedings, and a proposed Order,

4. Defendant's Motion for Discovery and Inspection, and a proposed Order,

5. Defendant's Motion for Production of Grand Jury Testimony, and a proposed Order,

6. Defendant's Motion for Preservation and Production of Rough Notes, and a proposed Order, and

7. Defendant's Request for Notice.

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

Very truly yours,

Scott J. Atlas

Enclosures

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

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

VEHOU07:23225.1

CAUSE NO. 359805

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

DEFENDANT'S MOTION FOR PRODUCTION OF GRAND JURY TESTIMONY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW RICARDO ALDAPE GUERRA, Defendant, by and through his attorneys, Scott J. Atlas and Stanley G. Schneider, and presents this Motion for Production of Grand Jury Testimony. In support hereof, Defendant would show this court as follows:

I.

Defendant seeks production of any and all testimony presented to the grand jury of any witness who will testify at the trial of this case. Additionally, Defendant requests production of any and all reports or data compilations of any kind that were presented to the grand jury that will be relied on either in whole or part as a basis for any witness's testimony in this cause. Additionally, Defendant requests the names of all witnesses who testified before the grand jury.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays that his motion for production of grand jury testimony be granted.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: Scott J. Atlas

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No.: 01418400
Sarah Cooper
Stephanie K. Crain
Theodore W. Kassinger
J. Cavanaugh O'Leary
2300 First City Tower
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STANLEY G. SCHNEIDER
Texas Bar No.: 1770500
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11 E. Greenway Plaza
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ATTORNEYS DEFENDANT,
RICARDO ALDAPE GUERRA

OF COUNSEL:

ANNE B. CLAYTON
Texas Bar No.: 02211200
4006 University
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(713) 667-2654

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Scott J. Atlas

SCOTT J. ATLAS

VEHOU07:23183.1

CAUSE NO. 359805

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

ORDER

Before the court is Defendant's Motion to Produce Grand Jury Testimony. After considering the motion, any responses, any evidence, and the arguments of counsel, it is the opinion of the Court that the motion is well taken and should be GRANTED.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the State produce to the Defendant on or before the tenth day after the date of this order:

I. A transcript of any and all testimony presented to the grand jury of any witness who will testify at the trial of this case.

GRANTED/DENIED

II. Copies of any and all reports or data compilations of any kind that were presented to the grand jury that will be relied on either in whole or part as a basis for any witness's testimony in this cause.

GRANTED/DENIED

III. The names of all witnesses who testified before the grand jury.

GRANTED/DENIED

SIGNED and ENTERED this ___ day of _____, 1996.

_____

JUDGE PRESIDING

F –
Aldpldg

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
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September 13, 1996

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5. Defendant's Motion for Production of Grand Jury Testimony, and a proposed Order,

6. Defendant's Motion for Preservation and Production of Rough Notes, and a proposed Order, and

7. Defendant's Request for Notice.

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

Very truly yours,

Scott J. Atlas

Enclosures

c: Casey O'Brien, Assistant District Attorney
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Houston, Texas 77002

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SCHNEIDER & MCKINNEY
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Houston, Texas 77046

VEHOU07:23225.1

CAUSE NO. 359805

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

DEFENDANT'S MOTION FOR DISCOVERY AND INSPECTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the above referenced Defendant, by and through the undersigned counsel, and respectfully moves this Court, pursuant to:

(A) article 39.14 of the Texas Code of Criminal Procedures,

(B) the Due Process Clause of the 14th Amendment of the United States Constitution and Article I, §§13 and 19, of the Texas Constitution,

(C) the right to effective assistance of counsel, the right to be informed of the nature of the accusation, the right of confrontation and cross-examination and the right to compulsory process as guaranteed by the Sixth Amendment of the United States Constitution and Article I, § 10, of the Texas Constitution,

for an order requiring the State's attorney to produce and permit examination, inspection and copying of the following items by undersigned counsel and forensic experts employed by the Defendant.

I.

STATEMENTS BY DEFENDANT

1. All written statements allegedly made by the Defendant.

2. All recorded statements allegedly made by the Defendant as well as any transcription thereof.

3. All oral statements allegedly made by the Defendant as well as any transcription thereof.

4. Those portions of any report (including police offense reports), memoranda, notes, or other writings, or records, which contain either a verbatim account or a summary of the substance of any written, recorded, or oral statement allegedly made by the Defendant.

II.

TANGIBLE EVIDENCE

5. Any and all tangible objects belonging to the Defendant or obtained from Defendant's person, or property owned, occupied, or possessed by the Defendant which are in the possession, custody or control of the prosecutor or any law enforcement agency, or to which they have a greater right of access than the Defendant. These tangible objects include, but are not limited to, documents, papers, books, accounts, letters, records, receipts, notes, photographs, audio tape recordings, video tape recordings, clothing, shoes, jewelry, tools, firearms, and other tangible things.

6. Any and all tangible objects received as a direct or indirect result of the investigation made the basis of this indictment, and a list thereof. These tangible objects include, but are not limited to, documents, papers, books, accounts, letters, records, receipts, notes, photographs, audio tape recordings, video tape recordings, clothing, shoes, jewelry, tools, firearms, and other tangible things.

7. All fingerprints lifted or taken or discovered in connection with the investigation of this case, including latent prints.

8. A copy of any and all pictures, photographs, snapshots, mug shots, movies, or the replica or likeness made of the Defendant, obtained pursuant to his arrest in the instant case, or taken or obtained as a result of or in connection with the investigation of this case.

9. All sketches, schemes, diagrams, or drawings dealing with any and all matters contained in the allegations of the present indictment.

10. All business, governmental, or certified records.

11. Any documents, objects, photographs, or charts, the contents of which have in any way been placed before any witness to be called by the State or which is material either to guilt or punishment and will or may be placed before the Jury by direct examination of said witness.

III.

SCIENTIFIC EVIDENCE

12. All reports, written statements, notes, and audio or video recordings pertaining to expert witness or the testing process or results of scientific tests or experiments conducted in connection with this case. These reports include, but are not limited to reports prepared by or concerning any of the following: medical, social worker, medical examiner, crime lab, fingerprint, tire marks, clothing, handwriting, etc.

IV.

SEARCHES

13. A copy of all search warrants, affidavits in support of search warrants and returns made as a result of any executed search warrant, whether the search warrants are for tangible items or communications.

14. A copy of all arrest warrants, affidavits in support of arrest warrants and returns made as a result of any executed arrest warrant.

15. Any lists of items seized subsequent to all searches conducted.

16. A copy of any consent to search executed by the defendant(s) or any other person(s) having custody or control of the defendant's property.

17. The names, home and office addresses, and home and office telephone numbers of any and all officers executing any search or arrest warrant or that were present when any search or arrest warrant was executed.

18. The names, home and office addresses, and home and office telephone numbers of any and all officers executing any search pursuant to a consent to search or that were present when any search was conducted pursuant to a consent to search.

V.

WITNESSES

19. The names, home and office addresses, and home and office telephone numbers of all State's witnesses.

20. The names, home and office addresses, and home and office telephone numbers of all police officers who were present at the time defendant was arrested, or that

appeared at the arrest scene while the defendant was still present, or that interviewed or attempted to interview the defendant.

21. The names, home and office addresses, and home and office telephone numbers of all State's expert witnesses.

22. The names, home and office addresses, and home and office telephone numbers of any and all persons the State knows to possess relevant information in connection with the charges in the indictment in the instant case.

VI.

INFORMANTS

23. The names, home and office addresses, and home and office telephone numbers of all informants and/or "confidential Informants" who were present during the events charged in the indictment and who have material evidence.

24. In addition to the foregoing, the names, home and office addresses, and home and office telephone numbers of all informants and/or confidential informants, regardless of whether they were present during the event that forms the basis of this prosecution: such disclosure, on record, but *in camera* with all counsel present to insure adversarial advocacy, and, if it be then determined that such disclosure is not required, the record to be sealed and preserved for appellate review, while all present are, in such case, to be enjoined not to reveal the testimony given.

VII.

BRADY MATERIAL

25. Pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and consistent with the rationale of *Brady v. Maryland*, 373 U.S. 83 (1963), any evidence or information in the possession or control of the State of Texas or known to the agents of the State that is inconsistent with the guilt of the Defendant, or that might tend to ameliorate the punishment of the Defendant in the event of a verdict of guilty, including but not limited to all notes, reports, audiotapes and videotapes discussing, constituting, or relating any communications since July 13, 1982 between the State and any witness who testified in either the original 1982 criminal trial of the Defendant or the November 1993 evidentiary hearing on the Defendant's habeas corpus petition, or any other person who the State may call as a witness.

VIII.

PROMISES (Giglio Material)

26. Any and all agreements, promises or inducements, formal or otherwise, included in the rationale of *Giglio v. United States*, 92 S. Ct. 763 (1972), made with any potential witness herein, by the State or any agency thereof, wherein the State has promised any form of reward, consideration, favorable treatment, leniency, immunity, emolument, reduction in sentence, or anything else, in return for such witness's assistance in this, or any other case.

IX.

IMPEACHING MATERIAL

27. The full record of arrest and criminal convictions of any prospective witness that the State may call at the trial of this case.

28. Any evidence that may be used to impeach or discredit any potential witness the State may call at the trial of the above case, particularly, but not exclusively, any inconsistent statement or testimony of a witness or between witnesses, bias or prejudice, admission of a poor memory, significant misconduct or bad acts.

29. The personnel files and the internal affairs, internal investigation and public integrity investigation files in connection with each witness who was or is a law enforcement officer.

30. Any statement, whether in writing or however recorded, whether signed or unsigned, of any witness called to testify by the State of Texas after his or her testimony on direct examination.

31. A transcript of the Grand Jury testimony of any witness called by the State to testify after the witness has completed his or her testimony on direct examination.

32. In the alternative, and without waiving the aforementioned request for inspection of the Grand Jury testimony, this Defendant respectfully requests that after each witness is called by the State and testifies during the trial, the Court retire and examine the Grand Jury minutes in camera for possible inconsistencies with the witness's trial testimony.

33. Any documents, objects, photographs, or charts, the contents of which have in any way been placed before the Grand Jury or which is material either to guilt or

punishment and will or may be placed before the jury by direct or cross-examination of any witness.

34. Any police record where the same is shown to purport to be what a witness observed or did at the time in question and that concerns facts to be testified to by the witness, whether made by the witness or not, as long as the witness has adopted the same as correct.

35. In the alternative, and without waiving the above, any police report where the same is shown to purport to be what the witness observed or did at the time in question and that concerns facts to be testified to by the witness on direct examination, whether made by the witness or not, as long as the witness has adopted the same as correct.

36. Any police report, documents, objects, photographs, or charts made by any witness, or by the State, whether inculpatory or exculpatory, and whether made by the witness or by the State, as long as the witness and/or the State has adopted the same as correct, if the State has possession of the items sought and such items are otherwise unobtainable by the Defendant.

37. The memoranda and/or summaries of any and all oral statements or admissions and confessions made to the State by any and all persons in connection with the subject matter of this case regardless of whether:

(a) the statement, if it is in writing, has been signed or approved by the witness, if the subject relates to the proposed subject matter of the direct testimony of the witness at trial; or

(b) the statement, if it is in writing, has been signed or approved by the Defendant, and the statement relates to the proposed subject matter of the direct testimony of any witness at trial.

X.

OTHER

38. Medical, financial or employment records of Defendant, or copies thereof, that will or may be used as evidence by the State.

39. Any and all juvenile records of the Defendant, and any co-defendants, accomplices or co-conspirators.

40. Copies of any photo spreads or lineup video tapes.

41. Any and all polygraphs tests.

In support of this MOTION, the Defendant shows as follows:

1. The matter requested is in the exclusive possession, custody and control of the State of Texas by and through its agents, a law enforcement agency, or the prosecuting attorney's office, and the Defendant has no other way to obtain said information, other than through this Motion;

2. The items requested are not privileged.

3. The matter requested is material and necessary for the preparation of the defense in this case;

4. Absent such discovery, Defendant's rights under Article 39.14 of the Texas Code of Criminal Procedure; Article 1, Section 10, of the Constitution of the State of Texas; and the Fourth (4th), Fifth (5th), Sixth (6th), and Fourteenth (14th) Amendments to the Constitution of the United State of America will be violated to his irreparable injury and thus deprive the Defendant of a fair trial;

5. This Motion is made in good faith and not for the purpose of delay.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that said Motion for Discovery and Inspection of Evidence be GRANTED in its entirety.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: Scott J. Atlas

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No.: 01418400
Sarah Cooper
Stephanie K. Crain
Theodore W. Kassinger
J. Cavanaugh O'Leary
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
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11 E. Greenway Plaza
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ATTORNEYS DEFENDANT,
RICARDO ALDAPE GUERRA

OF COUNSEL:

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Scott J. Atlas

SCOTT J. ATLAS

VEHOU07:23049.1

CAUSE NO. 359805

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

ORDER

Before the Court is Defendant's Motion for Discovery and Inspection, and after due consideration of same it is the Court's opinion that said Motion should GRANTED or DENIED as follows:

1. GRANTED/DENIED	15. GRANTED/DENIED	29. GRANTED/DENIED
2. GRANTED/DENIED	16. GRANTED/DENIED	30. GRANTED/DENIED
3. GRANTED/DENIED	17. GRANTED/DENIED	31. GRANTED/DENIED
4. GRANTED/DENIED	18. GRANTED/DENIED	32. GRANTED/DENIED
5. GRANTED/DENIED	19. GRANTED/DENIED	33. GRANTED/DENIED
6. GRANTED/DENIED	20. GRANTED/DENIED	34. GRANTED/DENIED
7. GRANTED/DENIED	21. GRANTED/DENIED	35. GRANTED/DENIED
8. GRANTED/DENIED	22. GRANTED/DENIED	36. GRANTED/DENIED
9. GRANTED/DENIED	23. GRANTED/DENIED	37. GRANTED/DENIED
10. GRANTED/DENIED	24. GRANTED/DENIED	38. GRANTED/DENIED
11. GRANTED/DENIED	25. GRANTED/DENIED	39. GRANTED/DENIED
12. GRANTED/DENIED	26. GRANTED/DENIED	40. GRANTED/DENIED
13. GRANTED/DENIED	27. GRANTED/DENIED	41. GRANTED/DENIED
14. GRANTED/DENIED	28. GRANTED/DENIED	42. GRANTED/DENIED

It is therefore **ORDERED** that any evidence within the scope of the items granted above be provided by the State to defendant's attorney at his office, 1001 Fannin, Suite 2819, Houston, Texas 77002, on or before 5:00 p.m. on the tenth day after the date of this order.

It is further **ORDERED** that this order is continuing and that the State will immediately make available to the Defendant's attorney any subsequent discoverable matter within the scope of the above granted items within 24 hours of the time it learns of or obtains such discoverable matter.

It is further **ORDERED** that any items herein not produced in violation of this Order shall be and are excluded from evidence in this case if offered by the State.

It is further **ORDERED** that testimony concerning the items not produced in violation of this Order or the information contained in those items shall be and are excluded from evidence in this case if offered by the State.

SIGNED AND ORDERED this_____ day of _____, 1996.

_____
JUDGE PRESIDING

F –
Aldpldg

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
2300 FIRST CITY TOWER
1001 FANNIN STREET
HOUSTON, TEXAS 77002-6760
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7. Defendant's Request for Notice.

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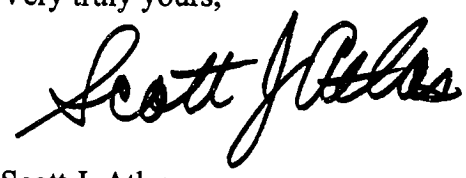

Scott J. Atlas

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OFFICE OF THE HARRIS COUNTY DISTRICT ATTORNEY
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CAUSE NO. 359805

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

DEFENDANT'S MOTION TO REQUIRE
COURT REPORTER TO TAKE NOTES OF ALL PROCEEDINGS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, RICARDO ALDAPE GUERRA, Defendant, by and through his attorneys, Scott J. Atlas and Stanley G. Schneider, and presents this Motion to Require Court Reporter to Take Notes of All Proceedings. In support hereof, Defendant would show this court as follows:

I.

Defendant moves this court to require and order the court reporter to take notes of all the trial proceedings including but not limited to voir dire examination, the opening arguments, objections to the Court's charge and final arguments, all oral motions, all objections whether made in or out of the presence of the jury or at or away from the bench, and all rulings made by the trial court to any matter.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant requests that the Court order the court reporter to take all notes of all proceedings.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: Scott J. Atlas

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No.: 01418400
Sarah Cooper
Stephanie K. Crain
Theodore W. Kassinger
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RICARDO ALDAPE GUERRA

OF COUNSEL:

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Scott J. Atlas

SCOTT J. ATLAS

VEHOU07:23048.1

CAUSE NO. 359805

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

ORDER

Before the Court is Defendant's Motion to Require Court Reporter to Take Notes of All Proceedings. After considering the motion, any reply, and arguments from counsel, it is of the opinion of the Court that the motion should be GRANTED.

It is, therefore, **ORDERED** that the court reporter shall record all proceedings in this cause including, but not limited to, voir dire examination, the opening arguments, objections to the Court's charge and final arguments, all oral motions, all objections whether made in or out of the presence of the jury or at or away from the bench, and all rulings made by the trial court to any matter.

SIGNED and ENTERED on this the ___ day of _____, 1996.

_____

JUDGE PRESIDING

F –
Aldpldg

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
2300 FIRST CITY TOWER
1001 FANNIN STREET
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
FAX (713) 758-2346

WRITER'S TELEPHONE
(713) 758-2024

WRITER'S FAX
(713) 615-5399

September 13, 1996

VIA MESSENGER

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

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

Dear Sir:

Enclosed for filing in the captioned cause are the following pleadings:

1. Defendant's Motion for Disclosure of Names, Addresses and Telephone Numbers of All the State's Witnesses, and a proposed Order,

2. Defendant's Motion to Invoke Witness Rule and to Prevent the Jury from Becoming Informed of the Request, and a proposed Order,

3. Defendant's Motion to Require Court Reporter to Take Notes of All Proceedings, and a proposed Order,

4. Defendant's Motion for Discovery and Inspection, and a proposed Order,

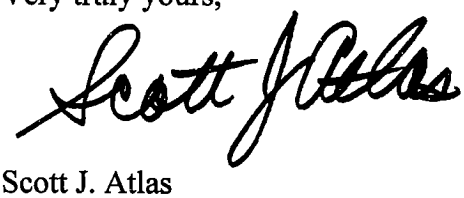
5. Defendant's Motion for Production of Grand Jury Testimony, and a proposed Order,

6. Defendant's Motion for Preservation and Production of Rough Notes, and a proposed Order, and

7. Defendant's Request for Notice.

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

Very truly yours,



Scott J. Atlas

Enclosures

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

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

VEHOU07:23225.1

CAUSE NO. 359805

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

DEFENDANT'S MOTION TO INVOKE WITNESS RULE AND TO PREVENT THE JURY FROM BECOMING INFORMED OF THE REQUEST

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES RICARDO ALDAPE GUERRA, Defendant, by and through his attorneys, Scott J. Atlas and Stanley G. Schneider, and presents this Motion to Invoke Witness Rule and to Prevent the Jury from Becoming Informed of the Request. In support hereof, Defendant would show this court as follows:

I.

This motion is brought pursuant to TEX. CODE CRIM. PROC. ANN. art. 36.05 and 36.06, and TEX. R. CRIM. EVID. 603. This motion applies to all witnesses who are or may be called by the prosecution. Defendant requests that all prosecution witnesses be instructed as follows:

A. To remain outside the courtroom in some area designated by the Court during all proceedings, including jury selection and final argument, except when brought into the courtroom by the bailiff at the order of the Court;

B. To not discuss their testimony with anyone, except with an attorney in the case and outside the presence of any other witness;

C. To not discuss the actual or anticipated testimony of any other witness with any person.

II.

Defendant requests that the prosecution be instructed as follows:

A. To not discuss with any witness the testimony of any other witness.

B. To make known to the Court and the defense counsel the arrival of any prosecution witness not present when the foregoing instructions are given to other witnesses so that such witness can be instructed.

C. To not communicate to any witness the content of the testimony of any other witness.

III.

Finally, it is requested that the Court not make known to the jury that the defense invoked the rule and that the Court order the State not to make the same known to the jury or to any witness in this cause.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant requests that the witness rule be invoked as herein requested.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: _____

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No.: 01418400
Sarah Cooper
Stephanie K. Crain
Theodore W. Kassinger
J. Cavanaugh O'Leary
2300 First City Tower
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STANLEY G. SCHNEIDER
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11 E. Greenway Plaza
Houston, Texas 77046
(713) 961-5901

ATTORNEYS DEFENDANT,
RICARDO ALDAPE GUERRA

OF COUNSEL:

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MANUEL LOPEZ
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2800 Post Oak Blvd., Ste. 6400
Houston, Texas 77056
(713) 850-1212

RICHARD A. MORRIS
Texas Bar No.: 14497750
FELDMAN & ROGERS
12 Greenway Plaza, Suite 1202
Houston, Texas 77046
(713) 960-6019

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by hand delivering a copy to the assistant district attorney handling the case or by sending a copy certified mail, return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 13th day of September, 1996.

_____
SCOTT J. ATLAS

VEHOU07:23043.1

CAUSE NO. 359805

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

ORDER

Before the Court is Defendant's Motion to Invoke Witness Rule and to Prevent the Jury from Becoming Informed of the Request. After considering the motion, any reply, and arguments from counsel, it is the opinion of the Court that the motion should be GRANTED.

It is therefore ORDERED, ADJUDGED, and DECREED that each prosecution witness:

A. Remain outside the courtroom in some area designated by the Court during all proceedings, including jury selection and final argument, except when brought into the courtroom by the bailiff at the order of the Court;

B. Not discuss their testimony with anyone, except with an attorney in the case and outside the presence of any other witness;

C. Not discuss the actual or anticipated testimony of any other witness with any person.

It is further ORDERED that the prosecutor:

A. Not discuss with any witness the testimony of any other witness.

B. Make known to the Court and the defense counsel the arrival of any prosecution witness not present when the foregoing instructions are given to other witnesses so that such witness can be instructed.

C. Not communicate to any witness the content of the testimony of any other witness.

SIGNED and ENTERED on this the ___ day of _____, 1996.

_____

JUDGE PRESIDING

SJA 2819
Z 426 790 160

Receipt for Certified Mail
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

UNITED STATES POSTAL SERVICE

Casey O'Brien, Assistant District Attorney
OFFICE OF THE HARRIS COUNTY DISTRICT ATTORN
201 Fannin, Suite 200
Houston, Texas 77002

USPS

PS

Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	$
Postmark or Date	

Is your RETURN ADDRESS completed on the reverse side?

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

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

4a. Article Number
Z426 790 160

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
16 SEP 1996

5. Signature (Addressee)
Angela Goodhue

6. Signature (Agent)

8. Addressee's Address (Only if requested and fee is paid)

Thank you for using Return Receipt Service.

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STICK POSTAGE STAMPS TO ARTIC **STAGE,**
CERTIFIED MAIL FEE, AND CHARGES FOR A **ES (see front).**

1. If you want this receipt postmarked, stick t return address leaving the receipt attached and present the ar v or hand it to your rural carrier (no extra charge).

2. If you do not want this receipt postmarked, t of the return address of the article, date, detach and retain

3. If you want a return receipt, write the certified mail number and your name and address on a return receipt card, Form 3811, and attach it to the front of the article by means of the gummed ends if space permits. Otherwise, affix to back of article. Endorse front of article **RETURN RECEIPT. REQUESTED** adjacent to the number.

4. If you want delivery restricted to the addressee, or to an authorized agent of the addressee, endorse **RESTRICTED DELIVERY** on the front of the article.

5. Enter fees for the services requested in the appropriate spaces on the front of this receipt. If return receipt is requested, check the applicable blocks in item 1 of Form 3811.

6. Save this receipt and present it if you make inquiry. 105603-93-B-0218

PS Form 3800, March 1993 *(Reverse)*

UNITED STATES POSTAL SERVICE

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PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

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Print your name, address and ZIP Code here

ATTN: Scott J. Atlas
VINSON & ELKINS L.L.P.
2300 FIRST CITY TOWER
1001 FANNIN
HOUSTON, TX 77002-6760

Aldape
7 Mtns
9/13/96

F. Aldape

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
2300 FIRST CITY TOWER
1001 FANNIN STREET
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
FAX (713) 758-2346

FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
96 SEP 13 PM 4:50
BY _____ DEPUTY

WRITER'S TELEPHONE
(713) 758-2024

WRITER'S FAX
(713) 615-5399

September 13, 1996

VIA MESSENGER

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

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

Dear Sir:

Enclosed for filing in the captioned cause are the following pleadings:

1. Defendant's Motion for Disclosure of Names, Addresses and Telephone Numbers of All the State's Witnesses, and a proposed Order,

2. Defendant's Motion to Invoke Witness Rule and to Prevent the Jury from Becoming Informed of the Request, and a proposed Order,

3. Defendant's Motion to Require Court Reporter to Take Notes of All Proceedings, and a proposed Order,

4. Defendant's Motion for Discovery and Inspection, and a proposed Order,

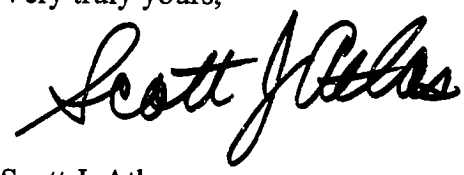
5. Defendant's Motion for Production of Grand Jury Testimony, and a proposed Order,

6. Defendant's Motion for Preservation and Production of Rough Notes, and a proposed Order, and

7. Defendant's Request for Notice.

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

Very truly yours,



Scott J. Atlas

Enclosures

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

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

VEHOU07:23225.1

CAUSE NO. 359805

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

DEFENDANT'S MOTION FOR DISCLOSURE OF NAMES, ADDRESSES AND TELEPHONE NUMBERS OF ALL THE STATE'S WITNESSES

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Ricardo Aldape Guerra, Defendant, by and through the undersigned attorneys, Scott J. Atlas and Stanley G. Schneider, and presents this Motion for Disclosure of Names, Addresses, and Telephone Numbers of All the State's Witnesses. In support hereof, Defendant would show this Court as follows:

I.

Defendant moves this Court to order the State to divulge to the Defendant the names, home and office addresses, and home and office telephone numbers of all witnesses on whose testimony the State intends to rely in proving its case. Defendant contends that it may be necessary to interview and investigate said witnesses, and Defendant must know the names, addresses, and telephone numbers of said witnesses in order to know whether such investigation and research is necessary.

Defendant further contends that the above information is necessary in order for his attorneys to provide him effective assistance of counsel.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court order the State, before the cause is called for trial, to furnish to the Defendant's attorneys the names, home and office

addresses, and home and office telephone numbers of all witnesses the State intends to call during trial of this cause.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: 

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No.: 01418400
Sarah Cooper
Stephanie K. Crain
Theodore W. Kassinger
J. Cavanaugh O'Leary
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 758-2024 - telephone
(713) 615-5399 - telecopy

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

ATTORNEYS DEFENDANT,
RICARDO ALDAPE GUERRA

OF COUNSEL:

ANNE B. CLAYTON
Texas Bar No.: 02211200
4006 University
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(713) 667-2654

MANUEL LOPEZ
Texas Bar No.: 00784495
SOLAR & FERNANDES, L.L.P.
2800 Post Oak Blvd., Ste. 6400
Houston, Texas 77056
(713) 850-1212

RICHARD A. MORRIS
Texas Bar No.: 14497750
FELDMAN & ROGERS
12 Greenway Plaza, Suite 1202
Houston, Texas 77046
(713) 960-6019

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by hand delivering a copy to the assistant district attorney handling the case or by sending a copy certified mail, return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 13th day of September, 1996.

Scott J. Atlas

SCOTT J. ATLAS

VEHOU07:23041.1

CAUSE NO. 359805

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

ORDER

Before the Court is Defendant's Motion for Disclosure of Names, Addresses, and Telephone Numbers of All the State's Witnesses. After considering the motion, any reply, and arguments of counsel, the Court is of the opinion that it is meritorious and should be GRANTED.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the State disclose in writing to the Defendant, on or before the tenth day after the date of this Order, the names, home and office addresses, and home and office telephone numbers of all witnesses that the State contemplates potentially calling as witnesses in this cause.

It is further ORDERED that the State shall not be allowed to call at trial any witness whose name, address, and telephone number were not produced as herein ordered.

SIGNED and ENTERED on this the ____ day of _____, 1996.

