Aldape: Fed. Habeas Pleadings
(2/93-6/93) (v. 8)

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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44.	Signed Order re: Respondent's Second Unopposed Motion for Extension of Time	05/06/93
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IN THE UNITED STATES DISTRICT COURT
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RICARDO ALDAPE GUERRA, Petitioner.	§	
v.	§	Civil Action No. H-93-290
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cc: Lee
Schneider
Babcock
Guerra

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED f-pldgs
JUN 04 1993
Michael N. Milby, Clerk
By Deputy:

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.	§	
	§	

ENTERED
JUN 05 1993
S.J.A.

ORDER

On this day came for consideration Petitioner's First Unopposed Motion for Extension of Time, and the Court having considered said Motion is of the opinion that it has merit and should be GRANTED.

It is, therefore, ORDERED, ADJUDGED, and DECREED that Petitioner's time for filing a reply to Respondent's Answer, Motion for Summary Judgment and Brief in Support should be and hereby is extended up to and including the 15th day of June, 1993.

Signed on this 2nd day of June, 1993, at Houston, Texas.

Judge Presiding

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4:93-cv-00290

Scott J Atlas, Esq. fs
Vinson & Elkins
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May 28, 1993

By Messenger

Hon. Michael N. Milby, Clerk
United States District Court
Southern District of Texas
Houston Division
515 Rusk
Houston, Texas 77002

Re: Guerra v. Collins, No. H-93-290

Dear Sir:

Enclosed please find the original and one (1) copy of **Petitioner's First Unopposed Motion for Extension of Time** to be filed among the papers in the above-referenced cause. Also enclosed for the Court's convenience is a proposed Order.

By copy of this letter, I am forwarding a copy of this instrument to the Respondent's attorney.

Please indicate the date of filing on the enclosed copy of this letter and return it to me.

Thank you for your assistance in this matter.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

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Enclosures

cc: William C. Zapalac [by telecopy (512/463-2084) and regular mail]
Assistant Attorney General
Enforcement Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Ricardo Aldape Guerra
Kari Sckerl
Hon. Thomas Gibbs Gee
Stanley Schneider

bcc: Sandra Babcock
Francisco Gonzalez de Cossio
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Santiago Roel
Mary Lou Soller
Julia E. Sullivan

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.	§	
	§	

PETITIONER'S FIRST UNOPPOSED
MOTION FOR EXTENSION OF TIME

Ricardo Aldape Guerra, Petitioner ("Guerra"), files this First Unopposed Motion for Extension of Time as follows:

1. At a status conference on February 22, 1993, this Court directed Respondent to file an answer to Guerra's Petition for Habeas Corpus by April 16, 1993, and gave Guerra until April 30, 1993 to file a reply.

2. For various reasons, principally related to other work commitments, Respondent filed three (3) unopposed requests for extension of time to file its answer. All three (3) requests were granted, and the answer was filed on May 17, 1993. Under the Court's oral ruling from the Bench at the status conference on February 22, Guerra has two

(2) weeks from the filing of Respondent's answer to file a reply, which makes the reply due on June 1, 1993.

3. Due to the press of business and the nature of Respondent's answer, it will not be possible to complete Guerra's response by June 1, and Guerra requests an additional two (2) weeks to file his pleading in this cause.

4. Guerra's petition was filed on February 1, 1993 and sent by overnight mail to Respondent's counsel. Three-and-one-half months later, Respondent filed its Answer, Motion for Summary Judgment and Brief in Support, which raised a number of issues not previously raised in this case, including issues decided by the U.S. Supreme Court and the Fifth Circuit as recently as late April 1993. Two weeks is simply not an adequate time in which to research all the issues raised by Respondent. An additional fourteen (14) days appear to be sufficient to permit an appropriate response to be completed and filed.

5. This motion is not made for the purpose of delay, but so that a proper response to Respondent's answer can be prepared to assist the Court in resolving the issues presented.

6. Accordingly, Petitioner Ricardo Aldape Guerra respectfully requests an extension of time until June 15, 1993, to file his response to Respondent's Answer in this case.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: Scott J. Atlas

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**ATTORNEYS FOR APPLICANT,
RICARDO ALDAPE GUERRA**

OF COUNSEL:

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CERTIFICATE OF CONFERENCE

I, Scott J. Atlas, lead counsel for Petitioner Ricardo Aldape Guerra, hereby certify that on May 28, 1993, I conferred by telephone with William C. Zapalac, attorney for Respondent, and he stated that he would not oppose the granting of a Motion for Extension of Time for two (2) weeks, until June 15, 1993.

Scott J. Atlas

STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT OF VERIFICATION

I, SCOTT J. ATLAS, upon oath state that I have read the foregoing Petitioner Ricardo Aldape Guerra's First Unopposed Motion for Extension of Time; I am familiar with its contents; and to the best of my knowledge and belief the matters set forth therein are true and correct.