_____

JUDGE PRESIDING

F- old pleadings

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RECEIVED
SEP 11 1996
SJA

Ricardo Guerra §
§
§
vs §
Wayne Scott, James §
Collins §

(CA)/CR 93-290

NOTICE OF DESTRUCTION OF HEARING/TRIAL EXHIBITS

TO: Scott J. Atlas

You are hereby notified to take possession of the exhibits submitted into evidence on the above titled case by the following date 9/23/96 or the exhibits will be destroyed without further notice pursuant to Local Rule 11 of the Southern District of Texas.

Michael N. Milby **CLERK**

DATE: 9/9/96 **BY:** Mary Mapps
DEPUTY CLERK

EXHIBITS CONSISTS OF:
3 Boxes of
Plaintiff's exhibits

PLEASE CONTACT MARY MAPPS **U.S. CLERK'S OFFICE, SUITE 5300 REGARDING INQUIRIES OR CALL** 250-5201.

NOTICE MAILED TO:
Scott J. Atlas
1001 Fannin
Ste 2300
Houston Texas 77002

F. Wald pldge
cc: Rinaldo
Team (in + out)
Judge Sullivan

nited States Court of Appe s

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

August 21, 1996

RECEIVED
AUG 23 1996
SJA

Mr Michael N Milby, Clerk
Southern District of Texas, Houston
United States District Court
515 Rusk Avenue
Room 5300
Houston, TX 77002

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

Enclosed, for the district court only, is a certified copy of the judgment issued as the mandate.

Enclosed, for the district court only, is a copy of the court's opinion.

Record/original papers/exhibits to be returned:

(13) Volumes (1) Envelope (7) Boxes

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: Monica Washington
Monica Washington, Deputy Clerk

cc: (letter only)
Honorable Kenneth M Hoyt
Mr William Charles Zapalac
Mr Scott J Atlas
Mr Ronald S Flagg
Ms Marisa Andrea Gomez
Ms Mary Lou Soller
Mr Stephen Brooks Bright

Court Coordinator No. 2-A

F-old Pldg

CAUSE NO. 359805 CHARGE _____

THE STATE OF TEXAS _____ DISTRICT COURT

8/21/96

VS. OF HARRIS COUNTY, TEXAS.

Ricardo Allaga Guerra
Defendant

AGREED SETTING

The undersigned Counsel hereby agrees this case is reset for

Pretrial Hearing to Oct 18 1996
(Type of Setting) (Date)

Trial Dec 2 1996

_____
Attorney for the State

Ricardo Allaga Guerra
Defendant

Scott J. Atlas
(Print) Attorney for Defendant

Scott J. Atlas
(Signature) Attorney for Defendant

1001 Fannin, Ste. 2300
(Street Address)

Houston Tx 77002
(City) (State) (Zip)

713/758-2024
(Phone Number)

01418400
(Bar Number)

APPROVED BY THE COURT:

_____
Judge Presiding

_____
Date

DEFENSE ATTORNEY

8/12/96 & ... pleadings 10/18 hrg 12/2 trial 128 vol. 14

CAUSE NO. 359805

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

DEFENDANT'S REQUEST FOR A HEARING TO DETERMINE THE EFFECT OF THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW, RICARDO ALDAPE GUERRA, Defendant in the above-styled and numbered cause, by and through his attorneys of record, Scott J. Atlas and Stanley G. Schneider, and respectfully moves the Court to order a hearing to determine the effect of the opinion of the United States Court of Appeals for the Fifth Circuit has on the proceedings to be held in this Court and would show this Court the following:

I.

On July 13, 1982, Ricardo Aldape Guerra was charged with the felony offense of capital murder. He was subsequently convicted by a jury of capital murder and sentenced to death. His conviction was affirmed by the Texas Court of Criminal Appeals, Guerra v. State, 771 S.W.2d 453 (Tex. Crim. App. 1988), and the Supreme Court of the United States denied his application for writ of certiorari. Guerra v. Texas, 492 U.S. 925 (1989).

A writ of habeas corpus was filed in this Court in September 1992. The Court of Criminal Appeals denied his application for writ of habeas corpus without the benefit of a state evidentiary hearing. After the Court of Criminal Appeals denied his request for relief writ, the Defendant sought habeas relief in federal

court. After an evidentiary hearing, the United States District Court for the Southern District of Texas entered an order granting relief. See Guerra v. Collins, 916 F. Supp. 620 (S.D. Tex. 1995), aff'd., Guerra v. Johnson, No. 95-20443 (5th Cir. July 30, 1996).

II.

Several issues were presented to the United States Court of Appeals for the Fifth Circuit which could have an evidentiary effect on this Court. Accordingly, the Defendant requests that this Court hold a hearing wherein the issues are presented and this Court can determine what effect, if any, the decision of the United States Court of Appeals for the Fifth Circuit has on the factual and legal issues to be litigated in these proceedings.

Wherefore, premises considered, Ricardo Aldape Guerra prays that this Court order a hearing be set to determine the effect that the opinion issued the United States Court of Appeals for the Fifth Circuit on July 30, 1996 has on the factual and legal issues to

be litigated in this Court.

Respectfully submitted,

VINSON & ELKINS, L.L.P.

By:_____

SCOTT J. ATLAS
Texas Bar No. 01418400
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 758-2024 - telephone
(713) 615-5399 - telecopy

STANLEY G. SCHNEIDER
Texas Bar No.: 1770500
SCHNEIDER & McKINNEY, P.C.
11 Greenway Plaza
Suite 3112
Houston, Texas

(713) 961-5901

ATTORNEYS FOR DEFENDANT,
RICARDO ALDAPE GUERRA

OF COUNSEL:

ANNE B. CLAYTON
Texas Bar No. 02211200
4006 University
(713) 667-2654

MANUEL LOPEZ
Texas Bar No.: 00784495
SOLAR & FERNANDEZ, L.L.P.
800 Post Oak Blvd., Ste. 6400
(713) 850-1212

RICHARD A. MORRIS
Texas Bar No.: 14497750
FELDMAN & ASSOCIATES
12 Greenway Plaza, Suite 1202
Houston, Texas 77046
(713) 960-6019
77046

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been mailed and/or hand delivered to Keno Henderson, Assistant District Attorney of Harris County, Texas, 201 Fannin, Suite 200, Houston, Texas 77002, on August 21, 1996.

STANLEY G. SCHNEIDER

CAUSE NO. 359805

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

O R D E R

On this day came on to be heard Defendant's Request for a Hearing to Determine the Effect of the Opinion of the United States Court of Appeals for the Fifth Circuit and after hearing evidence and argument of counsel, it is the opinion of this Court that the same should be GRANTED\DENIED. The above motion is set for hearing on October 18, at 9:00 a.m. in the 248th Judicial District Court of Houston, Harris County, Texas.

SIGNED on this the 21st day of August, 1996.

/s/

JUDGE PRESIDING

CAUSE NO. 359805

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

DEFENDANT RICARDO ALDAPE GUERRA'S MOTION FOR PROTECTION

Now comes Defendant, Ricardo Aldape Guerra ("Guerra"), and files this Motion for Protection, for the following reasons:

1. In October 1982, Guerra was found guilty in this Court of the capital murder of a Houston police officer and sentenced to death. His petition for a writ of habeas corpus was granted, and his conviction was set aside. *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), *aff'd*, *Guerra v. Johnson*, No. 95-20443 (5th Cir. July 30, 1996) (a copy is attached for the Court's convenience and marked "Attachment 1").

2. Despite overwhelming evidence of innocence, as discussed in the opinions cited above, Guerra is apparently not popular with many law enforcement officials in Houston, who have never fully appreciated the evidence of his innocence and continue to believe him responsible for the death of a Houston police officer. After the first day of the habeas hearing in federal district court in November 1993, while at the Harris County Jail in the custody of Harris County Sheriff's deputies, Guerra was placed in a small cell that, except for a hole in place of a toilet, had no other furniture, including no beds. He slept on the floor, despite the extreme cold, and was provided no dinner. This was essentially confirmed by Harris County Sheriff Johnny Klevenhagen in a conversation reported on the record by U.S. District Judge Kenneth Hoyt. Transcript of proceedings, Nov. 16, 1993, Vol. II at 3, 108-09, 201, 205-06 (a copy is attached and marked "Attachment 2").

In addition, according to Guerra, while handcuffed he was hit several times by a sheriff's deputy, leaving a bruise on his hand and knee observed by the undersigned counsel. *Id.* at 3, 108, 201-02, 206. Judge Hoyt demanded and reported receiving from Sheriff Klevenhagen an assurance that during the rest of his stay at the county jail, Mr. Guerra would be protected and not subject to physical abuse. *Id.* at 204-05. Judge Hoyt also warned one of the officers who had been escorting Guerra and demanded an assurance that Guerra would suffer no verbal or physical abuse while in their custody. *Id.* at 205-09.

> Let me be very clear. I am not making accusations, but I want to be very clear about what we expect in terms of handling this man. He is obviously on death row. There are a lot of people who don't like him. And there may be officers and police and sheriffs in other places that do not like the fact he is getting this hearing and has been accused and found guilty of this offense. All kinds of reasons why they would feel some emotion about this man. Whatever that emotion is, I want you to assure me and to make sure you communicate with other officers that will be handling this man that none of that will come between you and your job.
>
> That is the best I can do. Otherwise, we will end up with a situation where I will end up having to house him some place separate and different which will cause the state an awful lot of embarrassment and money . . . . I think it is important whatever needs to be . . . gotten a handle on, I will certainly hope you will communicate this with the fellow officers who will be handling him and that no verbal abuse occur. I don't want him coming back tomorrow and telling his lawyer, they took me over and cussed me and called me a bunch of names and told me things were going to happen.

Id. at 208.

3. Guerra is once again at the Harris County Jail. Based on his previous treatment there, Guerra once again fears for his physical safety while he remains in the custody of the Harris County Sheriff's Department. For his protection, Guerra requests that the Court provide appropriate admonitions to the authorities at the Harris County Sheriff's Office and the Harris County Jail that he receive appropriate protection.

Accordingly, Defendant Ricardo Aldape Guerra requests that the Court instruct appropriate personnel in the Harris County Sheriff's Department and at the Harris County Jail that they are responsible for Mr. Guerra's safety and that any physical or verbal abuse of Guerra will be dealt with immediately and firmly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was hand delivered to opposing counsel on the 20th day of August, 1996.

Scott J. Atlas

VEHOU07:21585.1

Ricardo Aldape GUERRA,
Petitioner-Appellee,

v.

Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellant.

No. 95-20443.

United States Court of Appeals,
Fifth Circuit.

July 30, 1996.

After defendant's capital murder conviction was affirmed on direct appeal, 771 S.W.2d 453, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., 916 F.Supp. 620, granted habeas relief, and state appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that state's failure to disclose material exculpatory information to defense violated due process.

Affirmed.

1. Constitutional Law ⇐268(5)

State's failure to disclose material exculpatory information to defense is violative of due process if there is reasonable probability that, had evidence been disclosed, result of proceeding would have been different. U.S.C.A. Const.Amend. 14.

2. Habeas Corpus ⇐719

District court's finding that state's failure to disclose material exculpatory information violated due process, and thus warranted habeas relief, was not clearly erroneous, in view of evidence that one witness was intimidated by police into identifying defendant as shooter and later gave testimony indicating that defendant's companion was shooter, and that written versions of other witnesses' statements, which were prepared by police, did not conform to what witnesses told police. U.S.C.A. Const.Amend. 14.

3. Federal Courts ⇐844

Court of Appeals will declare testimony incredible as matter of law only when it is so unbelievable on its fact that it defies physical laws.

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

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Contending that the district court's factual findings of numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense, are clearly erroneous, Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, appeals the grant of habeas relief to Ricardo Aldape Guerra, who was convicted of capital murder and sentenced to death in 1982. We AFFIRM.

I.

On July 13, 1982, approximately two hours before midnight, Houston police officer J.D. Harris stopped his police car behind an automobile occupied by Guerra and Roberto Carrasco Flores (Carrasco), at the intersection of Edgewood and Walker Streets. Moments

Attachment 1

later, the Officer was shot three times in the head with a nine millimeter weapon and died shortly thereafter. Jose Francisco Armijo, who was near the intersection in an automobile with two of his children (one of whom, then ten years of age, was a key witness against Guerra at trial), was also shot in the head with a nine millimeter weapon and died later.

Witnesses informed police that the suspects might be found in the same neighborhood, at 4907 Rusk Street (Guerra's address). About one and one-half hours after Officer Harris was shot, Officer Trepagnier approached a garage next to that address. Using a nine millimeter weapon, Carrasco shot and seriously wounded the officer. Carrasco was killed in the ensuing exchange of gunfire with police. The nine millimeter weapon was found under Carrasco's body, and Officer Harris' service revolver was found under Carrasco's belt, along with another clip for the nine millimeter weapon.

Guerra was arrested moments after Carrasco was shot, when officers found him hiding nearby. A .45 caliber pistol was found within Guerra's reach.

Although the physical evidence pointed to Carrasco as Officer Harris' killer, Guerra was charged with capital murder on the basis of eyewitness identification. (The State did not seek to convict Guerra under the law of parties.)

In October 1982, three months after the murder, a jury found Guerra guilty, rejecting his defense that Carrasco shot Officer Harris; he was sentenced to death. The Texas Court of Criminal Appeals affirmed in 1988, *Guerra v. State*, 771 S.W.2d 453 (Tex.Crim.App.1988); and the next year, the Supreme Court denied Guerra's petition for a writ of certiorari. *Guerra v. Texas*, 492 U.S. 925, 109 S.Ct. 3260, 106 L.Ed.2d 606 (1989).

Guerra filed for habeas relief in the state trial court in May 1992. Following the appointment of new counsel that July, he filed an amended application in mid-September. Four days later, the trial court, without conducting an evidentiary hearing and making findings of fact or conclusions of law, recommended denial of relief. In January 1993, the Texas Court of Criminal Appeals accepted the recommendation and denied relief.

Shortly thereafter, in February, Guerra sought federal habeas relief. The district court conducted an extensive evidentiary hearing that November, and, a year later, in November 1994, entered an order granting relief. The order was amended the next May, *Guerra v. Collins*, 916 F.Supp. 620 (S.D.Tex.1995), and the respondent was ordered to release Guerra unless the State began retrial proceedings by arraigning him within 30 days. Our court stayed the judgment.

II.

As stated, the physical evidence led directly to Carrasco as Officer Harris' murderer. An obvious, critical question is why, if Guerra instead shot the Officer, the murder weapon (not to mention the Officer's service revolver) was found under Carrasco's body one and one-half hours after the Officer was shot. At oral argument, the respondent espoused the theory that, when Guerra and Carrasco exited their vehicle after the Officer pulled up behind them, they picked up each other's weapons, and then exchanged them after the murder. In light of this theory, it goes without saying that the next question that follows immediately is why, if Guerra shot the Officer, Carrasco would have been willing to take back and keep a weapon just used to kill a policeman. Among other obvious reasons for not wanting to be found with a murder weapon is the fact that it is common

knowledge that anyone who kills a law enforcement officer will be quickly, vigorously, and aggressively pursued, as reflected by the events in this case.

The State relied on this exchanged weapons theory at trial. In closing argument, the prosecutor stated:

> I don't have to prove to you how ... Guerra came in possession of that nine-millimeter pistol....
>
> ....
>
> There is no way that I had any type of equipment set up inside of that vehicle to show you what was done inside that vehicle and how the weapons could have gotten into this man's [Guerra's] hands, but you know one thing from listening to the evidence, and you know one thing from listening to when Ricardo Guerra testified. He didn't always keep his pistol tucked into his belt.
>
> Do you recall, right towards the end of his testimony, I asked him, "When you went into the store to get those Cokes [before the shooting], did you still have that pistol tucked inside your belt with your shirt covering it?"
>
> "No, I put it under the seat," and I think you can use your common sense....
>
> Do you think these guys are driving around and they've got those guns tucked in their belts? They take them out and set them on the seat....
>
> Do you think perhaps when they got out of the car, they picked up the wrong gun?

The record, however, contains little, if any, evidence to support this theory. Obviously, this was a critical fact issue at trial. As discussed *infra*, the State's non-disclosure of exculpatory information concerning this issue was one of the bases upon which the district court granted habeas relief.

At trial, Guerra testified that, on the night of the shooting, he and Carrasco went to the store; that Carrasco had a nine millimeter pistol which he was carrying at his belt; that he (Guerra) also was carrying a gun; that he put his gun under the car seat when he went into the store; that he put it back in his trousers when he got back to the car; and that the gun was in his belt when he got out of the car after Officer Harris arrived at the intersection.

On cross-examination at trial, Guerra denied that he and Carrasco took their guns out of their belts and put them on the seat while they were driving around. He testified further that Carrasco, whom he referred to by the nickname "Werro" (spelled various ways in the record; according to the respondent at oral argument, it meant "the blond one" or "the light-skinned one"), shot Officer Harris and took the Officer's gun; that they ran back to Guerra's residence (4907 Rusk Street); and that, when they arrived, Carrasco had two weapons—his own (the nine millimeter) and the Officer's.

Two of Guerra's roommates testified at trial that, shortly after Officer Harris was shot, Carrasco ran into the house and said that he had killed a policeman; and that Carrasco had the policeman's gun in his belt and another gun in his hand. One roommate testified further that, when Guerra arrived a minute or two later, Guerra said that Carrasco had just killed a policeman.

Two of the State's strongest witnesses at trial were Jose Armijo, Jr. (the then ten-year-old son of the man fatally wounded at the same intersection immediately after Officer Harris was killed), who testified that Guerra shot Officer Harris and his father, and Hilma Galvan, who testified that she saw Guerra shoot Officer Harris. Neither testi-

fied, however, at the federal evidentiary hearing.

The district court held that Guerra's due process rights were violated based on findings that, *inter alia*, (1) police and prosecutors threatened and intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense; (2) police and prosecutors used impermissibly suggestive identification procedures, such as permitting witnesses to see Guerra in handcuffs, with bags over his hands, prior to a line-up, permitting witnesses to discuss identification before, during, and after the line-up, conducting a reenactment of the shooting shortly after it occurred so that witnesses could develop a consensus view, and using mannequins of Guerra and Carrasco at trial to reinforce and bolster identification testimony; (3) police and prosecutors failed to disclose material, exculpatory evidence to the defense; (4) prosecutors engaged in misconduct at trial, including soliciting and encouraging witnesses to overstate or understate facts, falsely accusing a defense witness of either being drunk or having "smoked something" because he yawned during his testimony, questioning a defense witness about an extraneous murder which the prosecutors knew was a false rumor, and making improper closing argument; and (5) a court interpreter inaccurately translated witnesses' trial testimony.

Because the state habeas court did not make findings of fact, the statutory presumption of correctness for such findings is not in play. (The 28 U.S.C. § 2254(d) presumption of correctness has been redesignated as § 2254(e)(1) in the Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. No. 104–132, § 104(3), 110 Stat. 1214, 1219 (1996).) In fact, the only issue raised here is the contention that "the district court's factual findings that the police and prosecutors engaged in misconduct depriving Guerra of due process . . . are clearly erroneous." As a result, the respondent conceded at oral argument that, if those findings are not clearly erroneous, then a due process violation occurred. (Inconsistent with the statement of the issue and the concession at oral argument, the respondent's brief contains assertions that certain factual findings, even if not clearly erroneous, are legally irrelevant. We conclude that habeas relief is warranted by legally relevant factual findings that are not clearly erroneous.)

To restate the well-known standard, a factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (citation omitted). Along that line, in a case such as this, which turns almost exclusively "on determinations regarding the credibility of witnesses, [FED.R.CIV.P.] 52(a) demands even greater deference to the trial court's findings." *Id.* at 575, 105 S.Ct. at 1512. Similarly, "[w]here the court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error." *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir.1993) (internal quotation marks and citation omitted). Three examples more than suffice to demonstrate why, based on our review of the record, there are sufficient legally relevant, non-clearly erroneous findings of fact to warrant habeas relief.

[1] The district court found that, in interviews with police and prosecutors, three witnesses, all then under the age of 18 (Herlinda Garcia (14), Patricia Diaz (17), and Frank Perez (17)), gave police and prosecutors ma-

terial exculpatory information that was not disclosed to the defense. Such non-disclosure is violative of due process if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment); *see also Kyles v. Whitley*, — U.S. —, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). As noted, for these three examples, because, with slight exception, the respondent presents only a factual issue, our review is a most narrow one—were the findings of fact underlying a due process violation because of the non-disclosure clearly erroneous.

[2] Garcia, who identified Guerra at trial as Officer Harris' murderer, testified instead at the federal evidentiary hearing that she told police and prosecutors that she saw Carrasco pull something out of his trousers and point at Officer Harris with both hands clasped together in front of him; that Carrasco was standing a "couple of feet" away from the Officer; that she saw flames coming out of Carrasco's hands; and that, when she heard the shots, she saw Guerra leaning toward the police car, near the front, with his empty hands on the hood. This information was not included in Garcia's written statement, nor was it disclosed to the defense. Garcia, who, as noted, was 14 years of age at the time of the shooting, testified further that she was intimidated into identifying Guerra as the shooter by police warnings that her common-law husband, a parolee who was over 18 years of age, could be adversely affected if she did not cooperate.

The respondent contends that Garcia's testimony is not credible because her written statements prepared by the police were consistent with her trial testimony, even though she had not read her statements before trial, and because, if the police were trying to coerce witnesses to identify Guerra as the shooter, they would not have allowed Garcia to describe the shooter, both in her statement and at trial, as having blond hair and wearing a brown shirt and brown trousers. (Guerra had dark hair and was wearing a green shirt and blue jeans at the time of the shooting; Carrasco also had dark hair (but, as noted, was commonly referred to as "Werro", the "blond one" or "light-skinned one") and was wearing a purple or maroon shirt and brown trousers.)

[3] Finding that Garcia's habeas testimony was credible, the district court found further that she had been intimidated by police and prosecutors, and that the police omitted material exonerating information from her written statement. We will declare testimony incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." *United States v. Casteneda*, 951 F.2d 44, 48 (5th Cir.1992) (internal quotation marks and citation omitted). As the district court noted, Garcia's testimony is consistent with the physical evidence that Carrasco, rather than Guerra, shot Officer Harris. Accordingly, we cannot conclude that the court clearly erred by finding that Garcia told the truth at the evidentiary hearing.

Patricia Diaz, who, as noted, was 17 years of age when she testified at trial, testified at the evidentiary hearing that she told police and prosecutors that, an instant after she heard shots, she saw Guerra on the driver's side of the police car, near the front, facing that car, with his empty hands on its hood, as if he were about to be searched; and that she did not see anyone shoot Officer Harris.

But, her description of Guerra's location and his empty hands was not included in her written statements prepared by the police. Diaz testified further that, contrary to what is included in her first written statement, she did not tell the police that she saw a man from Guerra and Carrasco's car "pointing a gun in the direction of the police car, and I saw him shoot four times at the police car"; nor, contrary to what is included in her second written statement, did she tell the police, after the line-up, that she saw Guerra "with his hands outstretched, and I guess he had a gun in his hands". Diaz testified that she signed her statements without reading them because she was tired and because she was frightened by police threats to take her infant daughter from her if she did not cooperate.

The respondent maintains that Diaz's habeas testimony is not credible because, again, her trial testimony was consistent with her statements, even though she never read them. The respondent asserts that if, as Diaz testified at the evidentiary hearing, she had demonstrated at trial how Guerra was "pointing" by stretching her arms out in front of her with her palms open and down, the prosecution would have clarified her testimony, or the defense would have capitalized on it. The district court found, however, that Diaz's trial testimony was the product of police intimidation, and was tainted by the prosecutor's inclusion in his questions of incorrect statements of Diaz's prior testimony. Again, because there is evidence in the record to support these findings, we cannot conclude that they are clearly erroneous. Restated, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74, 105 S.Ct. at 1511.

Finally, Frank Perez, who, as noted, was 17 years of age when he testified at trial, testified at the federal evidentiary hearing that it "could have been anywhere from 30 seconds to a minute and a half" after he heard gunshots that he saw two men run past his house; but, he was "not really sure exactly how long it was". Perez's statement to the police the day after the shooting reports that he saw a Mexican American male run past his house "[j]ust a short time after the gun shots"; at trial, he testified that "it might have been a minute or less than that, or maybe a little over a minute", that he "couldn't really place the time".

Perez testified further at the federal hearing that he told the police and prosecutors that he could not identify the first man, who appeared to have been running on the south side of Walker Street (as noted, this was one of the streets forming the intersection where the shooting occurred); that the second man, whom he identified as Carrasco, appeared to have been running on the north side of that street; that, as Carrasco ran past, he pointed his left hand at Perez; that Carrasco put his left hand behind his back and then dropped an object that looked like a nine millimeter gun with a clip; that the object hit the street, making a metallic scraping sound; and that Carrasco picked up the object with his left hand and continued running down the street. Perez's written statement, prepared by the police, did not include that Carrasco appeared to be coming from the north side of Walker Street, or that the gun appeared to be a nine millimeter, or that Carrasco used his left hand both to point the gun at Perez and to pick up the gun. The word "gun" was typed in Perez's written statement, but, according to Perez, was changed to "object" after the police told him not to use the word

"gun" unless he was 100% certain that the object was one.

The respondent does not challenge Perez's credibility; instead, he contends that, because the defense had Perez's written statement—with "gun" changed to "object"—when it cross-examined him at trial, the district court erred by finding that the prosecution suppressed Perez's statement that Carrasco dropped a gun. But, the respondent does not address the other information that the district court found to have been omitted from Perez's statement (that Carrasco appeared to be coming from the north side of Walker Street, that the gun appeared to be a nine millimeter, and that Carrasco used his left hand to point the gun at Perez and to pick it up after he dropped it). Obviously, that information was material, because, according to it, Carrasco had the nine millimeter murder weapon shortly after the shooting. Moreover, the information is consistent with other evidence presented at the federal evidentiary hearing that there was a scratch on the nine millimeter weapon, consistent with it having been dropped; that the shooter ran from the scene on the north side of Walker Street; and that the shooter was left-handed (there was evidence at the federal hearing that Guerra is right-handed; this was not brought out at trial). As noted, the respondent challenges neither the correctness of the district court's factual finding that this information was suppressed, nor its materiality.

These three examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief. We need not discuss further examples of the lack of clear error in the district court's detailed factual findings. In sum, we are satisfied that more than sufficient non-clearly erroneous, legally relevant findings of fact support such relief.

III.

For the foregoing reasons, the judgment is *AFFIRMED.*

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

(The following proceedings were held outside the courtroom, in jury room.)

MR. ATLAS: Your Honor, my client advised me this morning about 15 minutes ago for the first time several things I thought important to bring to the Court's attention immediately. Not necessarily in the order of importance, he told me that last night he was -- they put him in a small cell that has a hole for necessity, but no other furniture, including no beds. He had to sleep on the floor and about froze to death.

Secondly, he got no dinner last night, a sandwich this morning. And when he was back at the county jail after the Marshal had released him, I believe, although I am not familiar enough with the mechanics to get the sequence completely accurate, he said one of the guards there who was wearing a TDC uniform hit him several times. He said he hadn't spoken to him in advance and I've actually seen one of the bruises on his hand. He has got another one on his knee. The fellow hit him at least three times.

MR. GEE: While he was handcuffed.

MR. ATLAS: While he was handcuffed. Must have been shortly after he got back over there. Needless to say, I am very disturbed about this and would ask the Court for whatever relief.

THE COURT: I guess I need to say something about this

Attachment 2

at this point on the record. A call came into my office this morning and I believe it was from police officer Heater. I believe she is the female who --

MS. CORNELIUS: Amey Heater.

THE COURT: -- testified. And she asked me to get in touch with Mr. Zapalac because she wanted to communicate with him. And of course, I said well -- I told my secretary, I said well, we really don't take messages. This is not the center for that. I said but if Mr. Zapalac is -- she's got the lady on hold. I said if this is one of Mr. Zapalac's witnesses, somebody who is assisting him, then I will have one of the clerks just take the number and name and Mr. Zapalac can call her back and tell her when she is to be here, whatever.

Well, when she got back on the phone, what she realized was the lady was offended by some article that appeared in today's Post or Chronicle. And she is not apparently a witness in the case. I don't think she is.

MS. CORNELIUS: No.

MR. ZAPALAC: She is not.

THE COURT: She indicated she had not apparently been contacted by you and her whole purpose and motivation was to get me to deliver a message to you so she could talk to you so that she would be able to, quote, set the record straight, so she could tell you what was wrong with this testimony yesterday. I simply bring that up to make sure that none of

you -- and I don't suggest that any of you are and obviously I don't think you had anything to do with any of this. This is a person who apparently is still with the police department.

MS. CORNELIUS: She is in the crime lab.

THE COURT: Yes, who wants to throw her --

MS. CORNELIUS: Two cents in.

THE COURT: -- two cents in. And I would say this. I will -- my office will take a message from any of your people that need to get in touch with you, if they are your witnesses or people that need to -- because I know that you don't walk around with phones in your pocket and things like that. That is important that you know what is going on. But I want you to know that because I don't want someone to tell you later on that there was an effort to reach you and the judge's office would not give you the message.

MR. ZAPALAC: Certainly.

THE COURT: I don't have an obligation to do it. But I don't know what the next move might be by this lady. She may call the press, she may say I called the judge's chambers, which is totally inappropriate anyway. And she may have some things to say about it. She may finally contact you and tell you she is unhappy that I didn't give you her number. And I told my secretary I am not going to give him any number based on what is going on.

I mention that because in the context of what you

are saying, there are some things that are happening that probably would not ordinarily happen in this kind of case.

I am not sure what I can do except to probably have -- I think there is an attorney, I think, out there for the police department. Obviously this man is not being handled by the police department, the City of Houston. He is being handled, I believe, by the Harris County Sheriff's Department. And it seems to me that the appropriate thing to do would be to get in touch with the sheriff about this, me personally try to talk with the sheriff about it to let him know the seriousness of this problem.

And I invite suggestions from you regarding how this should be handled because it is a very serious matter. And I am not sure what the total and full implications of this are in the sense that this man could -- his life could be put in jeopardy by simply placing him someplace that parties would not like him. And for whatever reason. Or someone do something to him thinking they are going to do the City of Houston or the Sheriff's Department some favor because they've overheard somebody say something. And even worse, police agency involvement in this kind of harassment and violation, potentially, of civil rights by individuals, if any of this is true.

So I would invite suggestions from you. I simply -- I believe that the best way to deal with it is to get

Sheriff Klevenhagen on the phone and talk to him about it or ask him to come over here and tell him in your presence what the problem is. And that, you know, this is on his watch. It is not on some sergeant's watch. It is not on some deputy's watch. It is not on somebody else's watch. This is his responsibility. I think that is the only way I know of to deal with it because to try to talk to someone else doesn't make any sense and I am not sure it makes any sense for you to deal with it because it is really not your fight. Not that anyway. You are state officials. And even the District Attorney's office doesn't have any authority over the Sheriff's office. These are all elected individuals and they have that responsibility.

MR. ATLAS: I appreciate that. I appreciate it happening -- consistent with the Court's convenience and schedules, having it happen as soon as reasonably possibly so if Sheriff Klevenhagen indicates there are not many options open to him, we can think about what option may be proposed.

THE COURT: I hate to think there aren't options available in the county jail situation.

MR. ATLAS: I am not opposed to him being segregated from the rest of the inmate population. I understand there is some security risk involved. Obviously the notion that he isn't given bed and isn't given dinner, obviously none of which I have personal knowledge of, but at least the first two ought to be easily verifiable in the sheriff's records.

THE COURT: Well, does he know the name of the officer that hit him?

MR. ATLAS: I don't think he does although I am not sure I posed the question quite that way. I asked him who it was and he said it was a TDC official.

THE COURT: As opposed to the sheriff.

MR. ATLAS: As opposed to the sheriff.

THE COURT: There are a couple in the courtroom.

MR. ATLAS: I don't know, but he is not in the courtroom.

MS. CORNELIUS: He was in a TDC uniform?

MR. ATLAS: That is what he said. When I heard about it, I decided I should give him the third degree. And I really haven't taken him on voir dire.

MR. GEE: Your Honor, I don't suppose there is room in the facility in the courthouse.

THE COURT: I don't know if we have overnight capability. We certainly have holdover cells. Sort of metal type. But we do not have the ability to house people overnight. That is not to say that we can't do it because I suspect that what we may have to do if we can't get some assurance is certainly we would have to make some arrangements maybe with the Marshal's Service there.

MR. GEE: My concern, Your Honor, is not only for him, but for what the people out here, if they heard about it.

THE COURT: Yes, and that is something that I don't want.

MR. GEE: We might have a riot.

THE COURT: I don't want to handle it in that fashion. I want to make sure that the appropriate officials understand the gravity of this situation and understand the seriousness of it to the extent that I don't want to have to stop doing what I am doing now to conduct a hearing about what is going on in the jail and enter some special order ordering the sheriff to do something because I think his general attitude would be it ain't my job, it is a state prisoner. You know, with all of the problems that the state and the county have had. It is a mixed bag of confusion at the very least.

MS. CORNELIUS: Do you want me to just try right now to get Sheriff Klevenhagen on the line?

THE COURT: I think I will do it. I will put a call in to his office now. And if he doesn't return my call, I would hate to think he would return yours.

MS. CORNELIUS: No, sir, I was going to call in your name. I was going to call in your name.

THE COURT: No, I think I need to try to personally get him on the phone and see if I can get him over here because I think it is important that he come over and talk with me in a setting like this about the situation. Now, he doesn't have any authority over the state -- theoretically over the state

guards, prison guards in some general sense. Certainly he has a responsibility -- certainly he has a responsibility to deal with persons that are in his domain and to speak to them specifically about matters that may be of interest and would protect him from knowing participation by just blind eyes to what is going on. So I think that it would be best for me to go ahead and call him and see if I can get him on the phone and tell him how important it is.

MS. CORNELIUS: Actually, Judge, I think right now he is a federal prisoner because he is being handled under a federal bench warrant. So, Judge -- the sheriff, I think, does have actual responsibility over him because you all have the agreement with the county jail holding federal prisoners. So don't let him tell you he doesn't have any control.

THE COURT: Well, he can tell me what he wants to. I won't argue with him about it but I do believe you can't just let something happen in your house. I don't think my sister can come over and beat a kid up in my house and kill him and I stand there and watch.

MR. GEE: Really this man has very little incentive to say something like this if not so. And if it is, we've got the potential for a real disaster.

MR. ATLAS: Yes, we do, and that is something I prefer to avoid any way I can so long as my client's rights are protected.

THE COURT: Okay, let me make that phone call and I will try to report back to you as soon as I hear something from him on that matter.

MR. ATLAS: Your Honor, I will also endeavor to see if I can get any more information describing the particular guard and if I can, I will report it to one of your court personnel.

(Proceedings in the courtroom.)

THE COURT: All right, I apologize for the delay. But I think we are ready to get started now. I believe we concluded on yesterday with the testimony of, I believe, Mr. Perez. And I believe we are ready now for your next witness. Who is that?

MR. ATLAS: Your Honor, I call to the stand Donna Monroe Jones. I had somebody go out in the hall to get her. Had some problems with weather-induced delay this morning, but I think most everybody will be here.

THE COURT: I understand that. That is why we have to some extent been delayed. We are still having some weather problems out there. Hopefully we will have that blow over and through soon.

Please come forward, ma'am. And we will swear you in.

DONNA MONROE JONES

Witness called by the petitioner, duly sworn

DIRECT EXAMINATION

procedure. If I need to enter some order, let me know. In the meantime, if he feels more comfortable, let him do that.

MR. ATLAS: I should say on the record, I mentioned this to you and Mr. Zapalac, I discovered after our in camera visit this morning that I had erred about one aspect about what my client told me involving the jail. He misunderstood a question of mine and said there were TDC guards present when the pummeling or whatever it was took place. It was actually someone from the Sheriff's Department that did it. There were other people present from TDC.

THE COURT: I had a call back, and I am glad you brought that up because I did get a call back from Sheriff Klevenhagen right about noontime. He indicated to me or confirmed what the procedure is for them to book a person out in the morning because he is a federal prisoner and book him back in in the afternoon. And that if someone, in his words, failed to do the computer work right, he would remain in a holding cell which is apparently where he was with no bed that entire night. But that it would not happen again. That has been corrected.

He also indicated that they gave him a bag lunch, a sack lunch is what they would normally give prisoners in the afternoon, I gather, or late people, they consider to be too late for dinner. I don't know what the dinner hours are. But you may want to confirm, find out from your client whether or

not he received a sack lunch of some sort.

MR. ATLAS: I did ask him that question because he said he had a sandwich given to him this morning but he had nothing last night after court.

THE COURT: What they are claiming occurred, according to him, did not occur. Or at least what Sheriff Klevenhagen's records show did not occur.

MR. ATLAS: What about the most significant, the first safety concern?

THE COURT: Well, he assured me that he was not aware of it, no incident reports, which obviously if you are going to slap somebody, you are not going to write it down. He assured me that would not happen. What I am going to do is to speak with the US Marshals and let them know that it is their responsibility to protect this prisoner while he is here in court, and if they have to sleep with him, that is their problem. They better make sure that he is not being mistreated.

The other thing that I think may be important, I don't know how many state guards are here, but from my perspective, I don't like to treat these things lightly. I would want to know from these guards that are here how many of them are here. They may have people over at the county jail all the time. In and out all the time. I don't know. But I would like to know who handled him last night, who put him in

his cell, those kinds of things. Somewhere during the course of this proceeding, we may end up having a little hearing like that to determine the extent of any handling by these persons and the extent to which they did or did not witness or participate in any altercation involving Mr. Guerra.

So I just say that because I think it has been brought to my attention. I don't think I can just say well, maybe it didn't happen. I think I've got to have a hearing to determine what, if anything, needs to be done. And it will also be based upon how he gets treated today also.

MR. ATLAS: He did tell me that they seem to send different people from the TDC down every day or at least the guards he has seen today from TDC are different.

MS. CORNELIUS: I was just going to say that these guards will be going back to Huntsville tonight.

THE COURT: Why are they going back and forth?

MS. CORNELIUS: So they don't have to pay the hotel.

THE COURT: They get mileage.

MS. CORNELIUS: They will be in state cars.

MR. ATLAS: And I asked him whether there was anyone in the courtroom who participated or observed and he said no.

THE COURT: Well, I think we can find out who the other guards were, whether it is through the records that are kept or not. But I think that can be determined. So if you want to go ahead and have your client change his shoes, I don't

have any problem with doing that so long as when he is -- if he is going -- when we take a break, and I am not sure what time we should break this this afternoon, we have got quite a bit of a problem out there with the weather. May be we should get out of here 3:30, 4:00 to make sure you all can get home, I guess. In any event, if he takes a break and goes upstairs, he cannot wear the shoes upstairs because they would obviously be offended by that. I want to make sure that we recognize and respect that procedure.

MR. ATLAS: And I will instruct my client.

Your Honor, I take it there is not anything we need to do in terms of subpoenaing the sheriff's records about who was on duty last night or anything of that nature.

THE COURT: Not at this point. And I'm not sure whether or not -- I mean if you want to do something about this, you certainly have the right to do something independent of this proceeding. But my main concern has to do with making sure that the right people get the message.

MR. ATLAS: That is my principal concern by far.

THE COURT: Because the other part of it has to do really with a personal grievance of his own. But I want to make sure he is not mishandled during this process.

(In open court)

THE COURT: All right, Mr. Atlas, are you ready to proceed at this time?

THE COURT: All right, you may step down, sir. Thank you very much.

MR. ATLAS: I ask that he be excused.

THE COURT: Any objection?

MR. ZAPALAC: No objection.

THE COURT: You may be excused. Thank you very much.

(Witness excused)

THE COURT: Let me see the attorneys at the bench.

(At the bench)

THE COURT: Mr. Guerra has informed his attorneys who have informed the Court that on yesterday afternoon when he was taken back to the Harris County Sheriff's office -- Harris County jail, that he was maintained in a, what I have learned this morning from Sheriff Klevenhagen to be a holdover cell which meant that he had nowhere to sleep except on the floor last night. And that he was not fed, that he was not given a sack lunch or any kind of -- I say sack lunch meaning he was not given a sack dinner last night.

I talked to Sheriff Klevenhagen about that. But I would like you to communicate to the United States Marshal or through the supervisors that I want them to ensure that this -- that this does not happen again.

DEPUTY US MARSHAL CHILDERS: Okay.

THE COURT: And that if they cannot ensure that, then I will take whatever affirmative acts are or is necessary to

ensure that the prisoner gets treated appropriately and also that the prisoner is fed after he goes back over in the afternoon.

There was an additional complaint that one of the Harris County deputies physically -- well, handled him. In other words, he punched him a couple, or two or three times or more. I am not sure and I have not asked Mr. Guerra anything and I don't want to go on the record at this point necessarily of asking him that. But I do want to make sure that when you all -- do they bring him through you all's holdover in the morning?

DEPUTY US MARSHAL CHILDERS: Yes, sir, they bring him to our holdover.

THE COURT: I would like for -- I would like for you all to make an inquiry each morning so that we don't have a problem on our hands here in the federal facility as to whether or not he has any complaints about, for example, any physical complaints or any problems. And we don't want to be handling him here if he has been physically hurt. I want to know that and I want you all to make sure that you record that he has been communicated with and that he doesn't have any complaints about the way he has been treated because if he comes in here injured, it becomes a problem for us obviously not paying attention to what is going on. I want to make sure he is communicated with on a daily basis in terms of what his

treatment has been the night before or during the period of time that he has been away from the federal facility. So if you would communicate that to her and if she needs some kind of order, some kind of letter from me, I will have it ready tomorrow morning.

DEPUTY US MARSHAL CHILDERS: Very good.

THE COURT: Let me say this. I will -- Mr. Guerra, I want him taken back and I don't know if I should communicate with the state prison guards or with you about this, but I want to take him back to the jury room behind me here so he may speak directly with his mother. And I know you all have your policies and procedures.

DEPUTY US MARSHAL CHILDERS: Yes, sir.

THE COURT: If that is not going to happen, if you don't want to do it that way, certainly you can do it in the courtroom. I don't want these people, the general public involved. It is not the situation where I want them feeling there is some reaction they need to make to this or reaction they need to maybe make to one of the officers not liking what was happening. We could have 200 people down here tomorrow marching around the building making us all look bad by what is happening here.

MR. ATLAS: By direct visit, you mean contact?

THE COURT: Yes, direct contact. I think everybody ought to be able to hug their mother at some point. What I

would like you to do is assure yourself along with Mr. Atlas that Mrs. -- what is her last name?

MR. ATLAS: Guerra de Aldape.

THE COURT: -- Mrs. Guerra has left all of her personal belongings. I am sure she went through the scanner and all that. But whatever she has got personally, she leaves it there at the bench and she may come inside the well. I may call her up. I don't know if she speaks English.

MR. ATLAS: She does not.

THE COURT: I don't want to go through that.

MR. ATLAS: She has someone that can interpret.

DEPUTY US MARSHAL CHILDERS: Do you want that done in the courtroom?

THE COURT: I want that done in the courtroom. You can ask her to come inside the well. Mr. Atlas will bring her inside to the bench here and she will be able to -- let's do it like this. Let's bring her up to the table and let her sit next to her son and she can talk and hug.

DEPUTY US MARSHAL CHILDERS: That would be fantastic.

THE COURT: Make sure she leaves her personal stuff in the back.

Could you speak to the prison guard in the back and ask him if he would step forward, please.

MR. ATLAS: Your Honor, it wasn't clear what extent Sheriff Klevenhagen had maintained that he would be able to

assure the physical safety of my client this evening.

THE COURT: He assured me that nothing would be happening to this young man. He gave me the impression that he had talked with the persons in charge and had communicated with them the importance that this be taken care of. And that is why I want you to make sure that your client communicates with the Marshal in the mornings when they come in and say look, something has happened and I need to tell you what it is before we get started so we will know the extent to which, if anything, we have a problem.

How are you doing this evening? What is your name for the record.

OFFICER HIMPSTEDT: Bill Himpstedt.

THE COURT: Himpstedt. How are you referred to, is it officer?

OFFICER HIMPSTEDT: Correction officer, yes. Transfer officers.

THE COURT: Officer Himpstedt, a complaint has been made by the attorneys representing Mr. Guerra regarding conditions that existed on yesterday afternoon at the jail. And I talked to Sheriff Klevenhagen about those, particularly number one, that Mr. Guerra did not get dinner last night. And number two, he didn't get booked in. None of that is your problem because you don't have the ability to make them book people in.

And -- but I want to make sure there is no omission here, that you are not doing something to prevent him from getting booked in and prevent him from getting to a cell where he can sleep. He did not sleep in a bed last night. He slept on the floor. And I am sure you know from your handling state prisoners that is really a violation of all the rules that have been set down for state prisoners, and it also violates our state order, our order here for the Harris County jail. But I want to make sure you and the people that handle him do not interfere with him in any way and prevent him from being handled appropriately by the Sheriff's Department when he is taken over there because I think he is being held in their custody pursuant to agreement between you all.

The second part of his complaint is a little bit more serious and concerns me quite a bit. His complaint is that one of the Harris County deputy sheriffs physically hit him on more than one occasion, either in your presence or in the presence of other officers. How many of you all were over there yesterday?

OFFICER HIMPSTEDT: Two officers were there.

THE COURT: Yourself and one other?

OFFICER HIMPSTEDT: Yes, sir.

THE COURT: Who was the other officer?

OFFICER HIMPSTEDT: Mr. Blumenthal was with me yesterday.

THE COURT: He is not here today, is he?

OFFICER HIMPSTEDT: No, sir.

THE COURT: How many officers are here today?

OFFICER HIMPSTEDT: We have four here today.

THE COURT: Four here today. So it is yourself and who else this afternoon?

OFFICER HIMPSTEDT: That man over there.

THE COURT: You don't know his last name right now?

OFFICER HIMPSTEDT: Mr. Barrow.

THE COURT: Mr. Barrow. In any event, the allegation is that this physical confrontation and violation occurred in your presence and that you were present when it occurred. Now, I don't know to what extent this man was handled or how he was handled, but certainly the last thing in the world that we need in the middle of this proceeding is for this man to be handled in such a way that it becomes something of a media event.

Number two, we do still have the 8th Amendment that creates a very serious problem for all of us, me from the point of view that I have the responsibility once these things come to any attention to make sure that not only I communicate with you and the other officers but that I put this information in the hands of people who have the responsibility to take care of it; you in the sense that it involves you personally, at least by the allegations; and the sheriff in the sense that it may involve him personally along with some of his officers.

Let me be very clear. I am not making accusations, but I want to be very clear about what we expect in terms of handling this man. He is obviously on death row. There are a lot of people who don't like him. And there may be officers and police and sheriffs in other places that do not like the fact he is getting this hearing and has been accused and found guilty of this offense. All kinds of reasons why they would feel some emotion about this man. Whatever that emotion is, I want you to assure me and to make sure you communicate with other officers that will be handling this man that none of that will come between you and your job.

That is the best I can do. Otherwise, we will end up with a situation where I will end up having to house him someplace separate and different which will cause the state an awful lot of embarrassment and money and the press can get this and run with it and embarrass us. I think it is important whatever needs to be gotten ahold of, gotten a handle on, I will certainly hope you will communicate this with the fellow officers who will be handling him and that no verbal abuse occur. I don't want him coming back tomorrow and telling his lawyer, they took me over and cussed me and and called me a bunch of names and told me things were going to happen. I see too many of those cases in my court. I appreciate it if this information is disseminated to the officers who are handling him if you would.

OFFICER HIMPSTEDT: I will.

THE COURT: I am going to permit his mother to come inside the well of the Court and spend two minutes with her son as soon as we dismiss. As soon as that is over, you all will be released to go.

MR. ATLAS: She have an opportunity to hug him and will not bring her purse.

THE COURT: Right. She is not going to bring any paraphernalia.

MR. ATLAS: Although I have nothing in particular, I would like to have the opportunity to take photographs of my client's bruises.

THE COURT: Well, I think you can probably bring a camera into this building. I will have to sign something. You need to take it up to the top floor and use it and take it back to the bottom floor and they will hold it for you. Communicate with your client and we will stand at ease.

MR. ATLAS: I will ask her to wait where she sits.

THE COURT: I really don't care. I think we should just do it.

(In open court)

THE COURT: All right, that is it.

(Whereupon the above-entitled matter was recessed)

Ricardo Aldape GUERRA, Petitioner-Appellee,
v.
Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellant.

No. 95-20443.

United States Court of Appeals,
Fifth Circuit.

July 30, 1996.

After defendant's capital murder conviction was affirmed on direct appeal, 771 S.W.2d 453, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., 916 F.Supp. 620, granted habeas relief, and state appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that state's failure to disclose material exculpatory information to defense violated due process.

Affirmed.

[1] CONSTITUTIONAL LAW ⇐ 268(5)
92k268(5)
State's failure to disclose material exculpatory information to defense is violative of due process if there is reasonable probability that, had evidence been disclosed, result of proceeding would have been different. U.S.C.A. Const.Amend. 14.

[2] HABEAS CORPUS ⇐ 719
197k719
District court's finding that state's failure to disclose material exculpatory information violated due process, and thus warranted habeas relief, was not clearly erroneous, in view of evidence that one witness was intimidated by police into identifying defendant as shooter and later gave testimony indicating that defendant's companion was shooter, and that written versions of other witnesses' statements, which were prepared by police, did not conform to what witnesses told police. U.S.C.A. Const.Amend. 14.

[3] FEDERAL COURTS ⇐ 844
170Bk844
Court of Appeals will declare testimony incredible as matter of law only when it is so unbelievable on its face that it defies physical laws.

***1075** Scott J. Atlas, John Cavanaugh O'Leary, Jr., Stephanie Kathleen Crain, Michael John Mucchetti, Vinson & Elkins, Houston, TX, Richard Alan Morris, Feldman & Associates, Houston, TX, Theodore W. Kassinger, James Roger Markham, Vinson & Elkins, Washington, DC, Stanley G. Schneider, Schneider & McKinney, Houston, TX, Manuel Lopez, Solar & Fernandes, Houston, TX, J. Anne Bernard Clayton, Houston, TX, for petitioner-appellee.

William Charles Zapalac, Asst. Atty. Gen., Office of the Attorney General for the State of Texas, Austin, TX, for respondent-appellant.

Mary Lou Soller, Grant D. Aldonas and Andrea K. Bjorklund, Miller & Chevalier, Chartered, Washington, DC, for the Government of the United Mexican States, amicus curiae.

Ronald S. Flagg, Julia Elizabeth Sullivan, Marisa Andrea Gomez, Sidley & Austin, Washington, DC, for American Immigration Lawyers' Ass'n, et al., amicus curiae.

Stephen Brooks Bright, Southern Center for Human Rights, Atlanta, GA, for Allard K. Lowenstein Human Rights Clinic, Southern Center for Human Rights and International Human Rights Law Group, amicus curiae.

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

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Contending that the district court's factual findings of numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense, are ***1076** clearly erroneous, Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, appeals the grant of habeas relief to Ricardo Aldape Guerra, who was convicted of capital murder and sentenced to death in 1982. We

AFFIRM.

I.

On July 13, 1982, approximately two hours before midnight, Houston police officer J.D. Harris stopped his police car behind an automobile occupied by Guerra and Roberto Carrasco Flores (Carrasco), at the intersection of Edgewood and Walker Streets. Moments later, the Officer was shot three times in the head with a nine millimeter weapon and died shortly thereafter. Jose Francisco Armijo, who was near the intersection in an automobile with two of his children (one of whom, then ten years of age, was a key witness against Guerra at trial), was also shot in the head with a nine millimeter weapon and died later.

Witnesses informed police that the suspects might be found in the same neighborhood, at 4907 Rusk Street (Guerra's address). About one and one-half hours after Officer Harris was shot, Officer Trepagnier approached a garage next to that address. Using a nine millimeter weapon, Carrasco shot and seriously wounded the officer. Carrasco was killed in the ensuing exchange of gunfire with police. The nine millimeter weapon was found under Carrasco's body, and Officer Harris' service revolver was found under Carrasco's belt, along with another clip for the nine millimeter weapon.

Guerra was arrested moments after Carrasco was shot, when officers found him hiding nearby. A .45 caliber pistol was found within Guerra's reach.

Although the physical evidence pointed to Carrasco as Officer Harris' killer, Guerra was charged with capital murder on the basis of eyewitness identification. (The State did not seek to convict Guerra under the law of parties.)

In October 1982, three months after the murder, a jury found Guerra guilty, rejecting his defense that Carrasco shot Officer Harris; he was sentenced to death. The Texas Court of Criminal Appeals affirmed in 1988, Guerra v. State, 771 S.W.2d 453 (Tex.Crim.App.1988); and the next year, the Supreme Court denied Guerra's petition for a writ of certiorari. Guerra v. Texas, 492 U.S. 925, 109 S.Ct. 3260, 106 L.Ed.2d 606 (1989).

Guerra filed for habeas relief in the state trial court in May 1992. Following the appointment of new counsel that July, he filed an amended application in mid-September. Four days later, the trial court, without conducting an evidentiary hearing and making findings of fact or conclusions of law, recommended denial of relief. In January 1993, the Texas Court of Criminal Appeals accepted the recommendation and denied relief.

Shortly thereafter, in February, Guerra sought federal habeas relief. The district court conducted an extensive evidentiary hearing that November, and, a year later, in November 1994, entered an order granting relief. The order was amended the next May, Guerra v. Collins, 916 F.Supp. 620 (S.D.Tex.1995), and the respondent was ordered to release Guerra unless the State began retrial proceedings by arraigning him within 30 days. Our court stayed the judgment.

II.

As stated, the physical evidence led directly to Carrasco as Officer Harris' murderer. An obvious, critical question is why, if Guerra instead shot the Officer, the murder weapon (not to mention the Officer's service revolver) was found under Carrasco's body one and one-half hours after the Officer was shot. At oral argument, the respondent espoused the theory that, when Guerra and Carrasco exited their vehicle after the Officer pulled up behind them, they picked up each other's weapons, and then exchanged them after the murder. In light of this theory, it goes without saying that the next question that follows immediately is why, if Guerra shot the Officer, Carrasco would have been willing to take back and keep a weapon just used to kill a policeman. Among other obvious reasons for not wanting to be found with a murder weapon is the fact that it is common knowledge that anyone who kills a law enforcement ***1077** officer will be quickly, vigorously, and aggressively pursued, as reflected by the events in this case.

The State relied on this exchanged weapons theory at trial. In closing argument, the prosecutor stated:

> I don't have to prove to you how ... Guerra came in possession of that nine-millimeter pistol....
> ....
> There is no way that I had any type of equipment set up inside of that vehicle to show you what was done inside that vehicle and how the weapons

could have gotten into this man's [Guerra's] hands, but you know one thing from listening to the evidence, and you know one thing from listening to when Ricardo Guerra testified. He didn't always keep his pistol tucked into his belt.

Do you recall, right towards the end of his testimony, I asked him, "When you went into the store to get those Cokes [before the shooting], did you still have that pistol tucked inside your belt with your shirt covering it?"

"No, I put it under the seat," and I think you can use your common sense....

Do you think these guys are driving around and they've got those guns tucked in their belts? They take them out and set them on the seat....

Do you think perhaps when they got out of the car, they picked up the wrong gun?

The record, however, contains little, if any, evidence to support this theory. Obviously, this was a critical fact issue at trial. As discussed infra, the State's non-disclosure of exculpatory information concerning this issue was one of the bases upon which the district court granted habeas relief.

At trial, Guerra testified that, on the night of the shooting, he and Carrasco went to the store; that Carrasco had a nine millimeter pistol which he was carrying at his belt; that he (Guerra) also was carrying a gun; that he put his gun under the car seat when he went into the store; that he put it back in his trousers when he got back to the car; and that the gun was in his belt when he got out of the car after Officer Harris arrived at the intersection.

On cross-examination at trial, Guerra denied that he and Carrasco took their guns out of their belts and put them on the seat while they were driving around. He testified further that Carrasco, whom he referred to by the nickname "Werro" (spelled various ways in the record; according to the respondent at oral argument, it meant "the blond one" or "the light-skinned one"), shot Officer Harris and took the Officer's gun; that they ran back to Guerra's residence (4907 Rusk Street); and that, when they arrived, Carrasco had two weapons--his own (the nine millimeter) and the Officer's.

Two of Guerra's roommates testified at trial that, shortly after Officer Harris was shot, Carrasco ran into the house and said that he had killed a policeman; and that Carrasco had the policeman's gun in his belt and another gun in his hand. One roommate testified further that, when Guerra arrived a minute or two later, Guerra said that Carrasco had just killed a policeman.

Two of the State's strongest witnesses at trial were Jose Armijo, Jr. (the then ten-year-old son of the man fatally wounded at the same intersection immediately after Officer Harris was killed), who testified that Guerra shot Officer Harris and his father, and Hilma Galvan, who testified that she saw Guerra shoot Officer Harris. Neither testified, however, at the federal evidentiary hearing.

The district court held that Guerra's due process rights were violated based on findings that, inter alia, (1) police and prosecutors threatened and intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense; (2) police and prosecutors used impermissibly suggestive identification procedures, such as permitting witnesses to see Guerra in handcuffs, with bags over his hands, prior to a line-up, permitting witnesses to discuss identification before, during, and after the line-up, conducting a reenactment of the shooting shortly after it occurred so that witnesses could develop a consensus view, and using mannequins of Guerra and Carrasco at trial to reinforce and bolster identification testimony; (3) police ***1078** and prosecutors failed to disclose material, exculpatory evidence to the defense; (4) prosecutors engaged in misconduct at trial, including soliciting and encouraging witnesses to overstate or understate facts, falsely accusing a defense witness of either being drunk or having "smoked something" because he yawned during his testimony, questioning a defense witness about an extraneous murder which the prosecutors knew was a false rumor, and making improper closing argument; and (5) a court interpreter inaccurately translated witnesses' trial testimony.

Because the state habeas court did not make findings of fact, the statutory presumption of correctness for such findings is not in play. (The 28 U.S.C. § 2254(d) presumption of correctness has been redesignated as § 2254(e)(1) in the Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (1996).) In fact, the only issue raised here is the contention that "the district court's factual findings that the police and prosecutors engaged in misconduct depriving Guerra of due

process ... are clearly erroneous." As a result, the respondent conceded at oral argument that, if those findings are not clearly erroneous, then a due process violation occurred. (Inconsistent with the statement of the issue and the concession at oral argument, the respondent's brief contains assertions that certain factual findings, even if not clearly erroneous, are legally irrelevant. We conclude that habeas relief is warranted by legally relevant factual findings that are not clearly erroneous.)

To restate the well-known standard, a factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (citation omitted). Along that line, in a case such as this, which turns almost exclusively "on determinations regarding the credibility of witnesses, [FED.R.CIV.P.] 52(a) demands even greater deference to the trial court's findings." Id. at 575, 105 S.Ct. at 1512. Similarly, "[w]here the court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error." Schlesinger v. Herzog, 2 F.3d 135, 139 (5th Cir.1993) (internal quotation marks and citation omitted). Three examples more than suffice to demonstrate why, based on our review of the record, there are sufficient legally relevant, non-clearly erroneous findings of fact to warrant habeas relief.

[1] The district court found that, in interviews with police and prosecutors, three witnesses, all then under the age of 18 (Herlinda Garcia (14), Patricia Diaz (17), and Frank Perez (17)), gave police and prosecutors material exculpatory information that was not disclosed to the defense. Such non-disclosure is violative of due process if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." See United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); id. at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment); see also Kyles v. Whitley, --- U.S. ----, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). As noted, for these three examples, because, with slight exception, the respondent presents only a factual issue, our review is a most narrow one--were the findings of fact underlying a due process violation because of the non-disclosure clearly erroneous.

[2] Garcia, who identified Guerra at trial as Officer Harris' murderer, testified instead at the federal evidentiary hearing that she told police and prosecutors that she saw Carrasco pull something out of his trousers and point at Officer Harris with both hands clasped together in front of him; that Carrasco was standing a "couple of feet" away from the Officer; that she saw flames coming out of Carrasco's hands; and that, when she heard the shots, she saw Guerra leaning toward the police car, near the front, with his empty hands on the hood. This information was not included in Garcia's written statement, nor was it disclosed to the defense. Garcia, who, as noted, was 14 years of age at the time of the shooting, testified further ***1079** that she was intimidated into identifying Guerra as the shooter by police warnings that her common-law husband, a parolee who was over 18 years of age, could be adversely affected if she did not cooperate.

The respondent contends that Garcia's testimony is not credible because her written statements prepared by the police were consistent with her trial testimony, even though she had not read her statements before trial, and because, if the police were trying to coerce witnesses to identify Guerra as the shooter, they would not have allowed Garcia to describe the shooter, both in her statement and at trial, as having blond hair and wearing a brown shirt and brown trousers. (Guerra had dark hair and was wearing a green shirt and blue jeans at the time of the shooting; Carrasco also had dark hair (but, as noted, was commonly referred to as "Werro", the "blond one" or "light-skinned one") and was wearing a purple or maroon shirt and brown trousers.)

[3] Finding that Garcia's habeas testimony was credible, the district court found further that she had been intimidated by police and prosecutors, and that the police omitted material exonerating information from her written statement. We will declare testimony incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." United States v. Casteneda, 951 F.2d 44, 48 (5th Cir.1992) (internal quotation marks and citation omitted). As the district court noted, Garcia's

testimony is consistent with the physical evidence that Carrasco, rather than Guerra, shot Officer Harris. Accordingly, we cannot conclude that the court clearly erred by finding that Garcia told the truth at the evidentiary hearing.

Patricia Diaz, who, as noted, was 17 years of age when she testified at trial, testified at the evidentiary hearing that she told police and prosecutors that, an instant after she heard shots, she saw Guerra on the driver's side of the police car, near the front, facing that car, with his empty hands on its hood, as if he were about to be searched; and that she did not see anyone shoot Officer Harris. But, her description of Guerra's location and his empty hands was not included in her written statements prepared by the police. Diaz testified further that, contrary to what is included in her first written statement, she did not tell the police that she saw a man from Guerra and Carrasco's car "pointing a gun in the direction of the police car, and I saw him shoot four times at the police car"; nor, contrary to what is included in her second written statement, did she tell the police, after the line-up, that she saw Guerra "with his hands outstretched, and I guess he had a gun in his hands". Diaz testified that she signed her statements without reading them because she was tired and because she was frightened by police threats to take her infant daughter from her if she did not cooperate.

The respondent maintains that Diaz's habeas testimony is not credible because, again, her trial testimony was consistent with her statements, even though she never read them. The respondent asserts that if, as Diaz testified at the evidentiary hearing, she had demonstrated at trial how Guerra was "pointing" by stretching her arms out in front of her with her palms open and down, the prosecution would have clarified her testimony, or the defense would have capitalized on it. The district court found, however, that Diaz's trial testimony was the product of police intimidation, and was tainted by the prosecutor's inclusion in his questions of incorrect statements of Diaz's prior testimony. Again, because there is evidence in the record to support these findings, we cannot conclude that they are clearly erroneous. Restated, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson, 470 U.S. at 573-74, 105 S.Ct. at 1511.

Finally, Frank Perez, who, as noted, was 17 years of age when he testified at trial, testified at the federal evidentiary hearing that it "could have been anywhere from 30 seconds to a minute and a half" after he heard gunshots that he saw two men run past his house; but, he was "not really sure exactly how long it was". Perez's statement ***1080** to the police the day after the shooting reports that he saw a Mexican American male run past his house "[j]ust a short time after the gun shots"; at trial, he testified that "it might have been a minute or less than that, or maybe a little over a minute", that he "couldn't really place the time".

Perez testified further at the federal hearing that he told the police and prosecutors that he could not identify the first man, who appeared to have been running on the south side of Walker Street (as noted, this was one of the streets forming the intersection where the shooting occurred); that the second man, whom he identified as Carrasco, appeared to have been running on the north side of that street; that, as Carrasco ran past, he pointed his left hand at Perez; that Carrasco put his left hand behind his back and then dropped an object that looked like a nine millimeter gun with a clip; that the object hit the street, making a metallic scraping sound; and that Carrasco picked up the object with his left hand and continued running down the street. Perez's written statement, prepared by the police, did not include that Carrasco appeared to be coming from the north side of Walker Street, or that the gun appeared to be a nine millimeter, or that Carrasco used his left hand both to point the gun at Perez and to pick up the gun. The word "gun" was typed in Perez's written statement, but, according to Perez, was changed to "object" after the police told him not to use the word "gun" unless he was 100% certain that the object was one.

The respondent does not challenge Perez's credibility; instead, he contends that, because the defense had Perez's written statement--with "gun" changed to "object"--when it cross-examined him at trial, the district court erred by finding that the prosecution suppressed Perez's statement that Carrasco dropped a gun. But, the respondent does not address the other information that the district court found to have been omitted from Perez's

statement (that Carrasco appeared to be coming from the north side of Walker Street, that the gun appeared to be a nine millimeter, and that Carrasco used his left hand to point the gun at Perez and to pick it up after he dropped it). Obviously, that information was material, because, according to it, Carrasco had the nine millimeter murder weapon shortly after the shooting. Moreover, the information is consistent with other evidence presented at the federal evidentiary hearing that there was a scratch on the nine millimeter weapon, consistent with it having been dropped; that the shooter ran from the scene on the north side of Walker Street; and that the shooter was left-handed (there was evidence at the federal hearing that Guerra is right-handed; this was not brought out at trial). As noted, the respondent challenges neither the correctness of the district court's factual finding that this information was suppressed, nor its materiality.

These three examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief. We need not discuss further examples of the lack of clear error in the district court's detailed factual findings. In sum, we are satisfied that more than sufficient non-clearly erroneous, legally relevant findings of fact support such relief.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

END OF DOCUMENT

Ricardo Aldape GUERRA, Petitioner-Appellee,
v.
Gary L. JOHNSON, Director, Texas Department Of Criminal Justice, Institutional Division, Respondent-Appellant.

No. 95-20443.

United States Court of Appeals,
Fifth Circuit.

July 30, 1996.

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

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge.

*1 Contending that the district court's factual findings of numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense, are clearly erroneous, Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, appeals the grant of habeas relief to Ricardo Aldape Guerra, who was convicted of capital murder and sentenced to death in 1982. We AFFIRM.

I.

On July 13, 1982, approximately two hours before midnight, Houston police officer J.D. Harris stopped his police car behind an automobile occupied by Guerra and Roberto Carrasco Flores (Carrasco), at the intersection of Edgewood and Walker Streets. Moments later, the Officer was shot three times in the head with a nine millimeter weapon and died shortly thereafter. Jose Francisco Armijo, who was near the intersection in an automobile with two of his children (one of whom, then ten years of age, was a key witness against Guerra at trial), was also shot in the head with a nine millimeter weapon and died later.

Witnesses informed police that the suspects might be found in the same neighborhood, at 4907 Rusk Street (Guerra's address). About one and one-half hours after Officer Harris was shot, Officer Trepagnier approached a garage next to that address. Using a nine millimeter weapon, Carrasco shot and seriously wounded the officer. Carrasco was killed in the ensuing exchange of gunfire with police. The nine millimeter weapon was found under Carrasco's body, and Officer Harris' service revolver was found under Carrasco's belt, along with another clip for the nine millimeter weapon.

Guerra was arrested moments after Carrasco was shot, when officers found him hiding nearby. A .45 caliber pistol was found within Guerra's reach.

Although the physical evidence pointed to Carrasco as Officer Harris' killer, Guerra was charged with capital murder on the basis of eyewitness identification. (The State did not seek to convict Guerra under the law of parties.)

In October 1982, three months after the murder, a jury found Guerra guilty, rejecting his defense that Carrasco shot Officer Harris; he was sentenced to death. The Texas Court of Criminal Appeals affirmed in 1988, Guerra v. State, 771 S.W.2d 453 (Tex.Crim.App.1988); and the next year, the Supreme Court denied Guerra's petition for a writ of certiorari. Guerra v. Texas, 492 U.S. 925 (1989).

Guerra filed for habeas relief in the state trial court in May 1992. Following the appointment of new counsel that July, he filed an amended application in mid-September. Four days later, the trial court, without conducting an evidentiary hearing and making findings of fact or conclusions of law, recommended denial of relief. In January 1993, the Texas Court of Criminal Appeals accepted the recommendation and denied relief.

Shortly thereafter, in February, Guerra

sought federal habeas relief. The district court conducted an extensive evidentiary hearing that November, and, a year later, in November 1994, entered an order granting relief. The order was amended the next May, Guerra v. Collins, 916 F.Supp. 620 (S.D.Tex.1995), and the respondent was ordered to release Guerra unless the State began retrial proceedings by arraigning him within 30 days. Our court stayed the judgment.

II.

*2 As stated, the physical evidence led directly to Carrasco as Officer Harris' murderer. An obvious, critical question is why, if Guerra instead shot the Officer, the murder weapon (not to mention the Officer's service revolver) was found under Carrasco's body one and one-half hours after the Officer was shot. At oral argument, the respondent espoused the theory that, when Guerra and Carrasco exited their vehicle after the Officer pulled up behind them, they picked up each other's weapons, and then exchanged them after the murder. In light of this theory, it goes without saying that the next question that follows immediately is why, if Guerra shot the Officer, Carrasco would have been willing to take back and keep a weapon just used to kill a policeman. Among other obvious reasons for not wanting to be found with a murder weapon is the fact that it is common knowledge that anyone who kills a law enforcement officer will be quickly, vigorously, and aggressively pursued, as reflected by the events in this case.

The State relied on this exchanged weapons theory at trial. In closing argument, the prosecutor stated:

> I don't have to prove to you how ... Guerra came in possession of that nine-millimeter pistol....
>
> * * *
>
> There is no way that I had any type of equipment set up inside of that vehicle to show you what was done inside that vehicle and how the weapons could have gotten into this man's [Guerra's] hands, but you know one thing from listening to the evidence, and you know one thing from listening to when Ricardo Guerra testified. He didn't always keep his pistol tucked into his belt.
>
> Do you recall, right towards the end of his testimony, I asked him, "When you went into the store to get those Cokes [before the shooting], did you still have that pistol tucked inside your belt with your shirt covering it?"
>
> "No, I put it under the seat," and I think you can use your common sense....
>
> Do you think these guys are driving around and they've got those guns tucked in their belts? They take them out and set them on the seat....
>
> Do you think perhaps when they got out of the car, they picked up the wrong gun?

The record, however, contains little, if any, evidence to support this theory. Obviously, this was a critical fact issue at trial. As discussed infra, the State's non-disclosure of exculpatory information concerning this issue was one of the bases upon which the district court granted habeas relief.

At trial, Guerra testified that, on the night of the shooting, he and Carrasco went to the store; that Carrasco had a nine millimeter pistol which he was carrying at his belt; that he (Guerra) also was carrying a gun; that he put his gun under the car seat when he went into the store; that he put it back in his trousers when he got back to the car; and that the gun was in his belt when he got out of the car after Officer Harris arrived at the intersection.

On cross-examination at trial, Guerra denied that he and Carrasco took their guns out of their belts and put them on the seat while they were driving around. He testified further that Carrasco, whom he referred to by the nickname "Werro" (spelled various ways in the record; according to the respondent at oral argument, it meant "the blond one" or "the light-skinned one"), shot Officer Harris and took the Officer's gun; that they ran back to Guerra's residence (4907 Rusk Street); and that, when they arrived, Carrasco had two weapons--his own (the nine millimeter) and

the Officer's.

*3 Two of Guerra's roommates testified at trial that, shortly after Officer Harris was shot, Carrasco ran into the house and said that he had killed a policeman; and that Carrasco had the policeman's gun in his belt and another gun in his hand. One roommate testified further that, when Guerra arrived a minute or two later, Guerra said that Carrasco had just killed a policeman.

Two of the State's strongest witnesses at trial were Jose Armijo, Jr. (the then ten-year-old son of the man fatally wounded at the same intersection immediately after Officer Harris was killed), who testified that Guerra shot Officer Harris and his father, and Hilma Galvan, who testified that she saw Guerra shoot Officer Harris. Neither testified, however, at the federal evidentiary hearing.

The district court held that Guerra's due process rights were violated based on findings that, inter alia, (1) police and prosecutors threatened and intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense; (2) police and prosecutors used impermissibly suggestive identification procedures, such as permitting witnesses to see Guerra in handcuffs, with bags over his hands, prior to a line-up, permitting witnesses to discuss identification before, during, and after the line-up, conducting a reenactment of the shooting shortly after it occurred so that witnesses could develop a consensus view, and using mannequins of Guerra and Carrasco at trial to reinforce and bolster identification testimony; (3) police and prosecutors failed to disclose material, exculpatory evidence to the defense; (4) prosecutors engaged in misconduct at trial, including soliciting and encouraging witnesses to overstate or understate facts, falsely accusing a defense witness of either being drunk or having "smoked something" because he yawned during his testimony, questioning a defense witness about an extraneous murder which the prosecutors knew was a false rumor, and making improper closing argument; and (5) a court interpreter inaccurately translated witnesses' trial testimony.

Because the state habeas court did not make findings of fact, the statutory presumption of correctness for such findings is not in play. (The 28 U.S.C. § 2254(d) presumption of correctness has been redesignated as § 2254(e)(1) in the Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. NO. 104-132, § 104(3), 110 Stat. 1214, 1219 (1996).) In fact, the only issue raised here is the contention that "the district court's factual findings that the police and prosecutors engaged in misconduct depriving Guerra of due process ... are clearly erroneous." As a result, the respondent conceded at oral argument that, if those findings are not clearly erroneous, then a due process violation occurred. (Inconsistent with the statement of the issue and the concession at oral argument, the respondent's brief contains assertions that certain factual findings, even if not clearly erroneous, are legally irrelevant. We conclude that habeas relief is warranted by legally relevant factual findings that are not clearly erroneous.)

*4 To restate the well-known standard, a factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985) (citation omitted). Along that line, in a case such as this, which turns almost exclusively "on determinations regarding the credibility of witnesses, [FED. R. CIV. P.] 52(a) demands even greater deference to the trial court's findings." Id. at 575. Similarly, "[w]here the court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error." Schlesinger v. Herzog, 2 F.3d 135, 139 (5th Cir.1993) (internal quotation marks and citation omitted). Three examples more than suffice to demonstrate why, based on our review of the record, there are sufficient legally relevant, non-clearly erroneous findings of fact to warrant habeas relief.

The district court found that, in interviews

with police and prosecutors, three witnesses, all then under the age of 18 (Herlinda Garcia (14), Patricia Diaz (17), and Frank Perez (17)), gave police and prosecutors material exculpatory information that was not disclosed to the defense. Such non-disclosure is violative of due process if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." See United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); id. at 685 (White, J., concurring in part and concurring in judgment); see also Kyles v. Whitley, --- U.S. ----, 115 S.Ct. 1555 (1995). As noted, for these three examples, because, with slight exception, the respondent presents only a factual issue, our review is a most narrow one--were the findings of fact underlying a due process violation because of the non-disclosure clearly erroneous.

Garcia, who identified Guerra at trial as Officer Harris' murderer, testified instead at the federal evidentiary hearing that she told police and prosecutors that she saw Carrasco pull something out of his trousers and point at Officer Harris with both hands clasped together in front of him; that Carrasco was standing a "couple of feet" away from the Officer; that she saw flames coming out of Carrasco's hands; and that, when she heard the shots, she saw Guerra leaning toward the police car, near the front, with his empty hands on the hood. This information was not included in Garcia's written statement, nor was it disclosed to the defense. Garcia, who, as noted, was 14 years of age at the time of the shooting, testified further that she was intimidated into identifying Guerra as the shooter by police warnings that her common-law husband, a parolee who was over 18 years of age, could be adversely affected if she did not cooperate.

***5** The respondent contends that Garcia's testimony is not credible because her written statements prepared by the police were consistent with her trial testimony, even though she had not read her statements before trial, and because, if the police were trying to coerce witnesses to identify Guerra as the shooter, they would not have allowed Garcia to describe the shooter, both in her statement and at trial, as having blond hair and wearing a brown shirt and brown trousers. (Guerra had dark hair and was wearing a green shirt and blue jeans at the time of the shooting; Carrasco also had dark hair (but, as noted, was commonly referred to as "Werro", the "blond one" or "light-skinned one") and was wearing a purple or maroon shirt and brown trousers.)

Finding that Garcia's habeas testimony was credible, the district court found further that she had been intimidated by police and prosecutors, and that the police omitted material exonerating information from her written statement. We will declare testimony incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." United States v. Casteneda, 951 F.2d 44, 48 (5th Cir.1992) (internal quotation marks and citation omitted). As the district court noted, Garcia's testimony is consistent with the physical evidence that Carrasco, rather than Guerra, shot Officer Harris. Accordingly, we cannot conclude that the court clearly erred by finding that Garcia told the truth at the evidentiary hearing.

Patricia Diaz, who, as noted, was 17 years of age when she testified at trial, testified at the evidentiary hearing that she told police and prosecutors that, an instant after she heard shots, she saw Guerra on the driver's side of the police car, near the front, facing that car, with his empty hands on its hood, as if he were about to be searched; and that she did not see anyone shoot Officer Harris. But, her description of Guerra's location and his empty hands was not included in her written statements prepared by the police. Diaz testified further that, contrary to what is included in her first written statement, she did not tell the police that she saw a man from Guerra and Carrasco's car "pointing a gun in the direction of the police car, and I saw him shoot four times at the police car"; nor, contrary to what is included in her second written statement, did she tell the police, after the line-up, that she saw Guerra "with his hands outstretched, and I guess he had a gun

in his hands". Diaz testified that she signed her statements without reading them because she was tired and because she was frightened by police threats to take her infant daughter from her if she did not cooperate.

The respondent maintains that Diaz's habeas testimony is not credible because, again, her trial testimony was consistent with her statements, even though she never read them. The respondent asserts that if, as Diaz testified at the evidentiary hearing, she had demonstrated at trial how Guerra was "pointing" by stretching her arms out in front of her with her palms open and down, the prosecution would have clarified her testimony, or the defense would have capitalized on it. The district court found, however, that Diaz's trial testimony was the product of police intimidation, and was tainted by the prosecutor's inclusion in his questions of incorrect statements of Diaz's prior testimony. Again, because there is evidence in the record to support these findings, we cannot conclude that they are clearly erroneous. Restated, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson, 470 U.S. at 573-74.

*6 Finally, Frank Perez, who, as noted, was 17 years of age when he testified at trial, testified at the federal evidentiary hearing that it "could have been anywhere from 30 seconds to a minute and a half" after he heard gunshots that he saw two men run past his house; but, he was "not really sure exactly how long it was". Perez's statement to the police the day after the shooting reports that he saw a Mexican American male run past his house "[j]ust a short time after the gun shots"; at trial, he testified that "it might have been a minute or less than that, or maybe a little over a minute", that he "couldn't really place the time".

Perez testified further at the federal hearing that he told the police and prosecutors that he could not identify the first man, who appeared to have been running on the south side of Walker Street (as noted, this was one of the streets forming the intersection where the shooting occurred); that the second man, whom he identified as Carrasco, appeared to have been running on the north side of that street; that, as Carrasco ran past, he pointed his left hand at Perez; that Carrasco put his left hand behind his back and then dropped an object that looked like a nine millimeter gun with a clip; that the object hit the street, making a metallic scraping sound; and that Carrasco picked up the object with his left hand and continued running down the street. Perez's written statement, prepared by the police, did not include that Carrasco appeared to be coming from the north side of Walker Street, or that the gun appeared to be a nine millimeter, or that Carrasco used his left hand both to point the gun at Perez and to pick up the gun. The word "gun" was typed in Perez's written statement, but, according to Perez, was changed to "object" after the police told him not to use the word "gun" unless he was 100% certain that the object was one.

The respondent does not challenge Perez's credibility; instead, he contends that, because the defense had Perez's written statement--with "gun" changed to "object"--when it cross-examined him at trial, the district court erred by finding that the prosecution suppressed Perez's statement that Carrasco dropped a gun. But, the respondent does not address the other information that the district court found to have been omitted from Perez's statement (that Carrasco appeared to be coming from the north side of Walker Street, that the gun appeared to be a nine millimeter, and that Carrasco used his left hand to point the gun at Perez and to pick it up after he dropped it). Obviously, that information was material, because, according to it, Carrasco had the nine millimeter murder weapon shortly after the shooting. Moreover, the information is consistent with other evidence presented at the federal evidentiary hearing that there was a scratch on the nine millimeter weapon, consistent with it having been dropped; that the shooter ran from the scene on the north side of Walker Street; and that the shooter was left-handed (there was evidence at the

federal hearing that Guerra is right-handed; this was not brought out at trial). As noted, the respondent challenges neither the correctness of the district court's factual finding that this information was suppressed, nor its materiality.

*7 These three examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief. We need not discuss further examples of the lack of clear error in the district court's detailed factual findings. In sum, we are satisfied that more than sufficient non-clearly erroneous, legally relevant findings of fact support such relief.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

END OF DOCUMENT

Ricardo Aldape GUERRA, Petitioner–Appellee,

v.

Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent–Appellant.

No. 95–20443.

United States Court of Appeals, Fifth Circuit.

July 30, 1996.

After defendant's capital murder conviction was affirmed on direct appeal, 771 S.W.2d 453, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., 916 F.Supp. 620, granted habeas relief, and state appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that state's failure to disclose material exculpatory information to defense violated due process.

Affirmed.

1. Constitutional Law ⇐268(5)

State's failure to disclose material exculpatory information to defense is violative of due process if there is reasonable probability that, had evidence been disclosed, result of proceeding would have been different. U.S.C.A. Const.Amend. 14.

2. Habeas Corpus ⇐719

District court's finding that state's failure to disclose material exculpatory information violated due process, and thus warranted habeas relief, was not clearly erroneous, in view of evidence that one witness was intimidated by police into identifying defendant as shooter and later gave testimony indicating that defendant's companion was shooter, and that written versions of other witnesses' statements, which were prepared by police, did not conform to what witnesses told police. U.S.C.A. Const.Amend. 14.

3. Federal Courts ⇐844

Court of Appeals will declare testimony incredible as matter of law only when it is so unbelievable on its fact that it defies physical laws.

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

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Contending that the district court's factual findings of numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense, are clearly erroneous, Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, appeals the grant of habeas relief to Ricardo Aldape Guerra, who was convicted of capital murder and sentenced to death in 1982. We AFFIRM.

I.

On July 13, 1982, approximately two hours before midnight, Houston police officer J.D. Harris stopped his police car behind an automobile occupied by Guerra and Roberto Carrasco Flores (Carrasco), at the intersection of Edgewood and Walker Streets. Moments

later, the Officer was shot three times in the head with a nine millimeter weapon and died shortly thereafter. Jose Francisco Armijo, who was near the intersection in an automobile with two of his children (one of whom, then ten years of age, was a key witness against Guerra at trial), was also shot in the head with a nine millimeter weapon and died later.

Witnesses informed police that the suspects might be found in the same neighborhood, at 4907 Rusk Street (Guerra's address). About one and one-half hours after Officer Harris was shot, Officer Trepagnier approached a garage next to that address. Using a nine millimeter weapon, Carrasco shot and seriously wounded the officer. Carrasco was killed in the ensuing exchange of gunfire with police. The nine millimeter weapon was found under Carrasco's body, and Officer Harris' service revolver was found under Carrasco's belt, along with another clip for the nine millimeter weapon.

Guerra was arrested moments after Carrasco was shot, when officers found him hiding nearby. A .45 caliber pistol was found within Guerra's reach.

Although the physical evidence pointed to Carrasco as Officer Harris' killer, Guerra was charged with capital murder on the basis of eyewitness identification. (The State did not seek to convict Guerra under the law of parties.)

In October 1982, three months after the murder, a jury found Guerra guilty, rejecting his defense that Carrasco shot Officer Harris; he was sentenced to death. The Texas Court of Criminal Appeals affirmed in 1988, *Guerra v. State,* 771 S.W.2d 453 (Tex.Crim. App.1988); and the next year, the Supreme Court denied Guerra's petition for a writ of certiorari. *Guerra v. Texas,* 492 U.S. 925, 109 S.Ct. 3260, 106 L.Ed.2d 606 (1989).

Guerra filed for habeas relief in the state trial court in May 1992. Following the appointment of new counsel that July, he filed an amended application in mid-September. Four days later, the trial court, without conducting an evidentiary hearing and making findings of fact or conclusions of law, recommended denial of relief. In January 1993, the Texas Court of Criminal Appeals accepted the recommendation and denied relief.

Shortly thereafter, in February, Guerra sought federal habeas relief. The district court conducted an extensive evidentiary hearing that November, and, a year later, in November 1994, entered an order granting relief. The order was amended the next May, *Guerra v. Collins,* 916 F.Supp. 620 (S.D.Tex.1995), and the respondent was ordered to release Guerra unless the State began retrial proceedings by arraigning him within 30 days. Our court stayed the judgment.

II.

As stated, the physical evidence led directly to Carrasco as Officer Harris' murderer. An obvious, critical question is why, if Guerra instead shot the Officer, the murder weapon (not to mention the Officer's service revolver) was found under Carrasco's body one and one-half hours after the Officer was shot. At oral argument, the respondent espoused the theory that, when Guerra and Carrasco exited their vehicle after the Officer pulled up behind them, they picked up each other's weapons, and then exchanged them after the murder. In light of this theory, it goes without saying that the next question that follows immediately is why, if Guerra shot the Officer, Carrasco would have been willing to take back and keep a weapon just used to kill a policeman. Among other obvious reasons for not wanting to be found with a murder weapon is the fact that it is common

knowledge that anyone who kills a law enforcement officer will be quickly, vigorously, and aggressively pursued, as reflected by the events in this case.

The State relied on this exchanged weapons theory at trial. In closing argument, the prosecutor stated:

> I don't have to prove to you how ... Guerra came in possession of that nine-millimeter pistol....
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> There is no way that I had any type of equipment set up inside of that vehicle to show you what was done inside that vehicle and how the weapons could have gotten into this man's [Guerra's] hands, but you know one thing from listening to the evidence, and you know one thing from listening to when Ricardo Guerra testified. He didn't always keep his pistol tucked into his belt.
>
> Do you recall, right towards the end of his testimony, I asked him, "When you went into the store to get those Cokes [before the shooting], did you still have that pistol tucked inside your belt with your shirt covering it?"
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> "No, I put it under the seat," and I think you can use your common sense....
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> Do you think these guys are driving around and they've got those guns tucked in their belts? They take them out and set them on the seat....
>
> Do you think perhaps when they got out of the car, they picked up the wrong gun?

The record, however, contains little, if any, evidence to support this theory. Obviously, this was a critical fact issue at trial. As discussed *infra*, the State's non-disclosure of exculpatory information concerning this issue was one of the bases upon which the district court granted habeas relief.

At trial, Guerra testified that, on the night of the shooting, he and Carrasco went to the store; that Carrasco had a nine millimeter pistol which he was carrying at his belt; that he (Guerra) also was carrying a gun; that he put his gun under the car seat when he went into the store; that he put it back in his trousers when he got back to the car; and that the gun was in his belt when he got out of the car after Officer Harris arrived at the intersection.

On cross-examination at trial, Guerra denied that he and Carrasco took their guns out of their belts and put them on the seat while they were driving around. He testified further that Carrasco, whom he referred to by the nickname "Werro" (spelled various ways in the record; according to the respondent at oral argument, it meant "the blond one" or "the light-skinned one"), shot Officer Harris and took the Officer's gun; that they ran back to Guerra's residence (4907 Rusk Street); and that, when they arrived, Carrasco had two weapons—his own (the nine millimeter) and the Officer's.

Two of Guerra's roommates testified at trial that, shortly after Officer Harris was shot, Carrasco ran into the house and said that he had killed a policeman; and that Carrasco had the policeman's gun in his belt and another gun in his hand. One roommate testified further that, when Guerra arrived a minute or two later, Guerra said that Carrasco had just killed a policeman.

Two of the State's strongest witnesses at trial were Jose Armijo, Jr. (the then ten-year-old son of the man fatally wounded at the same intersection immediately after Officer Harris was killed), who testified that Guerra shot Officer Harris and his father, and Hilma Galvan, who testified that she saw Guerra shoot Officer Harris. Neither testi-

fied, however, at the federal evidentiary hearing.

The district court held that Guerra's due process rights were violated based on findings that, *inter alia,* (1) police and prosecutors threatened and intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense; (2) police and prosecutors used impermissibly suggestive identification procedures, such as permitting witnesses to see Guerra in handcuffs, with bags over his hands, prior to a line-up, permitting witnesses to discuss identification before, during, and after the line-up, conducting a reenactment of the shooting shortly after it occurred so that witnesses could develop a consensus view, and using mannequins of Guerra and Carrasco at trial to reinforce and bolster identification testimony; (3) police and prosecutors failed to disclose material, exculpatory evidence to the defense; (4) prosecutors engaged in misconduct at trial, including soliciting and encouraging witnesses to overstate or understate facts, falsely accusing a defense witness of either being drunk or having "smoked something" because he yawned during his testimony, questioning a defense witness about an extraneous murder which the prosecutors knew was a false rumor, and making improper closing argument; and (5) a court interpreter inaccurately translated witnesses' trial testimony.

Because the state habeas court did not make findings of fact, the statutory presumption of correctness for such findings is not in play. (The 28 U.S.C. § 2254(d) presumption of correctness has been redesignated as § 2254(e)(1) in the Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. No. 104–132, § 104(3), 110 Stat. 1214, 1219 (1996).) In fact, the only issue raised here is the contention that "the district court's factual findings that the police and prosecutors engaged in misconduct depriving Guerra of due process ... are clearly erroneous." As a result, the respondent conceded at oral argument that, if those findings are not clearly erroneous, then a due process violation occurred. (Inconsistent with the statement of the issue and the concession at oral argument, the respondent's brief contains assertions that certain factual findings, even if not clearly erroneous, are legally irrelevant. We conclude that habeas relief is warranted by legally relevant factual findings that are not clearly erroneous.)

To restate the well-known standard, a factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (citation omitted). Along that line, in a case such as this, which turns almost exclusively "on determinations regarding the credibility of witnesses, [FED.R.CIV.P.] 52(a) demands even greater deference to the trial court's findings." *Id.* at 575, 105 S.Ct. at 1512. Similarly, "[w]here the court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error." *Schlesinger v. Herzog,* 2 F.3d 135, 139 (5th Cir.1993) (internal quotation marks and citation omitted). Three examples more than suffice to demonstrate why, based on our review of the record, there are sufficient legally relevant, non-clearly erroneous findings of fact to warrant habeas relief.

[1] The district court found that, in interviews with police and prosecutors, three witnesses, all then under the age of 18 (Herlinda Garcia (14), Patricia Diaz (17), and Frank Perez (17)), gave police and prosecutors ma-

terial exculpatory information that was not disclosed to the defense. Such non-disclosure is violative of due process if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment); *see also Kyles v. Whitley,* — U.S. ——, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). As noted, for these three examples, because, with slight exception, the respondent presents only a factual issue, our review is a most narrow one—were the findings of fact underlying a due process violation because of the non-disclosure clearly erroneous.

[2] Garcia, who identified Guerra at trial as Officer Harris' murderer, testified instead at the federal evidentiary hearing that she told police and prosecutors that she saw Carrasco pull something out of his trousers and point at Officer Harris with both hands clasped together in front of him; that Carrasco was standing a "couple of feet" away from the Officer; that she saw flames coming out of Carrasco's hands; and that, when she heard the shots, she saw Guerra leaning toward the police car, near the front, with his empty hands on the hood. This information was not included in Garcia's written statement, nor was it disclosed to the defense. Garcia, who, as noted, was 14 years of age at the time of the shooting, testified further that she was intimidated into identifying Guerra as the shooter by police warnings that her common-law husband, a parolee who was over 18 years of age, could be adversely affected if she did not cooperate.

The respondent contends that Garcia's testimony is not credible because her written statements prepared by the police were consistent with her trial testimony, even though she had not read her statements before trial, and because, if the police were trying to coerce witnesses to identify Guerra as the shooter, they would not have allowed Garcia to describe the shooter, both in her statement and at trial, as having blond hair and wearing a brown shirt and brown trousers. (Guerra had dark hair and was wearing a green shirt and blue jeans at the time of the shooting; Carrasco also had dark hair (but, as noted, was commonly referred to as "Werro", the "blond one" or "light-skinned one") and was wearing a purple or maroon shirt and brown trousers.)

[3] Finding that Garcia's habeas testimony was credible, the district court found further that she had been intimidated by police and prosecutors, and that the police omitted material exonerating information from her written statement. We will declare testimony incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." *United States v. Casteneda,* 951 F.2d 44, 48 (5th Cir.1992) (internal quotation marks and citation omitted). As the district court noted, Garcia's testimony is consistent with the physical evidence that Carrasco, rather than Guerra, shot Officer Harris. Accordingly, we cannot conclude that the court clearly erred by finding that Garcia told the truth at the evidentiary hearing.

Patricia Diaz, who, as noted, was 17 years of age when she testified at trial, testified at the evidentiary hearing that she told police and prosecutors that, an instant after she heard shots, she saw Guerra on the driver's side of the police car, near the front, facing that car, with his empty hands on its hood, as if he were about to be searched; and that she did not see anyone shoot Officer Harris.

But, her description of Guerra's location and his empty hands was not included in her written statements prepared by the police. Diaz testified further that, contrary to what is included in her first written statement, she did not tell the police that she saw a man from Guerra and Carrasco's car "pointing a gun in the direction of the police car, and I saw him shoot four times at the police car"; nor, contrary to what is included in her second written statement, did she tell the police, after the line-up, that she saw Guerra "with his hands outstretched, and I guess he had a gun in his hands". Diaz testified that she signed her statements without reading them because she was tired and because she was frightened by police threats to take her infant daughter from her if she did not cooperate.

The respondent maintains that Diaz's habeas testimony is not credible because, again, her trial testimony was consistent with her statements, even though she never read them. The respondent asserts that if, as Diaz testified at the evidentiary hearing, she had demonstrated at trial how Guerra was "pointing" by stretching her arms out in front of her with her palms open and down, the prosecution would have clarified her testimony, or the defense would have capitalized on it. The district court found, however, that Diaz's trial testimony was the product of police intimidation, and was tainted by the prosecutor's inclusion in his questions of incorrect statements of Diaz's prior testimony. Again, because there is evidence in the record to support these findings, we cannot conclude that they are clearly erroneous. Restated, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74, 105 S.Ct. at 1511.

Finally, Frank Perez, who, as noted, was 17 years of age when he testified at trial, testified at the federal evidentiary hearing that it "could have been anywhere from 30 seconds to a minute and a half" after he heard gunshots that he saw two men run past his house; but, he was "not really sure exactly how long it was". Perez's statement to the police the day after the shooting reports that he saw a Mexican American male run past his house "[j]ust a short time after the gun shots"; at trial, he testified that "it might have been a minute or less than that, or maybe a little over a minute", that he "couldn't really place the time".

Perez testified further at the federal hearing that he told the police and prosecutors that he could not identify the first man, who appeared to have been running on the south side of Walker Street (as noted, this was one of the streets forming the intersection where the shooting occurred); that the second man, whom he identified as Carrasco, appeared to have been running on the north side of that street; that, as Carrasco ran past, he pointed his left hand at Perez; that Carrasco put his left hand behind his back and then dropped an object that looked like a nine millimeter gun with a clip; that the object hit the street, making a metallic scraping sound; and that Carrasco picked up the object with his left hand and continued running down the street. Perez's written statement, prepared by the police, did not include that Carrasco appeared to be coming from the north side of Walker Street, or that the gun appeared to be a nine millimeter, or that Carrasco used his left hand both to point the gun at Perez and to pick up the gun. The word "gun" was typed in Perez's written statement, but, according to Perez, was changed to "object" after the police told him not to use the word

"gun" unless he was 100% certain that the object was one.

The respondent does not challenge Perez's credibility; instead, he contends that, because the defense had Perez's written statement—with "gun" changed to "object"—when it cross-examined him at trial, the district court erred by finding that the prosecution suppressed Perez's statement that Carrasco dropped a gun. But, the respondent does not address the other information that the district court found to have been omitted from Perez's statement (that Carrasco appeared to be coming from the north side of Walker Street, that the gun appeared to be a nine millimeter, and that Carrasco used his left hand to point the gun at Perez and to pick it up after he dropped it). Obviously, that information was material, because, according to it, Carrasco had the nine millimeter murder weapon shortly after the shooting. Moreover, the information is consistent with other evidence presented at the federal evidentiary hearing that there was a scratch on the nine millimeter weapon, consistent with it having been dropped; that the shooter ran from the scene on the north side of Walker Street; and that the shooter was left-handed (there was evidence at the federal hearing that Guerra is right-handed; this was not brought out at trial). As noted, the respondent challenges neither the correctness of the district court's factual finding that this information was suppressed, nor its materiality.

These three examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief. We need not discuss further examples of the lack of clear error in the district court's detailed factual findings. In sum, we are satisfied that more than sufficient non-clearly erroneous, legally relevant findings of fact support such relief.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

F. Aldape Pleadings

United States Court of Appeals

FIFTH CIRCUIT
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NEW ORLEANS, LA 70130

July 30, 1996

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MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW
Regarding: Fifth Circuit Statement on Petitions for Rehearing and Rehearing En Banc

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

Enclosed is a copy of the court's decision, and judgment has been entered under FRAP 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FRAPs 39 through 41, and Local Rules (LR) 35, 39, and 41 govern costs, rehearings, and mandates. **New LR's 35.2.10 and 40 require that a copy of the opinion or order sought to be reviewed shall be bound with the petition for rehearing or suggestion for rehearing en banc as an appendix but shall not be marked or annotated.** Please read carefully the Internal Operating Procedures (IOP's) following FRAP 40 and LR 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if a nonmeritorious suggestion for en banc is made.

Direct Criminal Appeals. LR 41 provides that a motion for a stay of mandate under FRAP 41 shall not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate a substantial question is to be presented to the Supreme Court. Otherwise, the motion may be denied and the mandate issued immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and will be considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FRAP 41. The issuance of the mandate does not affect the time, or your right, to file such a petition.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: Rhonda Flowers
Rhonda Flowers, Deputy Clerk

Enclosure
Mr William Charles Zapalac
Mr Scott J Atlas
Mr John Cavanaugh O'Leary Jr
Mr James Roger Markham
Mr Theodore W Kassinger
Ms J Bernard Clayton
Ms Stephanie Kathleen Crain
Mr Richard Alan Morris
Mr Michael John Mucchetti

Mr Stanley G Schneider
Mr Manuel Lopez
Ms Marisa Andrea Gomez
Mr Ronald S Flagg
Ms Mary Lou Soller
Mr Stephen Brooks Bright

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20443

RICARDO ALDAPE GUERRA,

Petitioner-Appellee,

versus

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

Respondent-Appellant.

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

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Contending that the district court's factual findings of numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense, are clearly erroneous, Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, appeals the grant of habeas relief to Ricardo Aldape Guerra, who was convicted of capital murder and sentenced to death in 1982. We AFFIRM.

-- I.

On July 13, 1982, approximately two hours before midnight, Houston police officer J. D. Harris stopped his police car behind an automobile occupied by Guerra and Roberto Carrasco Flores (Carrasco), at the intersection of Edgewood and Walker Streets. Moments later, the Officer was shot three times in the head with a nine millimeter weapon and died shortly thereafter. Jose Francisco Armijo, who was near the intersection in an automobile with two of his children (one of whom, then ten years of age, was a key witness against Guerra at trial), was also shot in the head with a nine millimeter weapon and died later.

Witnesses informed police that the suspects might be found in the same neighborhood, at 4907 Rusk Street (Guerra's address). About one and one-half hours after Officer Harris was shot, Officer Trepagnier approached a garage next to that address. Using a nine millimeter weapon, Carrasco shot and seriously wounded the officer. Carrasco was killed in the ensuing exchange of gunfire with police. The nine millimeter weapon was found under Carrasco's body, and Officer Harris' service revolver was found under Carrasco's belt, along with another clip for the nine millimeter weapon.

Guerra was arrested moments after Carrasco was shot, when officers found him hiding nearby. A .45 caliber pistol was found within Guerra's reach.

Although the physical evidence pointed to Carrasco as Officer Harris' killer, Guerra was charged with capital murder on the basis

of eyewitness identification. (The State did not seek to convict Guerra under the law of parties.)

In October 1982, three months after the murder, a jury found Guerra guilty, rejecting his defense that Carrasco shot Officer Harris; he was sentenced to death. The Texas Court of Criminal Appeals affirmed in 1988, ***Guerra v. State***, 771 S.W.2d 453 (Tex. Crim. App. 1988); and the next year, the Supreme Court denied Guerra's petition for a writ of certiorari. ***Guerra v. Texas***, 492 U.S. 925 (1989).

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II.

As stated, the physical evidence led directly to Carrasco as Officer Harris' murderer. An obvious, critical question is why, if Guerra instead shot the Officer, the murder weapon (not to mention the Officer's service revolver) was found under Carrasco's body one and one-half hours after the Officer was shot. At oral argument, the respondent espoused the theory that, when Guerra and Carrasco exited their vehicle after the Officer pulled up behind them, they picked up each other's weapons, and then exchanged them after the murder. In light of this theory, it goes without saying that the next question that follows immediately is why, if Guerra shot the Officer, Carrasco would have been willing to take back and keep a weapon just used to kill a policeman. Among other obvious reasons for not wanting to be found with a murder weapon is the fact that it is common knowledge that anyone who kills a law enforcement officer will be quickly, vigorously, and aggressively pursued, as reflected by the events in this case.

The State relied on this exchanged weapons theory at trial. In closing argument, the prosecutor stated:

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> Do you think these guys are driving around and they've got those guns tucked in their belts? They take them out and set them on the seat ....
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> Do you think perhaps when they got out of the car, they picked up the wrong gun?

The record, however, contains little, if any, evidence to support this theory. Obviously, this was a critical fact issue at trial. As discussed *infra*, the State's non-disclosure of exculpatory information concerning this issue was one of the bases upon which the district court granted habeas relief.

At trial, Guerra testified that, on the night of the shooting, he and Carrasco went to the store; that Carrasco had a nine millimeter pistol which he was carrying at his belt; that he (Guerra) also was carrying a gun; that he put his gun under the car seat when he went into the store; that he put it back in his trousers when he got back to the car; and that the gun was in his belt when he got out of the car after Officer Harris arrived at the intersection.

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seat while they were driving around. He testified further that Carrasco, whom he referred to by the nickname "Werro" (spelled various ways in the record; according to the respondent at oral argument, it meant "the blond one" or "the light-skinned one"), shot Officer Harris and took the Officer's gun; that they ran back to Guerra's residence (4907 Rusk Street); and that, when they arrived, Carrasco had two weapons -- his own (the nine millimeter) and the Officer's.

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common-law husband, a parolee who was over 18 years of age, could be adversely affected if she did not cooperate.

The respondent contends that Garcia's testimony is not credible because her written statements prepared by the police were consistent with her trial testimony, even though she had not read her statements before trial, and because, if the police were trying to coerce witnesses to identify Guerra as the shooter, they would not have allowed Garcia to describe the shooter, both in her statement and at trial, as having blond hair and wearing a brown shirt and brown trousers. (Guerra had dark hair and was wearing a green shirt and blue jeans at the time of the shooting; Carrasco also had dark hair (but, as noted, was commonly referred to as "Werro", the "blond one" or "light-skinned one") and was wearing a purple or maroon shirt and brown trousers.)

Finding that Garcia's habeas testimony was credible, the district court found further that she had been intimidated by police and prosecutors, and that the police omitted material exonerating information from her written statement. We will declare testimony incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." ***United States v. Casteneda***, 951 F.2d 44, 48 (5th Cir. 1992) (internal quotation marks and citation omitted). As the district court noted, Garcia's testimony is consistent with the physical evidence that Carrasco, rather than Guerra, shot Officer Harris. Accordingly, we cannot conclude that the court clearly erred by finding that Garcia told the truth at the evidentiary hearing.

Patricia Diaz, who, as noted, was 17 years of age when she testified at trial, testified at the evidentiary hearing that she told police and prosecutors that, an instant after she heard shots, she saw Guerra on the driver's side of the police car, near the front, facing that car, with his empty hands on its hood, as if he were about to be searched; and that she did not see anyone shoot Officer Harris. But, her description of Guerra's location and his empty hands was not included in her written statements prepared by the police. Diaz testified further that, contrary to what is included in her first written statement, she did not tell the police that she saw a man from Guerra and Carrasco's car "pointing a gun in the direction of the police car, and I saw him shoot four times at the police car"; nor, contrary to what is included in her second written statement, did she tell the police, after the line-up, that she saw Guerra "with his hands outstretched, and I guess he had a gun in his hands". Diaz testified that she signed her statements without reading them because she was tired and because she was frightened by police threats to take her infant daughter from her if she did not cooperate.

The respondent maintains that Diaz's habeas testimony is not credible because, again, her trial testimony was consistent with her statements, even though she never read them. The respondent asserts that if, as Diaz testified at the evidentiary hearing, she had demonstrated at trial how Guerra was "pointing" by stretching her arms out in front of her with her palms open and down, the prosecution would have clarified her testimony, or the defense

would have capitalized on it. The district court found, however, that Diaz's trial testimony was the product of police intimidation, and was tainted by the prosecutor's inclusion in his questions of incorrect statements of Diaz's prior testimony. Again, because there is evidence in the record to support these findings, we cannot conclude that they are clearly erroneous. Restated, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." ***Anderson***, 470 U.S. at 573-74.

Finally, Frank Perez, who, as noted, was 17 years of age when he testified at trial, testified at the federal evidentiary hearing that it "could have been anywhere from 30 seconds to a minute and a half" after he heard gunshots that he saw two men run past his house; but, he was "not really sure exactly how long it was". Perez's statement to the police the day after the shooting reports that he saw a Mexican American male run past his house "[j]ust a short time after the gun shots"; at trial, he testified that "it might have been a minute or less than that, or maybe a little over a minute", that he "couldn't really place the time".

Perez testified further at the federal hearing that he told the police and prosecutors that he could not identify the first man, who appeared to have been running on the south side of Walker Street (as noted, this was one of the streets forming the intersection where the shooting occurred); that the second man,

whom he identified as Carrasco, appeared to have been running on the north side of that street; that, as Carrasco ran past, he pointed his left hand at Perez; that Carrasco put his left hand behind his back and then dropped an object that looked like a nine millimeter gun with a clip; that the object hit the street, making a metallic scraping sound; and that Carrasco picked up the object with his left hand and continued running down the street. Perez's written statement, prepared by the police, did not include that Carrasco appeared to be coming from the north side of Walker Street, or that the gun appeared to be a nine millimeter, or that Carrasco used his left hand both to point the gun at Perez and to pick up the gun. The word "gun" was typed in Perez's written statement, but, according to Perez, was changed to "object" after the police told him not to use the word "gun" unless he was 100% certain that the object was one.

The respondent does not challenge Perez's credibility; instead, he contends that, because the defense had Perez's written statement -- with "gun" changed to "object" -- when it cross-examined him at trial, the district court erred by finding that the prosecution suppressed Perez's statement that Carrasco dropped a gun. But, the respondent does not address the other information that the district court found to have been omitted from Perez's statement (that Carrasco appeared to be coming from the north side of Walker Street, that the gun appeared to be a nine millimeter, and that Carrasco used his left hand to point the gun at Perez and to pick it up after he dropped it). Obviously, that information

was material, because, according to it, Carrasco had the nine millimeter murder weapon shortly after the shooting. Moreover, the information is consistent with other evidence presented at the federal evidentiary hearing that there was a scratch on the nine millimeter weapon, consistent with it having been dropped; that the shooter ran from the scene on the north side of Walker Street; and that the shooter was left-handed (there was evidence at the federal hearing that Guerra is right-handed; this was not brought out at trial). As noted, the respondent challenges neither the correctness of the district court's factual finding that this information was suppressed, nor its materiality.

These three examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief. We need not discuss further examples of the lack of clear error in the district court's detailed factual findings. In sum, we are satisfied that more than sufficient non-clearly erroneous, legally relevant findings of fact support such relief.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

the statute's plain meaning, I respectfully dissent.

Ricardo Aldape GUERRA, Petitioner–Appellee,

v.

Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent–Appellant.

No. 95–20443.

United States Court of Appeals, Fifth Circuit.

July 30, 1996.

After defendant's capital murder conviction was affirmed on direct appeal, 771 S.W.2d 453, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., 916 F.Supp. 620, granted habeas relief, and state appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that state's failure to disclose material exculpatory information to defense violated due process.

Affirmed.

1. Constitutional Law ⇐268(5)

State's failure to disclose material exculpatory information to defense is violative of due process if there is reasonable probability that, had evidence been disclosed, result of proceeding would have been different. U.S.C.A. Const.Amend. 14.

2. Habeas Corpus ⇐719

District court's finding that state's failure to disclose material exculpatory information violated due process, and thus warranted habeas relief, was not clearly erroneous, in view of evidence that one witness was intimidated by police into identifying defendant as shooter and later gave testimony indicating that defendant's companion was shooter, and that written versions of other witnesses' statements, which were prepared by police, did not conform to what witnesses told police. U.S.C.A. Const.Amend. 14.

3. Federal Courts ⇐844

Court of Appeals will declare testimony incredible as matter of law only when it is so unbelievable on its fact that it defies physical laws.

Scott J. Atlas, John Cavanaugh O'Leary, Jr., Stephanie Kathleen Crain, Michael John Mucchetti, Vinson & Elkins, Houston, TX, Richard Alan Morris, Feldman & Associates, Houston, TX, Theodore W. Kassinger, James Roger Markham, Vinson & Elkins, Washington, DC, Stanley G. Schneider, Schneider & McKinney, Houston, TX, Manuel Lopez, Solar & Fernandes, Houston, TX, J. Bernard Clayton, Houston, TX, for petitioner-appellee.

William Charles Zapalac, Asst. Atty. Gen., Office of the Attorney General for the State of Texas, Austin, TX, for respondent-appellant.

Ronald S. Flagg, Julia Elizabeth Sullivan, Marisa Andrea Gomez, Sidley & Austin, Washington, DC, for American Immigration Lawyers' Ass'n, amicus curiae.

Stephen Brooks Bright, Southern Center for Human Rights, Atlanta, GA, for Allard K. Lowenstein Human Rights Clinic, Southern Center for Human Rights and International Human Rights Law Group, amicus curiae.

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

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Contending that the district court's factual findings of numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense, are

clearly erroneous, Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, appeals the grant of habeas relief to Ricardo Aldape Guerra, who was convicted of capital murder and sentenced to death in 1982. We AFFIRM.

I.

On July 13, 1982, approximately two hours before midnight, Houston police officer J.D. Harris stopped his police car behind an automobile occupied by Guerra and Roberto Carrasco Flores (Carrasco), at the intersection of Edgewood and Walker Streets. Moments later, the Officer was shot three times in the head with a nine millimeter weapon and died shortly thereafter. Jose Francisco Armijo, who was near the intersection in an automobile with two of his children (one of whom, then ten years of age, was a key witness against Guerra at trial), was also shot in the head with a nine millimeter weapon and died later.

Witnesses informed police that the suspects might be found in the same neighborhood, at 4907 Rusk Street (Guerra's address). About one and one-half hours after Officer Harris was shot, Officer Trepagnier approached a garage next to that address. Using a nine millimeter weapon, Carrasco shot and seriously wounded the officer. Carrasco was killed in the ensuing exchange of gunfire with police. The nine millimeter weapon was found under Carrasco's body, and Officer Harris' service revolver was found under Carrasco's belt, along with another clip for the nine millimeter weapon.

Guerra was arrested moments after Carrasco was shot, when officers found him hiding nearby. A .45 caliber pistol was found within Guerra's reach.

Although the physical evidence pointed to Carrasco as Officer Harris' killer, Guerra was charged with capital murder on the basis of eyewitness identification. (The State did not seek to convict Guerra under the law of parties.)

In October 1982, three months after the murder, a jury found Guerra guilty, rejecting his defense that Carrasco shot Officer Harris; he was sentenced to death. The Texas Court of Criminal Appeals affirmed in 1988, *Guerra v. State*, 771 S.W.2d 453 (Tex.Crim. App.1988); and the next year, the Supreme Court denied Guerra's petition for a writ of certiorari. *Guerra v. Texas*, 492 U.S. 925, 109 S.Ct. 3260, 106 L.Ed.2d 606 (1989).

Guerra filed for habeas relief in the state trial court in May 1992. Following the appointment of new counsel that July, he filed an amended application in mid-September. Four days later, the trial court, without conducting an evidentiary hearing and making findings of fact or conclusions of law, recommended denial of relief. In January 1993, the Texas Court of Criminal Appeals accepted the recommendation and denied relief.

Shortly thereafter, in February, Guerra sought federal habeas relief. The district court conducted an extensive evidentiary hearing that November, and, a year later, in November 1994, entered an order granting relief. The order was amended the next May, *Guerra v. Collins*, 916 F.Supp. 620 (S.D.Tex.1995), and the respondent was ordered to release Guerra unless the State began retrial proceedings by arraigning him within 30 days. Our court stayed the judgment.

II.

As stated, the physical evidence led directly to Carrasco as Officer Harris' murderer. An obvious, critical question is why, if Guerra instead shot the Officer, the murder weapon (not to mention the Officer's service revolver) was found under Carrasco's body one and one-half hours after the Officer was shot. At oral argument, the respondent espoused the theory that, when Guerra and Carrasco exited their vehicle after the Officer pulled up behind them, they picked up each other's weapons, and then exchanged them after the murder. In light of this theory, it goes without saying that the next question that follows immediately is why, if Guerra shot the Officer, Carrasco would have been willing to take back and keep a weapon just used to kill a policeman. Among other obvious reasons for not wanting to be found with a murder weapon is the fact that it is common knowledge that anyone who kills a law en-

forcement officer will be quickly, vigorously, and aggressively pursued, as reflected by the events in this case.

The State relied on this exchanged weapons theory at trial. In closing argument, the prosecutor stated:

> I don't have to prove to you how ... Guerra came in possession of that nine-millimeter pistol....
>
> ....
>
> There is no way that I had any type of equipment set up inside of that vehicle to show you what was done inside that vehicle and how the weapons could have gotten into this man's [Guerra's] hands, but you know one thing from listening to the evidence, and you know one thing from listening to when Ricardo Guerra testified. He didn't always keep his pistol tucked into his belt.
>
> Do you recall, right towards the end of his testimony, I asked him, "When you went into the store to get those Cokes [before the shooting], did you still have that pistol tucked inside your belt with your shirt covering it?"
>
> "No, I put it under the seat," and I think you can use your common sense....
>
> Do you think these guys are driving around and they've got those guns tucked in their belts? They take them out and set them on the seat....
>
> Do you think perhaps when they got out of the car, they picked up the wrong gun?

The record, however, contains little, if any, evidence to support this theory. Obviously, this was a critical fact issue at trial. As discussed *infra*, the State's non-disclosure of exculpatory information concerning this issue was one of the bases upon which the district court granted habeas relief.

At trial, Guerra testified that, on the night of the shooting, he and Carrasco went to the store; that Carrasco had a nine millimeter pistol which he was carrying at his belt; that he (Guerra) also was carrying a gun; that he put his gun under the car seat when he went into the store; that he put it back in his trousers when he got back to the car; and that the gun was in his belt when he got out of the car after Officer Harris arrived at the intersection.

On cross-examination at trial, Guerra denied that he and Carrasco took their guns out of their belts and put them on the seat while they were driving around. He testified further that Carrasco, whom he referred to by the nickname "Werro" (spelled various ways in the record; according to the respondent at oral argument, it meant "the blond one" or "the light-skinned one"), shot Officer Harris and took the Officer's gun; that they ran back to Guerra's residence (4907 Rusk Street); and that, when they arrived, Carrasco had two weapons—his own (the nine millimeter) and the Officer's.

Two of Guerra's roommates testified at trial that, shortly after Officer Harris was shot, Carrasco ran into the house and said that he had killed a policeman; and that Carrasco had the policeman's gun in his belt and another gun in his hand. One roommate testified further that, when Guerra arrived a minute or two later, Guerra said that Carrasco had just killed a policeman.

Two of the State's strongest witnesses at trial were Jose Armijo, Jr. (the then ten-year-old son of the man fatally wounded at the same intersection immediately after Officer Harris was killed), who testified that Guerra shot Officer Harris and his father, and Hilma Galvan, who testified that she saw Guerra shoot Officer Harris. Neither testified, however, at the federal evidentiary hearing.

The district court held that Guerra's due process rights were violated based on findings that, *inter alia*, (1) police and prosecutors threatened and intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense; (2) police and prosecutors used impermissibly suggestive identification procedures, such as permitting witnesses to see Guerra in handcuffs, with bags over his hands, prior to a line-up, permitting witnesses to discuss identification before, during, and after the line-up, conducting a reenactment of the shooting shortly after it occurred so that witnesses could develop a consensus view, and using mannequins of Guerra and Carrasco at trial to reinforce and bolster identification testimony; (3) police

and prosecutors failed to disclose material, exculpatory evidence to the defense; (4) prosecutors engaged in misconduct at trial, including soliciting and encouraging witnesses to overstate or understate facts, falsely accusing a defense witness of either being drunk or having "smoked something" because he yawned during his testimony, questioning a defense witness about an extraneous murder which the prosecutors knew was a false rumor, and making improper closing argument; and (5) a court interpreter inaccurately translated witnesses' trial testimony.

Because the state habeas court did not make findings of fact, the statutory presumption of correctness for such findings is not in play. (The 28 U.S.C. § 2254(d) presumption of correctness has been redesignated as § 2254(e)(1) in the Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. No. 104–132, § 104(3), 110 Stat. 1214, 1219 (1996).) In fact, the only issue raised here is the contention that "the district court's factual findings that the police and prosecutors engaged in misconduct depriving Guerra of due process ... are clearly erroneous." As a result, the respondent conceded at oral argument that, if those findings are not clearly erroneous, then a due process violation occurred. (Inconsistent with the statement of the issue and the concession at oral argument, the respondent's brief contains assertions that certain factual findings, even if not clearly erroneous, are legally irrelevant. We conclude that habeas relief is warranted by legally relevant factual findings that are not clearly erroneous.)

To restate the well-known standard, a factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (citation omitted). Along that line, in a case such as this, which turns almost exclusively "on determinations regarding the credibility of witnesses, [FED.R.CIV.P.] 52(a) demands even greater deference to the trial court's findings." *Id.* at 575, 105 S.Ct. at 1512. Similarly, "[w]here the court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error." *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir.1993) (internal quotation marks and citation omitted). Three examples more than suffice to demonstrate why, based on our review of the record, there are sufficient legally relevant, non-clearly erroneous findings of fact to warrant habeas relief.

[1] The district court found that, in interviews with police and prosecutors, three witnesses, all then under the age of 18 (Herlinda Garcia (14), Patricia Diaz (17), and Frank Perez (17)), gave police and prosecutors material exculpatory information that was not disclosed to the defense. Such non-disclosure is violative of due process if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment); *see also Kyles v. Whitley*, — U.S. —, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). As noted, for these three examples, because, with slight exception, the respondent presents only a factual issue, our review is a most narrow one—were the findings of fact underlying a due process violation because of the non-disclosure clearly erroneous.

[2] Garcia, who identified Guerra at trial as Officer Harris' murderer, testified instead at the federal evidentiary hearing that she told police and prosecutors that she saw Carrasco pull something out of his trousers and point at Officer Harris with both hands clasped together in front of him; that Carrasco was standing a "couple of feet" away from the Officer; that she saw flames coming out of Carrasco's hands; and that, when she heard the shots, she saw Guerra leaning toward the police car, near the front, with his empty hands on the hood. This information was not included in Garcia's written statement, nor was it disclosed to the defense. Garcia, who, as noted, was 14 years of age at the time of the shooting, testified further

that she was intimidated into identifying Guerra as the shooter by police warnings that her common-law husband, a parolee who was over 18 years of age, could be adversely affected if she did not cooperate.

The respondent contends that Garcia's testimony is not credible because her written statements prepared by the police were consistent with her trial testimony, even though she had not read her statements before trial, and because, if the police were trying to coerce witnesses to identify Guerra as the shooter, they would not have allowed Garcia to describe the shooter, both in her statement and at trial, as having blond hair and wearing a brown shirt and brown trousers. (Guerra had dark hair and was wearing a green shirt and blue jeans at the time of the shooting; Carrasco also had dark hair (but, as noted, was commonly referred to as "Werro", the "blond one" or "light-skinned one") and was wearing a purple or maroon shirt and brown trousers.)

[3] Finding that Garcia's habeas testimony was credible, the district court found further that she had been intimidated by police and prosecutors, and that the police omitted material exonerating information from her written statement. We will declare testimony incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." *United States v. Casteneda*, 951 F.2d 44, 48 (5th Cir.1992) (internal quotation marks and citation omitted). As the district court noted, Garcia's testimony is consistent with the physical evidence that Carrasco, rather than Guerra, shot Officer Harris. Accordingly, we cannot conclude that the court clearly erred by finding that Garcia told the truth at the evidentiary hearing.

Patricia Diaz, who, as noted, was 17 years of age when she testified at trial, testified at the evidentiary hearing that she told police and prosecutors that, an instant after she heard shots, she saw Guerra on the driver's side of the police car, near the front, facing that car, with his empty hands on its hood, as if he were about to be searched; and that she did not see anyone shoot Officer Harris. But, her description of Guerra's location and his empty hands was not included in her written statements prepared by the police. Diaz testified further that, contrary to what is included in her first written statement, she did not tell the police that she saw a man from Guerra and Carrasco's car "pointing a gun in the direction of the police car, and I saw him shoot four times at the police car"; nor, contrary to what is included in her second written statement, did she tell the police, after the line-up, that she saw Guerra "with his hands outstretched, and I guess he had a gun in his hands". Diaz testified that she signed her statements without reading them because she was tired and because she was frightened by police threats to take her infant daughter from her if she did not cooperate.

The respondent maintains that Diaz's habeas testimony is not credible because, again, her trial testimony was consistent with her statements, even though she never read them. The respondent asserts that if, as Diaz testified at the evidentiary hearing, she had demonstrated at trial how Guerra was "pointing" by stretching her arms out in front of her with her palms open and down, the prosecution would have clarified her testimony, or the defense would have capitalized on it. The district court found, however, that Diaz's trial testimony was the product of police intimidation, and was tainted by the prosecutor's inclusion in his questions of incorrect statements of Diaz's prior testimony. Again, because there is evidence in the record to support these findings, we cannot conclude that they are clearly erroneous. Restated, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74, 105 S.Ct. at 1511.

Finally, Frank Perez, who, as noted, was 17 years of age when he testified at trial, testified at the federal evidentiary hearing that it "could have been anywhere from 30 seconds to a minute and a half" after he heard gunshots that he saw two men run past his house; but, he was "not really sure exactly how long it was". Perez's statement

to the police the day after the shooting reports that he saw a Mexican American male run past his house "[j]ust a short time after the gun shots"; at trial, he testified that "it might have been a minute or less than that, or maybe a little over a minute", that he "couldn't really place the time".

Perez testified further at the federal hearing that he told the police and prosecutors that he could not identify the first man, who appeared to have been running on the south side of Walker Street (as noted, this was one of the streets forming the intersection where the shooting occurred); that the second man, whom he identified as Carrasco, appeared to have been running on the north side of that street; that, as Carrasco ran past, he pointed his left hand at Perez; that Carrasco put his left hand behind his back and then dropped an object that looked like a nine millimeter gun with a clip; that the object hit the street, making a metallic scraping sound; and that Carrasco picked up the object with his left hand and continued running down the street. Perez's written statement, prepared by the police, did not include that Carrasco appeared to be coming from the north side of Walker Street, or that the gun appeared to be a nine millimeter, or that Carrasco used his left hand both to point the gun at Perez and to pick up the gun. The word "gun" was typed in Perez's written statement, but, according to Perez, was changed to "object" after the police told him not to use the word "gun" unless he was 100% certain that the object was one.

The respondent does not challenge Perez's credibility; instead, he contends that, because the defense had Perez's written statement—with "gun" changed to "object"—when it cross-examined him at trial, the district court erred by finding that the prosecution suppressed Perez's statement that Carrasco dropped a gun. But, the respondent does not address the other information that the district court found to have been omitted from Perez's statement (that Carrasco appeared to be coming from the north side of Walker Street, that the gun appeared to be a nine millimeter, and that Carrasco used his left hand to point the gun at Perez and to pick it up after he dropped it). Obviously, that information was material, because, according to it, Carrasco had the nine millimeter murder weapon shortly after the shooting. Moreover, the information is consistent with other evidence presented at the federal evidentiary hearing that there was a scratch on the nine millimeter weapon, consistent with it having been dropped; that the shooter ran from the scene on the north side of Walker Street; and that the shooter was left-handed (there was evidence at the federal hearing that Guerra is right-handed; this was not brought out at trial). As noted, the respondent challenges neither the correctness of the district court's factual finding that this information was suppressed, nor its materiality.

These three examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief. We need not discuss further examples of the lack of clear error in the district court's detailed factual findings. In sum, we are satisfied that more than sufficient non-clearly erroneous, legally relevant findings of fact support such relief.

III.

For the foregoing reasons, the judgment is *AFFIRMED.*

WEST KEY NUMBER SYSTEM

QUEST MEDICAL, INC., Plaintiff—Counter Claimant—Appellee,

v.

Earl J. APPRILL, Defendant—Counter Claimant—Appellant.

No. 95-10438.

United States Court of Appeals, Fifth Circuit.

Aug. 12, 1996.

In action arising out of tender offer, seller sued buyer for misrepresentation.

7/31/96

Ricardo Aldape GUERRA, Petitioner–Appellee,

v.

Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent–Appellant.

No. 95–20443.

United States Court of Appeals, Fifth Circuit.

July 30, 1996.

After defendant's capital murder conviction was affirmed on direct appeal, 771 S.W.2d 453, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., 916 F.Supp. 620, granted habeas relief, and state appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that state's failure to disclose material exculpatory information to defense violated due process.

Affirmed.

1. Constitutional Law ⇐268(5)

State's failure to disclose material exculpatory information to defense is violative of due process if there is reasonable probability that, had evidence been disclosed, result of proceeding would have been different. U.S.C.A. Const.Amend. 14.

2. Habeas Corpus ⇐719

District court's finding that state's failure to disclose material exculpatory information violated due process, and thus warranted habeas relief, was not clearly erroneous, in view of evidence that one witness was intimidated by police into identifying defendant as shooter and later gave testimony indicating that defendant's companion was shooter, and that written versions of other witnesses' statements, which were prepared by police, did not conform to what witnesses told police. U.S.C.A. Const.Amend. 14.

3. Federal Courts ⇐844

Court of Appeals will declare testimony incredible as matter of law only when it is so unbelievable on its fact that it defies physical laws.

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

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Contending that the district court's factual findings of numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense, are clearly erroneous, Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, appeals the grant of habeas relief to Ricardo Aldape Guerra, who was convicted of capital murder and sentenced to death in 1982. We AFFIRM.

I.

On July 13, 1982, approximately two hours before midnight, Houston police officer J.D. Harris stopped his police car behind an automobile occupied by Guerra and Roberto Carrasco Flores (Carrasco), at the intersection of Edgewood and Walker Streets. Moments

later, the Officer was shot three times in the head with a nine millimeter weapon and died shortly thereafter. Jose Francisco Armijo, who was near the intersection in an automobile with two of his children (one of whom, then ten years of age, was a key witness against Guerra at trial), was also shot in the head with a nine millimeter weapon and died later.

Witnesses informed police that the suspects might be found in the same neighborhood, at 4907 Rusk Street (Guerra's address). About one and one-half hours after Officer Harris was shot, Officer Trepagnier approached a garage next to that address. Using a nine millimeter weapon, Carrasco shot and seriously wounded the officer. Carrasco was killed in the ensuing exchange of gunfire with police. The nine millimeter weapon was found under Carrasco's body, and Officer Harris' service revolver was found under Carrasco's belt, along with another clip for the nine millimeter weapon.

Guerra was arrested moments after Carrasco was shot, when officers found him hiding nearby. A .45 caliber pistol was found within Guerra's reach.

Although the physical evidence pointed to Carrasco as Officer Harris' killer, Guerra was charged with capital murder on the basis of eyewitness identification. (The State did not seek to convict Guerra under the law of parties.)

In October 1982, three months after the murder, a jury found Guerra guilty, rejecting his defense that Carrasco shot Officer Harris; he was sentenced to death. The Texas Court of Criminal Appeals affirmed in 1988, *Guerra v. State,* 771 S.W.2d 453 (Tex.Crim. App.1988); and the next year, the Supreme Court denied Guerra's petition for a writ of certiorari. *Guerra v. Texas,* 492 U.S. 925, 109 S.Ct. 3260, 106 L.Ed.2d 606 (1989).

Guerra filed for habeas relief in the state trial court in May 1992. Following the appointment of new counsel that July, he filed an amended application in mid-September. Four days later, the trial court, without conducting an evidentiary hearing and making findings of fact or conclusions of law, recommended denial of relief. In January 1993, the Texas Court of Criminal Appeals accepted the recommendation and denied relief.

Shortly thereafter, in February, Guerra sought federal habeas relief. The district court conducted an extensive evidentiary hearing that November, and, a year later, in November 1994, entered an order granting relief. The order was amended the next May, *Guerra v. Collins,* 916 F.Supp. 620 (S.D.Tex.1995), and the respondent was ordered to release Guerra unless the State began retrial proceedings by arraigning him within 30 days. Our court stayed the judgment.

II.

As stated, the physical evidence led directly to Carrasco as Officer Harris' murderer. An obvious, critical question is why, if Guerra instead shot the Officer, the murder weapon (not to mention the Officer's service revolver) was found under Carrasco's body one and one-half hours after the Officer was shot. At oral argument, the respondent espoused the theory that, when Guerra and Carrasco exited their vehicle after the Officer pulled up behind them, they picked up each other's weapons, and then exchanged them after the murder. In light of this theory, it goes without saying that the next question that follows immediately is why, if Guerra shot the Officer, Carrasco would have been willing to take back and keep a weapon just used to kill a policeman. Among other obvious reasons for not wanting to be found with a murder weapon is the fact that it is common

knowledge that anyone who kills a law enforcement officer will be quickly, vigorously, and aggressively pursued, as reflected by the events in this case.

The State relied on this exchanged weapons theory at trial. In closing argument, the prosecutor stated:

> I don't have to prove to you how ... Guerra came in possession of that nine-millimeter pistol....
>
> ....
>
> There is no way that I had any type of equipment set up inside of that vehicle to show you what was done inside that vehicle and how the weapons could have gotten into this man's [Guerra's] hands, but you know one thing from listening to the evidence, and you know one thing from listening to when Ricardo Guerra testified. He didn't always keep his pistol tucked into his belt.
>
> Do you recall, right towards the end of his testimony, I asked him, "When you went into the store to get those Cokes [before the shooting], did you still have that pistol tucked inside your belt with your shirt covering it?"
>
> "No, I put it under the seat," and I think you can use your common sense....
>
> Do you think these guys are driving around and they've got those guns tucked in their belts? They take them out and set them on the seat....
>
> Do you think perhaps when they got out of the car, they picked up the wrong gun?

The record, however, contains little, if any, evidence to support this theory. Obviously, this was a critical fact issue at trial. As discussed *infra*, the State's non-disclosure of exculpatory information concerning this issue was one of the bases upon which the district court granted habeas relief.

At trial, Guerra testified that, on the night of the shooting, he and Carrasco went to the store; that Carrasco had a nine millimeter pistol which he was carrying at his belt; that he (Guerra) also was carrying a gun; that he put his gun under the car seat when he went into the store; that he put it back in his trousers when he got back to the car; and that the gun was in his belt when he got out of the car after Officer Harris arrived at the intersection.

On cross-examination at trial, Guerra denied that he and Carrasco took their guns out of their belts and put them on the seat while they were driving around. He testified further that Carrasco, whom he referred to by the nickname "Werro" (spelled various ways in the record; according to the respondent at oral argument, it meant "the blond one" or "the light-skinned one"), shot Officer Harris and took the Officer's gun; that they ran back to Guerra's residence (4907 Rusk Street); and that, when they arrived, Carrasco had two weapons—his own (the nine millimeter) and the Officer's.

Two of Guerra's roommates testified at trial that, shortly after Officer Harris was shot, Carrasco ran into the house and said that he had killed a policeman; and that Carrasco had the policeman's gun in his belt and another gun in his hand. One roommate testified further that, when Guerra arrived a minute or two later, Guerra said that Carrasco had just killed a policeman.

Two of the State's strongest witnesses at trial were Jose Armijo, Jr. (the then ten-year-old son of the man fatally wounded at the same intersection immediately after Officer Harris was killed), who testified that Guerra shot Officer Harris and his father, and Hilma Galvan, who testified that she saw Guerra shoot Officer Harris. Neither testi-

fied, however, at the federal evidentiary hearing.

The district court held that Guerra's due process rights were violated based on findings that, *inter alia,* (1) police and prosecutors threatened and intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense; (2) police and prosecutors used impermissibly suggestive identification procedures, such as permitting witnesses to see Guerra in handcuffs, with bags over his hands, prior to a line-up, permitting witnesses to discuss identification before, during, and after the line-up, conducting a reenactment of the shooting shortly after it occurred so that witnesses could develop a consensus view, and using mannequins of Guerra and Carrasco at trial to reinforce and bolster identification testimony; (3) police and prosecutors failed to disclose material, exculpatory evidence to the defense; (4) prosecutors engaged in misconduct at trial, including soliciting and encouraging witnesses to overstate or understate facts, falsely accusing a defense witness of either being drunk or having "smoked something" because he yawned during his testimony, questioning a defense witness about an extraneous murder which the prosecutors knew was a false rumor, and making improper closing argument; and (5) a court interpreter inaccurately translated witnesses' trial testimony.

Because the state habeas court did not make findings of fact, the statutory presumption of correctness for such findings is not in play. (The 28 U.S.C. § 2254(d) presumption of correctness has been redesignated as § 2254(e)(1) in the Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. No. 104–132, § 104(3), 110 Stat. 1214, 1219 (1996).) In fact, the only issue raised here is the contention that "the district court's factual findings that the police and prosecutors engaged in misconduct depriving Guerra of due process ... are clearly erroneous." As a result, the respondent conceded at oral argument that, if those findings are not clearly erroneous, then a due process violation occurred. (Inconsistent with the statement of the issue and the concession at oral argument, the respondent's brief contains assertions that certain factual findings, even if not clearly erroneous, are legally irrelevant. We conclude that habeas relief is warranted by legally relevant factual findings that are not clearly erroneous.)

To restate the well-known standard, a factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (citation omitted). Along that line, in a case such as this, which turns almost exclusively "on determinations regarding the credibility of witnesses, [FED.R.CIV.P.] 52(a) demands even greater deference to the trial court's findings." *Id.* at 575, 105 S.Ct. at 1512. Similarly, "[w]here the court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error." *Schlesinger v. Herzog,* 2 F.3d 135, 139 (5th Cir.1993) (internal quotation marks and citation omitted). Three examples more than suffice to demonstrate why, based on our review of the record, there are sufficient legally relevant, non-clearly erroneous findings of fact to warrant habeas relief.

[1] The district court found that, in interviews with police and prosecutors, three witnesses, all then under the age of 18 (Herlinda Garcia (14), Patricia Diaz (17), and Frank Perez (17)), gave police and prosecutors ma-

terial exculpatory information that was not disclosed to the defense. Such non-disclosure is violative of due process if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment); *see also Kyles v. Whitley,* — U.S. ——, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). As noted, for these three examples, because, with slight exception, the respondent presents only a factual issue, our review is a most narrow one—were the findings of fact underlying a due process violation because of the non-disclosure clearly erroneous.

[2] Garcia, who identified Guerra at trial as Officer Harris' murderer, testified instead at the federal evidentiary hearing that she told police and prosecutors that she saw Carrasco pull something out of his trousers and point at Officer Harris with both hands clasped together in front of him; that Carrasco was standing a "couple of feet" away from the Officer; that she saw flames coming out of Carrasco's hands; and that, when she heard the shots, she saw Guerra leaning toward the police car, near the front, with his empty hands on the hood. This information was not included in Garcia's written statement, nor was it disclosed to the defense. Garcia, who, as noted, was 14 years of age at the time of the shooting, testified further that she was intimidated into identifying Guerra as the shooter by police warnings that her common-law husband, a parolee who was over 18 years of age, could be adversely affected if she did not cooperate.

The respondent contends that Garcia's testimony is not credible because her written statements prepared by the police were consistent with her trial testimony, even though she had not read her statements before trial, and because, if the police were trying to coerce witnesses to identify Guerra as the shooter, they would not have allowed Garcia to describe the shooter, both in her statement and at trial, as having blond hair and wearing a brown shirt and brown trousers. (Guerra had dark hair and was wearing a green shirt and blue jeans at the time of the shooting; Carrasco also had dark hair (but, as noted, was commonly referred to as "Werro", the "blond one" or "light-skinned one") and was wearing a purple or maroon shirt and brown trousers.)

[3] Finding that Garcia's habeas testimony was credible, the district court found further that she had been intimidated by police and prosecutors, and that the police omitted material exonerating information from her written statement. We will declare testimony incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." *United States v. Casteneda,* 951 F.2d 44, 48 (5th Cir.1992) (internal quotation marks and citation omitted). As the district court noted, Garcia's testimony is consistent with the physical evidence that Carrasco, rather than Guerra, shot Officer Harris. Accordingly, we cannot conclude that the court clearly erred by finding that Garcia told the truth at the evidentiary hearing.

Patricia Diaz, who, as noted, was 17 years of age when she testified at trial, testified at the evidentiary hearing that she told police and prosecutors that, an instant after she heard shots, she saw Guerra on the driver's side of the police car, near the front, facing that car, with his empty hands on its hood, as if he were about to be searched; and that she did not see anyone shoot Officer Harris.

But, her description of Guerra's location and his empty hands was not included in her written statements prepared by the police. Diaz testified further that, contrary to what is included in her first written statement, she did not tell the police that she saw a man from Guerra and Carrasco's car "pointing a gun in the direction of the police car, and I saw him shoot four times at the police car"; nor, contrary to what is included in her second written statement, did she tell the police, after the line-up, that she saw Guerra "with his hands outstretched, and I guess he had a gun in his hands". Diaz testified that she signed her statements without reading them because she was tired and because she was frightened by police threats to take her infant daughter from her if she did not cooperate.

The respondent maintains that Diaz's habeas testimony is not credible because, again, her trial testimony was consistent with her statements, even though she never read them. The respondent asserts that if, as Diaz testified at the evidentiary hearing, she had demonstrated at trial how Guerra was "pointing" by stretching her arms out in front of her with her palms open and down, the prosecution would have clarified her testimony, or the defense would have capitalized on it. The district court found, however, that Diaz's trial testimony was the product of police intimidation, and was tainted by the prosecutor's inclusion in his questions of incorrect statements of Diaz's prior testimony. Again, because there is evidence in the record to support these findings, we cannot conclude that they are clearly erroneous. Restated, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74, 105 S.Ct. at 1511.

Finally, Frank Perez, who, as noted, was 17 years of age when he testified at trial, testified at the federal evidentiary hearing that it "could have been anywhere from 30 seconds to a minute and a half" after he heard gunshots that he saw two men run past his house; but, he was "not really sure exactly how long it was". Perez's statement to the police the day after the shooting reports that he saw a Mexican American male run past his house "[j]ust a short time after the gun shots"; at trial, he testified that "it might have been a minute or less than that, or maybe a little over a minute", that he "couldn't really place the time".

Perez testified further at the federal hearing that he told the police and prosecutors that he could not identify the first man, who appeared to have been running on the south side of Walker Street (as noted, this was one of the streets forming the intersection where the shooting occurred); that the second man, whom he identified as Carrasco, appeared to have been running on the north side of that street; that, as Carrasco ran past, he pointed his left hand at Perez; that Carrasco put his left hand behind his back and then dropped an object that looked like a nine millimeter gun with a clip; that the object hit the street, making a metallic scraping sound; and that Carrasco picked up the object with his left hand and continued running down the street. Perez's written statement, prepared by the police, did not include that Carrasco appeared to be coming from the north side of Walker Street, or that the gun appeared to be a nine millimeter, or that Carrasco used his left hand both to point the gun at Perez and to pick up the gun. The word "gun" was typed in Perez's written statement, but, according to Perez, was changed to "object" after the police told him not to use the word

"gun" unless he was 100% certain that the object was one.

The respondent does not challenge Perez's credibility; instead, he contends that, because the defense had Perez's written statement—with "gun" changed to "object"—when it cross-examined him at trial, the district court erred by finding that the prosecution suppressed Perez's statement that Carrasco dropped a gun. But, the respondent does not address the other information that the district court found to have been omitted from Perez's statement (that Carrasco appeared to be coming from the north side of Walker Street, that the gun appeared to be a nine millimeter, and that Carrasco used his left hand to point the gun at Perez and to pick it up after he dropped it). Obviously, that information was material, because, according to it, Carrasco had the nine millimeter murder weapon shortly after the shooting. Moreover, the information is consistent with other evidence presented at the federal evidentiary hearing that there was a scratch on the nine millimeter weapon, consistent with it having been dropped; that the shooter ran from the scene on the north side of Walker Street; and that the shooter was left-handed (there was evidence at the federal hearing that Guerra is right-handed; this was not brought out at trial). As noted, the respondent challenges neither the correctness of the district court's factual finding that this information was suppressed, nor its materiality.

These three examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief. We need not discuss further examples of the lack of clear error in the district court's detailed factual findings. In sum, we are satisfied that more than sufficient non-clearly erroneous, legally relevant findings of fact support such relief.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUL 30 1996
CHARLES R. FULBRUGE III
CLERK

No. 95-20443

D.C. Docket No. CA-H-93-290

United States District Court
Southern District of Texas
FILED
AUG 30 1996
Michael N. Milby, Clerk

RICARDO ALDAPE GUERRA

Petitioner - Appellee

v.

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

Respondent - Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

ISSUED AS MANDATE: AUG 21 1996

OP-11-S

A true copy
Test:
Clerk, U.S. Court of Appeals, Fifth Circuit
By _____ Deputy
New Orleans, Louisiana AUG 21 1996

TRUE COPY I CERTIFY
ATTEST: 10-16-96
MICHAEL N. MILBY, Clerk
By _____ Deputy Clerk

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125a Vol. II

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By _____ Deputy Clerk

Old pledge (9/9/96)
not filed on
given to J.
Voigt

CAUSE NO. 359805

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

DEFENDANT RICARDO ALDAPE GUERRA'S
MOTION FOR RETURN OF PERSONAL PROPERTY

Now comes Defendant, Ricardo Aldape Guerra ("Guerra"), and files this Motion for Return of Personal Property, and as cause therefor would show this Court the following:

1. In October 1982, Guerra was found guilty in this Court of the capital murder of a Houston police officer and sentenced to death. His petition for a writ of habeas corpus was granted, and his conviction was set aside. *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), *aff'd, Guerra v. Johnson*, No. 95-20443 (5th Cir. July 30, 1996) (a copy is attached for the Court's convenience and marked "Attachment 1").

2. On the night of his arrest, Houston police officers confiscated from Guerra $14.21 in cash and a $300.00 money order made out to his mother. A copy of the record from official police files reflecting the retention of this money order (F333, F677) is attached hereto, marked "Attachment 2," and incorporated herein for all purposes. Guerra wishes to obtain the return of said money order and cash so that it can be given to his parents.

3. Neither the money order nor the cash has ever been used as evidence in any proceeding, and neither has evidentiary significance. In any event, Guerra is prepared to stipulate to the authenticity of a true and correct copy of the money order.

Accordingly, Defendant Ricardo Aldape Guerra respectfully requests the return of the $300.00 money order and $14.00 in cash that were confiscated by Houston police officers on the evening of July 13, 1982.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was hand delivered to opposing counsel on the 20th day of August, 1996.

Scott J. Atlas

VEHOU07:21518.1

cc:

Ricardo Aldape GUERRA, Petitioner–Appellee,

v.

Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent–Appellant.

No. 95–20443.

United States Court of Appeals, Fifth Circuit.

July 30, 1996.

After defendant's capital murder conviction was affirmed on direct appeal, 771 S.W.2d 453, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., 916 F.Supp. 620, granted habeas relief, and state appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that state's failure to disclose material exculpatory information to defense violated due process.

Affirmed.

1. Constitutional Law ⇐268(5)

State's failure to disclose material exculpatory information to defense is violative of due process if there is reasonable probability that, had evidence been disclosed, result of proceeding would have been different. U.S.C.A. Const.Amend. 14.

2. Habeas Corpus ⇐719

District court's finding that state's failure to disclose material exculpatory information violated due process, and thus warranted habeas relief, was not clearly erroneous, in view of evidence that one witness was intimidated by police into identifying defendant as shooter and later gave testimony indicating that defendant's companion was shooter, and that written versions of other witnesses' statements, which were prepared by police, did not conform to what witnesses told police. U.S.C.A. Const.Amend. 14.

3. Federal Courts ⇐844

Court of Appeals will declare testimony incredible as matter of law only when it is so unbelievable on its fact that it defies physical laws.

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

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Contending that the district court's factual findings of numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense, are clearly erroneous, Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, appeals the grant of habeas relief to Ricardo Aldape Guerra, who was convicted of capital murder and sentenced to death in 1982. We AFFIRM.

I.

On July 13, 1982, approximately two hours before midnight, Houston police officer J.D. Harris stopped his police car behind an automobile occupied by Guerra and Roberto Carrasco Flores (Carrasco), at the intersection of Edgewood and Walker Streets. Moments

Attachment 1

later, the Officer was shot three times in the head with a nine millimeter weapon and died shortly thereafter. Jose Francisco Armijo, who was near the intersection in an automobile with two of his children (one of whom, then ten years of age, was a key witness against Guerra at trial), was also shot in the head with a nine millimeter weapon and died later.

Witnesses informed police that the suspects might be found in the same neighborhood, at 4907 Rusk Street (Guerra's address). About one and one-half hours after Officer Harris was shot, Officer Trepagnier approached a garage next to that address. Using a nine millimeter weapon, Carrasco shot and seriously wounded the officer. Carrasco was killed in the ensuing exchange of gunfire with police. The nine millimeter weapon was found under Carrasco's body, and Officer Harris' service revolver was found under Carrasco's belt, along with another clip for the nine millimeter weapon.

Guerra was arrested moments after Carrasco was shot, when officers found him hiding nearby. A .45 caliber pistol was found within Guerra's reach.

Although the physical evidence pointed to Carrasco as Officer Harris' killer, Guerra was charged with capital murder on the basis of eyewitness identification. (The State did not seek to convict Guerra under the law of parties.)

In October 1982, three months after the murder, a jury found Guerra guilty, rejecting his defense that Carrasco shot Officer Harris; he was sentenced to death. The Texas Court of Criminal Appeals affirmed in 1988, *Guerra v. State*, 771 S.W.2d 453 (Tex.Crim. App.1988); and the next year, the Supreme Court denied Guerra's petition for a writ of certiorari. *Guerra v. Texas*, 492 U.S. 925, 109 S.Ct. 3260, 106 L.Ed.2d 606 (1989).

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knowledge that anyone who kills a law enforcement officer will be quickly, vigorously, and aggressively pursued, as reflected by the events in this case.

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>
> There is no way that I had any type of equipment set up inside of that vehicle to show you what was done inside that vehicle and how the weapons could have gotten into this man's [Guerra's] hands, but you know one thing from listening to the evidence, and you know one thing from listening to when Ricardo Guerra testified. He didn't always keep his pistol tucked into his belt.
>
> Do you recall, right towards the end of his testimony, I asked him, "When you went into the store to get those Cokes [before the shooting], did you still have that pistol tucked inside your belt with your shirt covering it?"
>
> "No, I put it under the seat," and I think you can use your common sense....
>
> Do you think these guys are driving around and they've got those guns tucked in their belts? They take them out and set them on the seat....
>
> Do you think perhaps when they got out of the car, they picked up the wrong gun?

The record, however, contains little, if any, evidence to support this theory. Obviously, this was a critical fact issue at trial. As discussed *infra*, the State's non-disclosure of exculpatory information concerning this issue was one of the bases upon which the district court granted habeas relief.

At trial, Guerra testified that, on the night of the shooting, he and Carrasco went to the store; that Carrasco had a nine millimeter pistol which he was carrying at his belt; that he (Guerra) also was carrying a gun; that he put his gun under the car seat when he went into the store; that he put it back in his trousers when he got back to the car; and that the gun was in his belt when he got out of the car after Officer Harris arrived at the intersection.

On cross-examination at trial, Guerra denied that he and Carrasco took their guns out of their belts and put them on the seat while they were driving around. He testified further that Carrasco, whom he referred to by the nickname "Werro" (spelled various ways in the record; according to the respondent at oral argument, it meant "the blond one" or "the light-skinned one"), shot Officer Harris and took the Officer's gun; that they ran back to Guerra's residence (4907 Rusk Street); and that, when they arrived, Carrasco had two weapons—his own (the nine millimeter) and the Officer's.

Two of Guerra's roommates testified at trial that, shortly after Officer Harris was shot, Carrasco ran into the house and said that he had killed a policeman; and that Carrasco had the policeman's gun in his belt and another gun in his hand. One roommate testified further that, when Guerra arrived a minute or two later, Guerra said that Carrasco had just killed a policeman.

Two of the State's strongest witnesses at trial were Jose Armijo, Jr. (the then ten-year-old son of the man fatally wounded at the same intersection immediately after Officer Harris was killed), who testified that Guerra shot Officer Harris and his father, and Hilma Galvan, who testified that she saw Guerra shoot Officer Harris. Neither testi-

fied, however, at the federal evidentiary hearing.

The district court held that Guerra's due process rights were violated based on findings that, *inter alia*, (1) police and prosecutors threatened and intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense; (2) police and prosecutors used impermissibly suggestive identification procedures, such as permitting witnesses to see Guerra in handcuffs, with bags over his hands, prior to a line-up, permitting witnesses to discuss identification before, during, and after the line-up, conducting a reenactment of the shooting shortly after it occurred so that witnesses could develop a consensus view, and using mannequins of Guerra and Carrasco at trial to reinforce and bolster identification testimony; (3) police and prosecutors failed to disclose material, exculpatory evidence to the defense; (4) prosecutors engaged in misconduct at trial, including soliciting and encouraging witnesses to overstate or understate facts, falsely accusing a defense witness of either being drunk or having "smoked something" because he yawned during his testimony, questioning a defense witness about an extraneous murder which the prosecutors knew was a false rumor, and making improper closing argument; and (5) a court interpreter inaccurately translated witnesses' trial testimony.

Because the state habeas court did not make findings of fact, the statutory presumption of correctness for such findings is not in play. (The 28 U.S.C. § 2254(d) presumption of correctness has been redesignated as § 2254(e)(1) in the Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. No. 104–132, § 104(3), 110 Stat. 1214, 1219 (1996).) In fact, the only issue raised here is the contention that "the district court's factual findings that the police and prosecutors engaged in misconduct depriving Guerra of due process . . . are clearly erroneous." As a result, the respondent conceded at oral argument that, if those findings are not clearly erroneous, then a due process violation occurred. (Inconsistent with the statement of the issue and the concession at oral argument, the respondent's brief contains assertions that certain factual findings, even if not clearly erroneous, are legally irrelevant. We conclude that habeas relief is warranted by legally relevant factual findings that are not clearly erroneous.)

To restate the well-known standard, a factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (citation omitted). Along that line, in a case such as this, which turns almost exclusively "on determinations regarding the credibility of witnesses, [FED.R.CIV.P.] 52(a) demands even greater deference to the trial court's findings." *Id.* at 575, 105 S.Ct. at 1512. Similarly, "[w]here the court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error." *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir.1993) (internal quotation marks and citation omitted). Three examples more than suffice to demonstrate why, based on our review of the record, there are sufficient legally relevant, non-clearly erroneous findings of fact to warrant habeas relief.

[1] The district court found that, in interviews with police and prosecutors, three witnesses, all then under the age of 18 (Herlinda Garcia (14), Patricia Diaz (17), and Frank Perez (17)), gave police and prosecutors ma-

terial exculpatory information that was not disclosed to the defense. Such non-disclosure is violative of due process if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment); *see also Kyles v. Whitley*, — U.S. —, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). As noted, for these three examples, because, with slight exception, the respondent presents only a factual issue, our review is a most narrow one—were the findings of fact underlying a due process violation because of the non-disclosure clearly erroneous.

[2] Garcia, who identified Guerra at trial as Officer Harris' murderer, testified instead at the federal evidentiary hearing that she told police and prosecutors that she saw Carrasco pull something out of his trousers and point at Officer Harris with both hands clasped together in front of him; that Carrasco was standing a "couple of feet" away from the Officer; that she saw flames coming out of Carrasco's hands; and that, when she heard the shots, she saw Guerra leaning toward the police car, near the front, with his empty hands on the hood. This information was not included in Garcia's written statement, nor was it disclosed to the defense. Garcia, who, as noted, was 14 years of age at the time of the shooting, testified further that she was intimidated into identifying Guerra as the shooter by police warnings that her common-law husband, a parolee who was over 18 years of age, could be adversely affected if she did not cooperate.

The respondent contends that Garcia's testimony is not credible because her written statements prepared by the police were consistent with her trial testimony, even though she had not read her statements before trial, and because, if the police were trying to coerce witnesses to identify Guerra as the shooter, they would not have allowed Garcia to describe the shooter, both in her statement and at trial, as having blond hair and wearing a brown shirt and brown trousers. (Guerra had dark hair and was wearing a green shirt and blue jeans at the time of the shooting; Carrasco also had dark hair (but, as noted, was commonly referred to as "Werro", the "blond one" or "light-skinned one") and was wearing a purple or maroon shirt and brown trousers.)

[3] Finding that Garcia's habeas testimony was credible, the district court found further that she had been intimidated by police and prosecutors, and that the police omitted material exonerating information from her written statement. We will declare testimony incredible as a matter of law only when it "is so unbelievable on its face that it defies physical laws." *United States v. Casteneda*, 951 F.2d 44, 48 (5th Cir.1992) (internal quotation marks and citation omitted). As the district court noted, Garcia's testimony is consistent with the physical evidence that Carrasco, rather than Guerra, shot Officer Harris. Accordingly, we cannot conclude that the court clearly erred by finding that Garcia told the truth at the evidentiary hearing.

Patricia Diaz, who, as noted, was 17 years of age when she testified at trial, testified at the evidentiary hearing that she told police and prosecutors that, an instant after she heard shots, she saw Guerra on the driver's side of the police car, near the front, facing that car, with his empty hands on its hood, as if he were about to be searched; and that she did not see anyone shoot Officer Harris.

But, her description of Guerra's location and his empty hands was not included in her written statements prepared by the police. Diaz testified further that, contrary to what is included in her first written statement, she did not tell the police that she saw a man from Guerra and Carrasco's car "pointing a gun in the direction of the police car, and I saw him shoot four times at the police car"; nor, contrary to what is included in her second written statement, did she tell the police, after the line-up, that she saw Guerra "with his hands outstretched, and I guess he had a gun in his hands". Diaz testified that she signed her statements without reading them because she was tired and because she was frightened by police threats to take her infant daughter from her if she did not cooperate.

The respondent maintains that Diaz's habeas testimony is not credible because, again, her trial testimony was consistent with her statements, even though she never read them. The respondent asserts that if, as Diaz testified at the evidentiary hearing, she had demonstrated at trial how Guerra was "pointing" by stretching her arms out in front of her with her palms open and down, the prosecution would have clarified her testimony, or the defense would have capitalized on it. The district court found, however, that Diaz's trial testimony was the product of police intimidation, and was tainted by the prosecutor's inclusion in his questions of incorrect statements of Diaz's prior testimony. Again, because there is evidence in the record to support these findings, we cannot conclude that they are clearly erroneous. Restated, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74, 105 S.Ct. at 1511.

Finally, Frank Perez, who, as noted, was 17 years of age when he testified at trial, testified at the federal evidentiary hearing that it "could have been anywhere from 30 seconds to a minute and a half" after he heard gunshots that he saw two men run past his house; but, he was "not really sure exactly how long it was". Perez's statement to the police the day after the shooting reports that he saw a Mexican American male run past his house "[j]ust a short time after the gun shots"; at trial, he testified that "it might have been a minute or less than that, or maybe a little over a minute", that he "couldn't really place the time".

Perez testified further at the federal hearing that he told the police and prosecutors that he could not identify the first man, who appeared to have been running on the south side of Walker Street (as noted, this was one of the streets forming the intersection where the shooting occurred); that the second man, whom he identified as Carrasco, appeared to have been running on the north side of that street; that, as Carrasco ran past, he pointed his left hand at Perez; that Carrasco put his left hand behind his back and then dropped an object that looked like a nine millimeter gun with a clip; that the object hit the street, making a metallic scraping sound; and that Carrasco picked up the object with his left hand and continued running down the street. Perez's written statement, prepared by the police, did not include that Carrasco appeared to be coming from the north side of Walker Street, or that the gun appeared to be a nine millimeter, or that Carrasco used his left hand both to point the gun at Perez and to pick up the gun. The word "gun" was typed in Perez's written statement, but, according to Perez, was changed to "objeet" after the police told him not to use the word

"gun" unless he was 100% certain that the object was one.

The respondent does not challenge Perez's credibility; instead, he contends that, because the defense had Perez's written statement—with "gun" changed to "object"—when it cross-examined him at trial, the district court erred by finding that the prosecution suppressed Perez's statement that Carrasco dropped a gun. But, the respondent does not address the other information that the district court found to have been omitted from Perez's statement (that Carrasco appeared to be coming from the north side of Walker Street, that the gun appeared to be a nine millimeter, and that Carrasco used his left hand to point the gun at Perez and to pick it up after he dropped it). Obviously, that information was material, because, according to it, Carrasco had the nine millimeter murder weapon shortly after the shooting. Moreover, the information is consistent with other evidence presented at the federal evidentiary hearing that there was a scratch on the nine millimeter weapon, consistent with it having been dropped; that the shooter ran from the scene on the north side of Walker Street; and that the shooter was left-handed (there was evidence at the federal hearing that Guerra is right-handed; this was not brought out at trial). As noted, the respondent challenges neither the correctness of the district court's factual finding that this information was suppressed, nor its materiality.

These three examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief. We need not discuss further examples of the lack of clear error in the district court's detailed factual findings. In sum, we are satisfied that more than sufficient non-clearly erroneous, legally relevant findings of fact support such relief.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

SUSPECT(S)

NO-01 DISPOSITION-ARRESTED /CHARGED HPD-NO-000000
NAME: LAST-GUERRA FIRST-RICARDO MIDDLE-ALDAPE
ADDRESS-4911 RUSK
RACE-W SEX-M AGE-20-00 HISPANIC-H DATE OF BIRTH-04/03/62
WEAPON USED-BROWNING 9MM HIGH POWER
MISC-CHARGED IN 248TH D.C. CAUSE #359805

NO-02 DISPOSITION-ARRESTED /CHARGED HPD-NO-000000
NAME: LAST-FLORES FIRST-ROBERTO MIDDLE-CARRASCO
ALIAS(NICKNAME)-GUERO WEDO
ADDRESS-UNK
RACE-W SEX-M AGE-27-00 HISPANIC-H DATE OF BIRTH-11/27/54
WEAPON USED-BROWING 9MM HIGH POWER
INJURED: TAKEN TO-HARRIS COUNTY MORGUE BY-
CONDITION-DOA

M.O. SUMMARY

RELATED CASES-042667382/042669482/042667682/037977582/

REPORT ENTERED BY-MAUREEN LINCOLN EMPLOYEE NUMBER-068769 000000000

STATUS: OPEN-X CLEARED- INACTIVE- UNFOUNDED-
REPORT REVIEWED BY-NJB EMPLOYEE NUMBER-074413
COPIES ALSO SENT TO-RP1/ / / / ACTION DUE DATE- / /

NARRATIVE

THIS REPORT IS CONFIDENTIAL - PLEASE CODE ACCORDINGLY

INTRODUCTION:

DET'S HOLLAND AND NEELY, WHILE IN THE HOMICIDE OFFICE THIS EVENING, RECEIVED AN ASSIGNMENT FROM LT. R.D. CAIN TO MAKE THE SCENE OF A POLICE OFFICER SHOOTING AT 2900 DUMBLE AT WALKER. DET'S RECEIVED THIS ASSIGNMENT AT APPROX 10:10PM AND WERE INFORMED THAT A HOUSTON POLICE OFFICER HAD BEEN SHOT AT THAT LOCATION. NO OTHER INFORMATION WAS AVAILABLE AT THAT TIME. THESE DET'S WERE ASSIGNED TO MAKE THE SCENE, ALONG WITH DET'S E.T. YANCHAK AND A.T. HERMANN. DET'S LEFT THE OFFICE IMMEDIATELY AND DROVE DIRECTLY TO THE SCENE, ARRIVING AT APPROX 10:23PM. ENROUTE TO THE SCENE, DET'S LEARNED VIA THE POLICE RADIO THAT PREPARATIONS WERE BEING MADE TO LIFE FLIGHT THE WOUNDED OFFICER TO THE HOSPITAL. UPON ARRIVAL AT DUMBLE AND WALKER, IT WAS LEARNED THAT THE ACTUAL SHOOTING HAD OCCURRED FARTHER EAST AT THE INTERSECTION OF 4900 WALKER AT EDGEWOOD. DET'S PROCEEDED TO THE CORNER OF WALKER AND EDGEWOOD AND OBSERVED NUMEROUS POLICE OFFICERS AND POLICE VEHICLES IN THE AREA. DET'S SPOKE WITH SEVERAL OFFICERS AT THE SCENE AND

Attachment 2

OFFICER ARRIVED AT THE SCENE OF 4911 RUSK, A HOUSTON PATROL OFFICER EMERGED FROM THE EAST REAR SIDE OF THE HOUSE AND SHOUTED THAT A HOUSTON OFFICER HAD BEEN HIT AND ALSO THAT THE SUSP WAS DOA AT THE REAR OF THE HOUSE. THE SCENE WAS SECURED AS BEST AS POSSIBLE AND IT WAS LEARNED THAT OFFICER TREPAGNIER HAD CONFRONTED THE SUSP AND THAT SHOTS WERE EXCHANGED AND THAT TREPAGNIER HAD BEEN HIT SEVERAL TIMES IN THE STOMACH AND CHEST AREA AND THAT OTHER OFFICERS ON THE SCENE FIRED AT THE SUSP AND THAT HE FELL DEAD ON THE SPOT. WHILE THE SCENE WAS BEING SECURED, ASST. D.A. WILSON WAS TYING CRIME SCENE TAPE AROUND THE BACK OF THE HOUSE AND NOTICED A MOVEMENT BEHIND A HORSE TRAILER THAT WAS BACK THERE AND SHINED HIS LIGHT AND FOUND THE SECOND SUSP HIDING BEHIND THE TRAILER. HE WAS ARRESTED AND TURNED OVER TO DETECTIVE GATEWOOD AND A SEARCH LATER FOUND HIS WEAPON UNDER THE TRAILER IN FRONT OF WHERE HE HAD BEEN CROUCHED DOWN AND HIDING.

DET WEST WHO WAS ALSO AT THE 4911 RUSK SCENE, STATED THAT HE WOULD HANDLE THAT SCENE AND THAT HE WOULD NEED SOME ASSISTANCE FOR WITNESSES AND THE SCENE. DET KENT AND WALTMON CAME BY AND STATED THAT THEY WOULD ASSIST THAT SCENE AND DET ST. JOHN WITH OFFICER YBARBO CANVASSED THE AREA FOR WITNESSES. DET WEBBER WAS THEN RE-ASSIGNED BY THIS OFFICER TO RETURN TO THE ORIGINAL SCENE ON WALKER AND CONTINUE TO ASSIST HOLLAND AND NEELY AND THAT DET DELONEY WAS ENROUTE THERE TO ASSIST HIM. BOTH SCENES WERE SECURED AND THE PROPER PERSONNEL FROM THE LABS NOTIFIED AS TO THE SCENE TO WORK. A CALL WAS PUT OUT TO CALL OUT THE REST OF THE CHICANO SQUAD TO ASSIST WITH THE STATEMENTS AT THE OFFICE AND LT LOFLAND WAS CALLED OUT FROM HOME TO REPORT TO THE HOMICIDE DIVISION AND COORDINATE THE SCENES AS THEY ARRIVED IN HOMICIDE. OFFICERS INVOLVED WERE ASKED TO COME TO THE STATION AND MAKE SUPPLEMENTS AND STATEMENTS.

SUPPLEMENT ENTERED BY = 16925
REPORT REVIEWED BY-CSF EMPLOYEE NUMBER-057123
COPIES ALSO SENT TO- RP1/ / / / / ACTION DUE DATE- / /
DATE CLEARED- 07/13/82

NO-0007

OFFENSE- CAPITAL MURDER OF A POLICE OFFICER @@

STREET LOCATION INFORMATION

NUMBER- 4900 NAME-WALKER TYPE- SUFFIX-
APT NO-C NAME- TYPE- SUFFIX-
DATE OF OFFENSE-07/13/82 DATE OF SUPPLEMENT-07/18/82
COMPL(S) LAST-HARRIS FIRST-JAMES MIDDLE-D
LAST- FIRST- MIDDLE-

RECOVERED STOLEN VEHICLES INFORMATION

NONE
OFFICER1-R.M. GATEWOOD EMP#-036193 SHIFT-3 DIV/STATION-HOMICIDE
OFFICER2-F. YBARBO EMP#-060613 SHIFT-3

SUPPLEMENT NARRATIVE

WE, GATEWOOD AND YBARBO WHILE AT THE HOMICIDE OFFICE WERE ASKED BY LT CAIN TO GO TO THE SHOOTING LOCATED AT THE 4900 BLOCK OF WALKER. DET'S RECEIVED THIS ASSIGNMENT AT 11:00PM AND ARRIVED AT 11:15PM. UPON ARRIVAL, DET'S TALKED TO LT SWAIM WHO TOLD DET'S THAT DET YANCHAK NEEDED HELP TALKING TO A FEMALE WHO MIGHT BE A WITNESS IN THIS CASE.

DET'S FOUND DET YANCHAK WHO TOLD US THAT A LAF HAD TOLD ONE OF THE OTHER WITNESSES THAT SHE HAD SEEN SOME PARTS OF THE SHOOTING AND THAT HER SON HAD ACTUALLY SEEN THE SHOOTING. DET'S FOUND THIS LADY STANDING AT THE CORNER OF WALKER AND EDDINGTON WHERE AT THIS TIME DET GATEWOOD ASKED HER IF SHE HAD SEEN THE SHOOTING AND IF SHE HAD RECOGNIZED ANY OF THE SUSP'S. THIS WITNESS IDENTIFIED HERSELF AS ELENA GONZALES HALGEN, LAF/38, AND SHE TOLD DET THAT SHE MIGHT BE ABLE TO RECOGNIZE ONE OF THE SUSP'S BUT THAT SHE WASN'T SURE. SHE STATES THAT SHE KNEW WHERE THE SUSP'S LIVED AND THAT THEY HAD RUN IN THE DIRECTION OF THE HOUSE ON RUSK. AT THIS TIME, DET'S GATEWOOD, YANCHAK, YBARBO AND SEVERAL OTHER OFFICERS WERE TAKEN TO THE CORNER OF DUMBLE AND RUSK WHERE WE WERE SHOWN A TWO-STORY HOUSE THAT WAS SUPPOSED TO BE THE HOME OF ONE OF THE SUSP'S.

DET'S NOTICED THAT THERE WERE SOME OFFICERS STANDING BY THE HOUSE AND THEY APPEARED TO BE TALKING TO SOME PEOPLE THAT WERE SITTING ON TOP OF THE PORCH. DET'S WALKED TO THEIR LOCATION WHERE WE TALKED TO ONE OF THE LAM'S WHO WAS ASKED IF HE HAD SEEN ANY OF THE SUSP'S RUN BACK TO THE HOUSE. THIS LAM TOLD DET THAT HE HAD BEEN SITTING ON THE PORCH FOR SEVERAL MINUTES AND THAT NO ONE HAD GONE INTO THE HOUSE. DET AT THIS TIME, ASKED THIS LAM IF HE LIVED IN THE HOUSE AND IF HE DID IF HE WOULD GIVE US PERMISSION TO GO INSIDE THE HOUSE AND LOOK FOR THE SUSP'S. THE LAM STATED THAT HE DID LIVE IN THE HOUSE AND THAT WE HAD HIS PERMISSION TO ENTER AND SEARCH THE HOUSE. DET'S ALONG WITH SOME OF THE OFFICERS WENT INTO THE HOUSE WHERE WE SEARCHED FOR SOME OF THE SUSP'S. AFTER SEARCHING FOR SEVERAL MINUTES, DET'S FOUND SOME PHOTO'S OF SEVERAL LAM'S WHO DET BELIEVED MIGHT BE INVOLVED IN THE SHOOTING OF THE OFFICER.

DET GATEWOOD TOOK THE PHOTO'S AND WALKED BACK TO THE LOCATION OF MS HALGEN, WHO WAS STANDING AT THE CORNER OF DUMBLE AND RUSK. THE PHOTO'S CONSISTED OF SEVERAL LAM'S STANDING NEXT TO ONE ANOTHER. MS HALGEN LOOKED AT THE PHOTO AND AFTER LOOKING AT THE PHOTO SHE TOLD DET THAT SHE WASN'T SURE IF SHE COULD ID THE SUSP. WHILE DET GATEWOOD WAS TALKING TO MS HALGEN SEVERAL SHOTS RANG OUT AND THEY APPEARED TO BE COMING FROM THE DIRECTION OF THE HOUSE THAT THE SUSP'S WERE SUPPOSED TO HAVE RUN TO.

DET RAN TO 4911 RUSK WHERE SEVERAL OFFICERS WERE ALREADY RETURNING FIRE. AFTER THE SHOOTING HAD STOPPED DET LEARNED THAT THE SUSP HAD BEEN SHOT AND ALSO THAT ANOTHER OFFICER HAD BEEN SHOT. WHILE DET'S AND OFFICERS WERE TRYING TO PROTECT THE SCENE, ONE OF THE OTHER SUSP'S WAS SPOTTED AND IMMEDIATELY ARRESTED. ASST D.A. WILSON HAD SPOTTED THE SUSP HIDING BEHIND A HORSE TRAILER.

AFTER THE ARREST OF THE SUSP, HE WAS HANDED OVER TO DET GATEWOOD AND INV YBARBO WHO WERE TOLD TO LEAVE THE SCENE AND TO TAKE THE SUSP BACK TO THE HOMICIDE OFFICE. UNIT 11D30 WITH OFFICERS J.R. ROBERTS PR#61590 AND G.L. BLANKINSHIP

PR#78337, TRANSPORTED THE #2 SUSP TO THE HOMICIDE OFFICE. WHEN OFFICERS ARRIVED AT THE HOMICIDE OFFICE THE SUSP WAS GIVEN HIS LEGAL WARNING AT 1:00AM. JUDGE NICHOL BARRERA WHO LIVES AT 6934 HERON WAS CALLED AT 1:05AM AND HE WAS ASKED IF HE WOULD GIVE THE #2 SUSP HIS WARNINGS IN SPANISH. JUDGE BARRERA TOLD DET THAT HE WOULD GIVE THE SUSP HIS WARNINGS AND THAT HE WOULD BE WAITING FOR DET'S ARRIVAL.

AFTER FINDING SEVERAL FORMS, CONSEJO LEGAL, DET GATEWOOD AND INV YBARBO ALONG WITH OFFICE STENOGRAPHER MAUREEN LINCOLN PR#68769, DROVE TO 6934 HERON WHERE DET'S FOUND JUDGE BARRERA WAITING FOR OFFICERS ARRIVAL. DET'S LEFT THE HOMICIDE OFFICE AT 1:35AM AND ARRIVED AT JUDGE BARRERA'S HOME AT 1:55AM. ONCE INSIDE THE JUDGES HOME DET GATEWOOD FILLED OUT TWO LEGAL WARNING FORMS WHICH CARRIED THE NAME OF OFFICER J.D. HARRIS ON ONE FORM AND OFFICER L.J. TREPAGNIER ON THE OTHER FORM. AFTER THE WARNINGS WERE GIVEN TO THE SUSP JUDGE BARRERA ASKED THE SUSP IF HE UNDERSTOOD HIS WARNINGS. THE SUSP TOLD THE JUDGE THAT HE DID UNDERSTAND HIS WARNINGS. DET'S AT THIS TIME LEFT THE JUDGES HOME AT 2:07AM AND ARRIVED AT THE HOMICIDE OFFICE AT 2:22AM. JUDGE BARRERA GAVE THE SUSP HIS WARNINGS AT 2:00AM.

DET'S AND THE SUSP WENT BACK TO THE HOMICIDE OFFICE WHERE DET GATEWOOD ASKED THE SUSP IF HE WANTED TO GIVE A STATEMENT REGARDING THE SHOOTING. THE SUSP TOLD DET THAT HE DIDN'T SHOOT ANYONE AND THAT HE WOULD CO-OPERATE IN ANY WAY THAT HE COULD. THE SUSP WAS PLACED IN ONE OF THE REAR OFFICES LOCATED IN THE HOMICIDE DIVISION WHERE HE WAS READ HIS LEGAL WARNINGS BY DET GATEWOOD OFF THE BLUE CARD IN SPANISH. AFTER THE READING OF THE WARNINGS, DET ASKED THE SUSP IF HE UNDERSTOOD THE WARNINGS READ TO HIM BY DET. THE SUSP ADVISED DET THAT HE DID UNDERSTAND HIS WARNINGS.

**********INTERVIEW WITH RICARDO ALDAPE GUERRA, LAM/20**********

THE SUSP STATED THAT AT 10 OR 11PM, THIS DATE HE WAS HOME WHEN THE #1 SUSP, WEDO CAME BY AND STARTED TALKING TO HIM. HE STATES THAT HE ASKED WEDO IF HE WANTED TO GO TO THE STORE WITH HIM. WEDO TOLD HIM THAT HE WOULD AND AT THIS TIME HE ASKED A MAN CALLED JACINTO IF HE COULD BORROW HIS CAR TELLING THEM THAT HE WOULD BE RIGHT BACK. JACINTO LET THE #2 SUSP BORROW THE CAR, SO THEY LEFT AND DROVE TO THE STOP N GO LOCATED AT DUMBLE AND POLK.

THE SUSP STATES THAT HE GOT OUT OF THE CAR TO GO INTO THE STORE WHILE WEDO WAITED FOR HIM INSIDE THE CAR. HE STATES THAT HE BOUGHT TWO COKES AND BEING THAT HE FELT GOOD BECAUSE HE HAD A CAR HE DECIDED TO GO RIDING AROUND THE AREA. HE STATES THAT HE WOULD STOP IN SOME PLACES AND THEN HE WOULD TAKE OFF AT A HIGH RATE OF SPEED. THE SUSP STATES THAT HE WAS GOING PRETTY FAST IN ONE PLACE AND REMEMBERS SCARING SOME PEOPLE THAT WERE WALKING ON THE SIDE OF THE ROAD.

THE SUSP STATED THAT HE TURNED ON WALKER STREET AND AFTER GOING A SHORT WAYS THE CAR STALLED ON HIM. HE WAS TRYING TO START THE CAR WHEN A POLICE CAR DROVE UP BEHIND HIM. HE STATES THAT HE HEARD THE OFFICER CALL TO HIM AFTER HE PUT A BRIGHT LIGHT ON HIM. THE SUSP GOT OUT OF THE CAR AND WALKED UP TO THE FENDER OF THE POLICE CAR. THE SUSP CLAIMS TO HAVE HAD A .45 CALIBER PISTOL TUCKED IN THE WAISTBAND OF HIS PANTS AND THAT HE HAD SIX LIVE POUNDS IN THE MAGAZINE. HE STATES THAT WHILE HE WAS AT THE FENDER OF THE POLICE CAR THE OTHER SUSP, WEDO, CAME FROM BEHIND HIM AND SHOT THE OFFICER. HE STATES THAT WEDO THEN GRABBED THE POLICE OFFICER'S GUN AND AT THIS TIME, THEY TOOK OFF RUNNING. WHILE THEY WERE RUNNING, A CAR CAME IN THEIR DIRECTION AND HE CLAIMS THAT HE PULLED HIS PISTOL AND FIRED TWICE IN THE AIR. HE STATES THAT BEFORE HE PULLED

HIS PISTOL TO SHOOT, WEDO HAD ALREADY SHOT SEVERAL TIMES AT THE CAR.

WHEN THEY GOT TO THE HOUSE ON RUSK, WEDO SHOWED HIM THE OFFICERS PISTOL. HE STATES THAT HE GOT SCARED AND DECIDED TO LEAVE THE HOUSE AND AS HE WALKED OUT THE BACK DOOR HE DECIDED TO HIDE BEHIND A HORSE TRAILER THAT WAS IN THE BACK YARD. HE STATES THAT HE SAW WEDO GO INTO THE GARAGE AND HE FIGURED THAT HE WAS GOING TO HIDE IN THERE. HE CLAIMS TO HAVE SEEN SOMEONE SHINE A LIGHT INSIDE THE GARAGE AND HE FIGURED THAT IT WAS A POLICE OFFICER.

HE STATES THAT HE HEARD SEVERAL SHOTS AND THAT IT APPEARED TO COME FROM TWO DIFFERENT WEAPONS, BECAUSE ALL OF THE SHOTS DION'T SOUND THE SAME. AFTER THE SHOOTING HE CLAIMS TO HAVE STAYED QUITE BUT ONE OF THE OFFICERS PUT HIS LIGHT ON HIM AND HE WAS ARRESTED. FOR DETAILS SEE ATTACHED STATEMENT...

THE SUSP WAS THEN ASKED TO REMOVE HIS CLOTHES SO THAT THEY COULD BE TAGGED IN THE CRIME LAB. A TRUSTEE'S UNIFORM WAS GIVEN TO HIM. DET WEBBER SUBMITTED THE SUSP'S CLOTHING. THE SUSP WAS THEN PLACED IN THE CUSTODY OF DET WEBBER.

SUPPLEMENT ENTERED BY = 68769
REPORT REVIEWED BY-DSF EMPLOYEE NUMBER-057123
COPIES ALSO SENT TO- RPI / / / / ACTION DUE DATE- / /
DATE CLEARED- 07/13/82

NO-C008

OFFENSE- CAPITAL MURDER OF A POLICE OFFICER aa

STREET LOCATION INFORMATION

NUMBER- 4900 NAME-WALKER TYPE- SUFFIX-
APT NO-C NAME- TYPE- SUFFIX-
DATE OF OFFENSE-07/13/82 DATE OF SUPPLEMENT-07/18/82
COMPL(S) LAST-HARRIS FIRST-JAMES MIDDLE-D
LAST- FIRST- MIDDLE-

RECOVERED STOLEN VEHICLES INFORMATION

NONE

OFFICER1-L.E. WEBBER EMPN-C43133 SHIFT-1 DIV/STATION-HOMICIDE

SUPPLEMENT NARRATIVE

THE BELOW ARRESTED SUSP WAS TURNED OVER TO DET'S WEBBER AND BOSTOCK AFTER DET GATEWOOD HAD COMPLETED HIS INTERVIEW OF THE SUSP. DET WEBBER TOOK THE SUSP TO THE PHOTO LAB WHERE PHOTO'S WERE TAKEN OF THE SUSP IN FULL LENGTH VERSION SHOWING THE CLOTHING OF THE SUSP AND HIS OVERALL HEIGHT. THE SUSP WAS LATER BROUGHT BACK TO THE HOMICIDE OFFICE WHERE THE SUSP WAS ASKED TO STRIP OUT OF HIS CLOTHING AND TO DRESS IN A JAIL WHITE JUMPSUIT.

THE SUSP'S CLOTHING WAS RETAINED BY THIS DET AND WAS SUBMITTED TO THE HPD CRIME LAB. THE CRIME LAB NUMBER IS L82-5806. DET REQUESTED THAT THE CLOTHING BE EXAMINED FOR BLOOD AND OTHER FOREIGN EVIDENCE RELEVENT TO THIS CASE AND INCIDENT #42667382.

EVIDENCE SUBMITTED:

1. A GREEN MILITARY FATIGUE LONG SLEEVE JACKET. THE RIGHT FRONT BREAST POCKET CONTAINED $.21 IN CHANGE, A BIC TYPE CIGARETTE LIGHTER THAT IS COVERED WITH A SILVER METAL CASE WITH AN EAGLE ATTACHED, AND FOURTEEN DOLLARS IN CURRENCY ($14.00) TWO FIVE DOLLAR BILLS AND FOUR ONE DOLLAR BILLS. *

2. PAIR OF SEMI-FADED LEVI BLUE JEANS WITH ONE DOLLAR AND THIRTY-EIGHT CENTS IN COINS IN THE RIGHT FRONT POCKET ($1.38).

3. PAIR OF WHITE HIGH-TOP TENNIS SHOES, ALL STAR BRAND.

4. A PAIR OF WHITE UNDER BRIEFS.

5. A PAIR OF WHITE CREW SOCKS WITH GREEN STRIPPINGS AT THE TOP.

6. DETECTIVE ALSO COLLECTED HAIR SAMPLES FROM THE SUSP.

THE SUSPECT WAS LATER PLACED IN THE CITY JAIL AT 8:00AM. DET'S WEBBER AND BOSTOCK SPOKE WITH SGT. WEAVER OF THE JAIL DIVISION AND REQUESTED THAT THE SUSP BE KEPT SEPARATE FROM ALL OTHER PRISONERS.

ARRESTED AND NOT YET CHARGED: RICARDO ALDAPE GUERRA LAM/20
4911 RUSK, DOB 4-3-62

HOLD CARD SHOWS DET GATEWOOD AND OFFICER YBARBO AS THE ARRESTING OFFICERS.

NOTE: RICARDO ALSO HAD IN HIS RIGHT BREAST POCKET OF THE SHIRT HE WAS WEARING A UNITED STATES POSTAL SERVICE MONEY ORDER MADE OUT TO A FRANCISCA ALDAPE IN MONTERREY, MEXICO. MONEY ORDER #27942975033 FOR THE AMOUNT OF $300.00. DATED 7-13-82 POST OFFICE #770111, MAIL TO FRANCISCA GUERRA, CARACAS 410 VALLE DE VOGALAR. SUSPECT LIST AN ADDRESS IN HOUSTON AS 6617 AVE C. *

SUPPLEMENT ENTERED BY = 43133
REPORT REVIEWED BY-OSF EMPLOYEE NUMBER-057123
COPIES ALSO SENT TO- RP1/ / / / ACTION DUE DATE- / /
DATE CLEARED- 07/13/82

CUSTOMER'S RECEIPT

DO NOT SEND THIS RECEIPT FOR PAYMENT
KEEP IT FOR YOUR RECORDS

SERIAL NUMBER	YEAR MONTH DAY	POST OFFICE	DOLLARS AND CENTS
27942975033	[illegible]	770111	[illegible]

AMOUNT OF ORIGINAL MONEY ORDER

UNITED STATES POSTAL SERVICE
U.S. MAIL

PAY TO	FRANCISCA GUERRA
STREET	Cumcas 410 Valle de Jogalar
CITY / STATE / ZIP	Monterey Nueuo Leon
FROM	Ricardo AlDAPe
STREET	1619 AUE. C.
CITY / STATE / ZIP	Houston Texas 77011
COD NO. OR USED FOR	

CUSTOMER RECEIPT

Not Negotiable

This receipt is your guarantee of 100% refund if your money order is lost or stolen, provided you fill in the Pay To and From information on the money order in the space provided. No claim for improper payment permitted 2 years after payment.

If your money order is lost or stolen, present this receipt and file a claim for a refund at your Post Office. Please allow 60 days for the issue of a replacement money order. Money orders are invalid after 20 years.

F 000677

Court Coordinator No. 4

6/19/96

CAUSE NO. 359805 CHARGE _____

THE STATE OF TEXAS

VS.

Ricardo Aldape Guerra

_____ DISTRICT COURT

OF HARRIS COUNTY, TEXAS.

TO THE HONORABLE JUDGE OF SAID COURT:

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

Ricardo A. Guerra
Defendant

Sworn to and subscribed before me on this, the _____ day of _____, A.D. 19____.

By: _____
Deputy District Clerk
Harris County, Texas

ORDER APPOINTING COUNSEL

On this, the 19th day of June, A.D. 1996, it appearing to the Court that the above named defendant has executed an affidavit stating that he is without counsel and is too poor to employ counsel, it is ordered that the attorney listed below is appointed to represent the above named defendant in said cause.

Stanley G. Schneider
Attorney

11 Greenway Plaza #3112
Address

Houston Tx 77046
City State Zip

961-5501
Phone

17740500
BAR #

It is further ordered that the said cause is set for: Disp- Def to File pretrial Motions

on the 12th day of July, 1995, at 9:00 A.M.

Signed this _____ day of _____, A.D. 19____.

_____
Judge Presiding

DEFENSE ATTORNEY

F. Ald pleds (may be dup)

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

April 17, 1996

TO ALL COUNSEL OF RECORD

No. 95-20443 - Ricardo Aldape Guerra vs.
Gary L. Johnson, Etc.

Dear Counsel:

In accordance with our telephone advice, the Court has directed that the above referenced case be assigned for oral argument on Wednesday, May 1, 1996 at 3:00 p.m. in the En Banc Courtroom of the John Minor Wisdom United States Court of Appeals Building, 600 Camp Street, New Orleans, Louisiana.

Counsel desiring to present oral argument should check in at Room 245 of the courthouse between 2:00 and 2:30 p.m. on the day of the hearing.

Counsel for the parties should acknowledge the assignment of this case on the extra copy of this letter.

Very truly yours,

CHARLES R. FULBRUGE III, Clerk

By: Geralyn A. Maher
Geralyn A. Maher
Calendar Clerk

/gam/vlb

Messrs. Scott J. Atlas, Michael J.
Mucchetti, John C. O'Leary, Jr. and
Ms. Stephanie K. Crain
Mr. James R. Markham
Mr. Richard A. Morris
Mr. Stanley G. Schneider
Mr. Manuel Lopez
Mr. J. Bernard Clayton
Mr. William C. Zapalac
Mr. Ronald S. Flagg and
Ms. Marissa A. Gomez
Mr. Stephen B. Bright

cc: Mr. Charles R. Fulbruge III, Clerk
Ms. Karen Price
Ms. Jane Giglio
Ms. Lisa Landry
Ms. Chere Persson
U.S. Marshal, New Orleans, LA

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

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By: Geralyn A. Maher
Geralyn A. Maher
Calendar Clerk

/gam/vlb

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Mr. William C. Zapalac
Mr. Ronald S. Flagg and
Ms. Marissa A. Gomez
Mr. Stephen B. Bright

NEW ORLEANS, LOUISIANA

EN BANC COURTROOM

WEDNESDAY, MAY 1, 1996

3:00 P.M.

No. 95-20443 - Ricardo Aldape Guerra vs.
Gary L. Johnson, Etc., Appellant.

DEPUTY
Valerie L. Bellanger

NOTE: Thirty (30) minutes of argument time per side has been authorized.

F. Aldape pldgs fax to: (1) D (2) Susan Blalock cc: Team of 3:30 p.m.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

cc: Mucchetti Crain Clayton Stan S. 0-m

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

April 17, 1996

Revised per 4/22 phonecall from Valerie - Zapalac argues another capital case at 2p.m. SJA

TO ALL COUNSEL OF RECORD

No. 95-20443 - Ricardo Aldape Guerra vs.
Gary L. Johnson, Etc.

Dear Counsel:

3:30

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by

Counsel for the parties should acknowledge the assignment of this case on the extra copy of this letter.

Very truly yours,

CHARLES R. FULBRUGE III, Clerk

By: Geralyn A. Maher
Geralyn A. Maher
Calendar Clerk

/gam/vlb

Messrs. Scott J. Atlas, Michael J.
Mucchetti, John C. O'Leary, Jr. and
Ms. Stephanie K. Crain
Mr. James R. Markham
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Mr. Manuel Lopez
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Mr. William C. Zapalac
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Ms. Marissa A. Gomez
Mr. Stephen B. Bright

NEW ORLEANS, LOUISIANA

EN BANC COURTROOM

WEDNESDAY, MAY 1, 1996

3:00 P.M.

No. 95-20443 - Ricardo Aldape Guerra vs.
Gary L. Johnson, Etc., Appellant.

DEPUTY
Valerie L. Bellanger

NOTE: Thirty (30) minutes of argument time per side has been authorized.

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
1001 FANNIN STREET
SUITE 2300
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
VOICE MAIL (713) 758-4300
FAX (713) 615-5399

FACSIMILE TRANSMITTAL PAGE

DATE: April 23, 1996 RECIPIENT'S CONFIRMATION #:

TO: Ms. Susan Pollack

COMPANY:

TYPE OF DOCUMENT: Correspondence

PAGES: 3 *(including this transmittal page)*

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

MESSAGE:

We are sending from a machine that is Group I, II, III compatible. Please check transmission after the last page. If this FAX transmission is illegible or you do not receive all pages, please call the sender at the number listed above. If you wish to respond, use FAX #: (713) 615-5399.

OPERATOR: RECIPIENT'S FAX #: (212) 727-8826

HARD COPY FOLLOWS: __ YES _X_ NO

Form VE0138A - Rev. 02.27.96

Convenience only

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
1001 FANNIN STREET
SUITE 2300
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
VOICE MAIL (713) 758-4300
FAX (713) 615-5399

FACSIMILE TRANSMITTAL PAGE

DATE: April 23, 1996

RECIPIENT'S CONFIRMATION #: (210)632-8244

TO: Mr. Morris Atlas

COMPANY: Atlas & Hall

TYPE OF DOCUMENT: Correspondence

PAGES: 3 *(including this transmittal page)*

FROM: Scott J. Atlas

SENDER'S PHONE #: (713) 758-2024

MESSAGE:

We are sending from a machine that is Group I, II, III compatible. Please check transmission after the last page. If this FAX transmission is illegible or you do not receive all pages, please call the sender at the number listed above. If you wish to respond, use FAX #: (713) 615-5399.

OPERATOR:

RECIPIENT'S FAX #: (210)686-6109

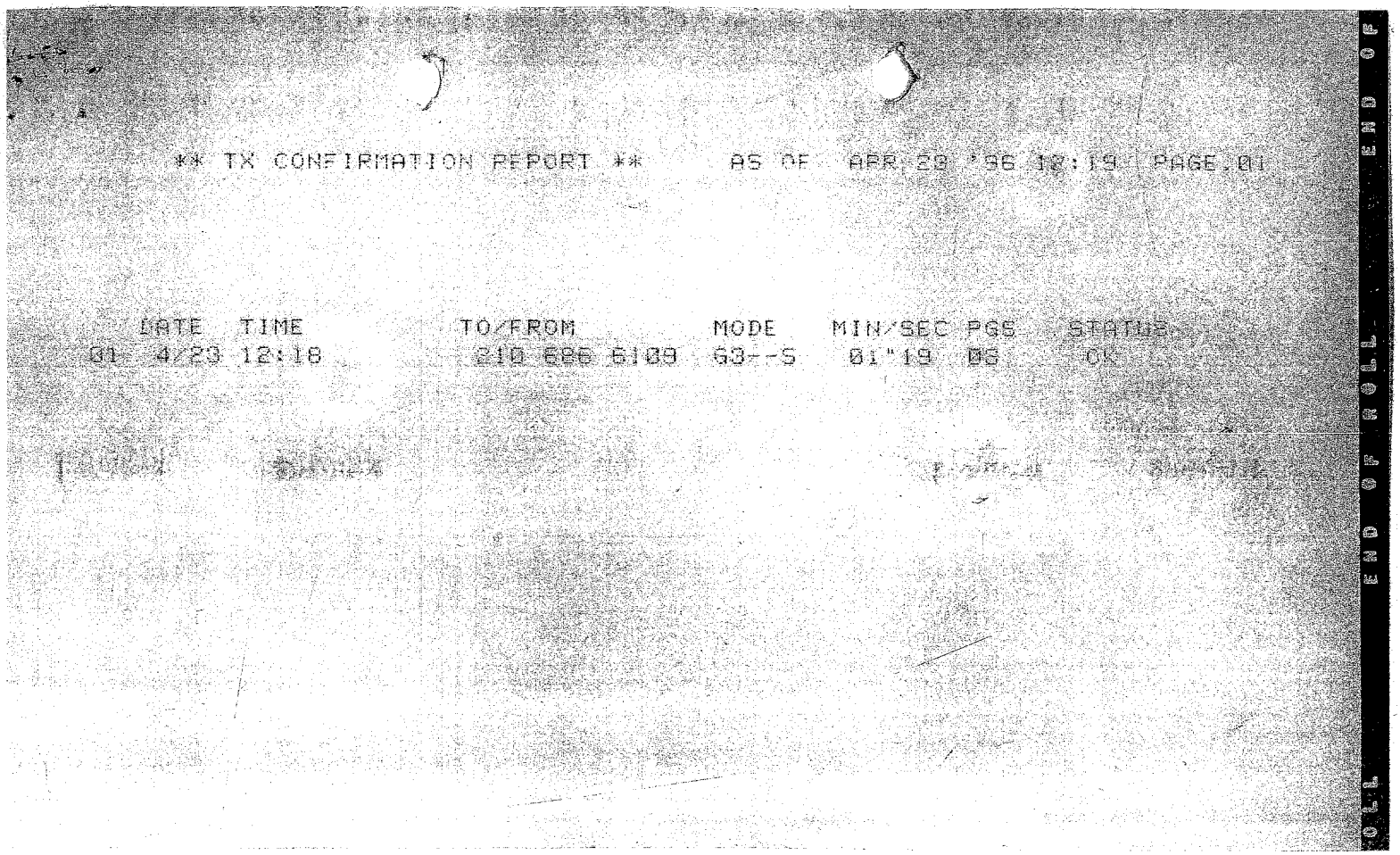
HARD COPY FOLLOWS: __ YES _X_ NO

Form VE0138A - Rev. 02.27.96

Convenience only

** TX CONFIRMATION REPORT ** AS OF APR 23 '96 12:35 PAGE.01

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
01	4/23	12:33	0000000000000	G3--S	01'42	03	OK



** TX CONFIRMATION REPORT ** AS OF APR.29 '96 12:19 PAGE.01

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
01	4/29	12:18	210 686 6109	G3--S	01"19	05	OK

D- Maher

1cy - F. [illegible]

p [illegible]

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

April 17, 1996

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Very truly yours,

CHARLES R. FULBRUGE III, Clerk

By: Geralyn A. Maher
Geralyn A. Maher
Calendar Clerk

/gam/vlb

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Mucchetti, John C. O'Leary, Jr. and
Ms. Stephanie K. Crain
Mr. James R. Markham
Mr. Richard A. Morris
Mr. Stanley G. Schneider
Mr. Manuel Lopez
Mr. J. Bernard Clayton
Mr. William C. Zapalac
Mr. Ronald S. Flagg and
Ms. Marissa A. Gomez
Mr. Stephen B. Bright

OK
Scott J Atlas

NEW ORLEANS, LOUISIANA

EN BANC COURTROOM

WEDNESDAY, MAY 1, 1996

3:00 P.M.

No. 95-20443 - Ricardo Aldape Guerra vs.
Gary L. Johnson, Etc., Appellant.

DEPUTY
Valerie L. Bellanger

NOTE: Thirty (30) minutes of argument time per side has been authorized.

E - Aldape pldg

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

April 17, 1996

TO ALL COUNSEL OF RECORD

No. 95-20443 - Ricardo Aldape Guerra vs.
Gary L. Johnson, Etc.

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Very truly yours,

CHARLES R. FULBRUGE III, Clerk

By: Geralyn A. Maher
Geralyn A. Maher
Calendar Clerk

/gam/vlb

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Mucchetti, John C. O'Leary, Jr. and
Ms. Stephanie K. Crain
Mr. James R. Markham
Mr. Richard A. Morris
Mr. Stanley G. Schneider
Mr. Manuel Lopez
Mr. J. Bernard Clayton
Mr. William C. Zapalac
Mr. Ronald S. Flagg and
Ms. Marissa A. Gomez
Mr. Stephen B. Bright

cc: Mr. Charles R. Fulbruge III, Clerk
Ms. Karen Price
Ms. Jane Giglio
Ms. Lisa Landry
Ms. Chere Persson
U.S. Marshal, New Orleans, LA

95-20443

Messrs. Scott J. Atlas, John C.
O'Leary, Jr., Michael J. and
Ms. Stephanie K. Crain, Attys. at Law
1001 Fannin St., Ste. 2300
Houston, TX 77002

F. Addap pleadings

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1722 EYE STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202: 736-8000
TELEX 89-463
FACSIMILE 202: 736-8711

CHICAGO
LOS ANGELES
NEW YORK

LONDON
SINGAPORE
TOKYO

FOUNDED 1866

WRITER'S DIRECT NUMBER
(202) 736-8195

March 22, 1996

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

Re: Guerra v. Johnson, No. 95-20443

Dear Mr. Fulbruge:

Enclosed for filing is an appearance form for Ronald S. Flagg and Marisa A. Gomez, counsel for the American Immigration Lawyers Association, American Immigration Law Foundation, Anti-Defamation League, Hispanic Bar Association, Lawyers' Committee for Civil Rights Under Law of Texas, League of United Latin American Citizens, Mexican American Legal Defense & Education Fund, Mexican American Bar Association of Houston, NAACP, National Bar Association, Texas Catholic Conference, and the Texas Criminal Defense Lawyers Association.

Sincerely,

Julia E. Sullivan

cc: William C. Zapalac
Scott J. Atlas

J8S96A16.SED (3/22/96 3:29pm)

Fifth Circuit

FORM FOR APPEARANCE OF COUNSEL

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

No. 95-20443

Guerra (Plaintiff) vs. Johnson (Defendant)

The Clerk will enter my/our appearance as Counsel for American Immigration Lawyers Association, et al.

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☐ Respondent(s) XXX Amicus Curiae ☐ Appellant(s) ☐ Appellee(s) ☐ Intervenor

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

RS Flagg (Signature)	Marisa A. Gomez (Signature)
Ronald S. Flagg (Type or Print Name)	Marisa A. Gomez (Type or Print Name)
Partner (Title, If Any)	Associate (Title, if Any)
Sidley & Austin (Firm or Organization)	Sidley & Austin (Firm or Organization)
Social Security No. 392-56-6464	Social Security No. 380-88-5938
Date of Birth 12/3/53 Sex: ☒ M ☐ F	Date of Birth 6/7/68 Sex: ☐ M ☒ F
Resident State/Bar No. 357855 (D.C.)	Resident State/Bar No. 47735 (D.C.)
Street Address 1722 Eye Street, N.W. Suite	
City & State Washington, D.C. Zip 20006 Phone (202) 736-8000 Fax (202) 736-8711	

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

Name of Lead Counsel (Type or Print) Julia E. Sullivan

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
APPLICATION AND OATH FOR ADMISSION
600 Camp Street, New Orleans, LA 70130

Name _____ (Last) (First) (Middle)

Firm or Agency _____

Street Address _____ Suite _____

City & State _____ Zip _____ Social Security No. _____

Phone ( ) _____ Resident State/Bar No. _____ Date of Birth _____ Sex: ☐ M ☐ F

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

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

FEE DATA: (Check One) ☐ Cash ☐ Check ☐ Court Apptd. ☐ U.S. Counsel

CASE NUMBER (If Any): _____

(Attach Admission Check Here)

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

_____

B. Inquiry of Counsel

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

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

Yes ☐ No ☐

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

Yes ☐ No ☐

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

Yes ☐ No ☐

(4) Does this case qualify for calendaring priority under Local Rule 47.7? If so, cite type of case _____

_____

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

Number and Style of Related Case _____

_____

Name of Court or Agency _____

Status if Appeal (if any) _____

_____

Other Status (if not appealed) _____

_____

NOTE: Attach sheet to give further details.

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

_____

_____

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

_____

Signature of Applicant

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

of _____, State of _____ this _____ day of _____ 19 _____.

_____

Signature of Notary

MOTION: I, _____ a member of the Bar of this Court, move for admission of the above attorney.

_____

Signature

Admitted this _____ day of _____ 19 _____.

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

By _____

Deputy Clerk