Scott J. Atlas

Subscribed and sworn to before me this 28th day of May, 1993.

Notary Public

My commission expires:

MARK S. BRAINERD
Notary Public, State of Texas
My Commission Expires
03/05/97

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by regular mail, and by telecopy on William C. Zapalac, Assistant Attorney General; Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station, Austin, Texas 78711, on the 28th day of May, 1993.

Scott J. 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.	§	
	§	

ORDER

On this day came for consideration Petitioner's First Unopposed Motion for Extension of Time, and the Court having considered said Motion is of the opinion that it has merit and should be GRANTED.

It is, therefore, ORDERED, ADJUDGED, and DECREED that Petitioner's time for filing a reply to Respondent's Answer, Motion for Summary Judgment and Brief in Support should be and hereby is extended up to and including the 15th day of June, 1993.

Signed on this _____ day of _____, 1993, at Houston, Texas.

_____
Judge Presiding

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SEND CONFIRMATION

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LOCAL I.D. 7137583338
LOCAL NAME SJ ATLAS

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fc: Aldape F. Aldape
cam
Tom Gee
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Sandra

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

MAY 19 1993

Michael N. Milby, Clerk
By Deputy:

RICARDO ALDAPE GUERRA Petitioner	§	
v.	§	Civil Action No. H-93-290
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	

ORDER

Be it remembered that on this _____ day of _____, 1993, came on to be heard Respondent's Motion for Extension of Time, and the Court after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that Respondent's Motion for Extension of Time be, and it is hereby GRANTED.

SIGNED on this the 18th day of May, 1993, at Houston, Texas.

KENNETH HOYT
United States District Judge

4:93-cv-00290

Scott J Atlas, Esq.
Vinson & Elkins
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Ste 2500
Houston, TX 77002

fs

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Tab 45
v. 8

MEMORANDUM

May 17, 1993

TO: Aldape Team

FROM: Scott J. Atlas

RE: State's Brief

Attached is the complete version of the State's brief. The copy that was received last Friday can now be discarded, since it contained only half of the brief.

SJA

cc: Team
Gee
Ruiz
de Cossio
Luna
Rall

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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 TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	

RESPONDENT'S ANSWER, MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent ("the Director"), by the Attorney General of Texas, and files this Answer, Motion for Summary Judgment, and Brief in Support. The Director would respectfully show the Court as follows:

I.

JURISDICTION

This court has jurisdiction over the subject matter and parties pursuant to 28 U.S.C. §§ 2241, 2254.

III.

DENIAL

Respondent denies each and every allegation of fact made by Petitioner ("Guerra") except those supported by the record and those specifically admitted herein.

III.

STATEMENT OF THE CASE

A. Course of Proceedings and Prior Disposition

The Director has lawful and valid custody of Guerra pursuant to a judgment and sentence of the 248th District Court of Harris County, Texas in cause number 359805, styled *The State of Texas v. Ricardo Aldape Guerra.* Guerra was indicted on for the murder of police officer J. D. Harris, while Officer Harris was in the lawful discharge of his duties, a capital offense. Guerra pled not guilty and was tried by a jury. On October 12, 1982, the jury found him guilty as charged. After a separate hearing on punishment, the jury, on October 14, 1982, returned affirmative answers to the issues submitted pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure. The trial court pronounced Guerra's sentence as death by lethal injection, as required by law.

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

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

No. 24.021-01 (Tex.Crim.App. January 13, 1993). Guerra then filed the instant petition for writ of habeas corpus in this Court.

B. Statement of Facts

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

At Guerra's trial, two teenage girls, Herlinda Garcia and Vera Flores testified that they were walking to the store about 10:00 p.m., that the same black car had stopped them seconds before, and the driver told them his car needed a boost and asked them if they had some cables (R. XXII - 446, 507). Both girls stated that they saw the police officer drive up and park his patrol car behind the black car seconds later (R. XXII - 448, 508). According to Garcia, two men exited the black car, walked towards the officer, and put their hands on the police car (R. XXII - 448-449, 479). Garcia then saw one of the men, later identified as Ricardo Aldape Guerra, pull what appeared to be a gun from his pants[1] (R. XXII - 449-450). She heard three shots and saw the officer fall to the ground (R. XXII - 450-451). Garcia, who ran toward her house holding her seven-month old baby, heard more shots being fired behind her (R. XXII - 451). As did Garcia, Vera Flores

[1] Guerra's companion was later identified as Roberto Carrasco Flores (Carrasco).

testified that she saw two men get out of the black and red car and approach the police car (R. XXII - 511). The men seemed to place their hands on the hood of the patrol car while the officer was standing by the open door of his car (R. XXII - 510, XXII - 527). After Flores saw the driver of the car, whom she identified as Guerra, pull something from in front of him, she heard three shots and then saw the officer lying on the ground (R. XXII - 512-513, 534, 543). Flores ducked beside a car and saw Guerra running down Walker street towards Lenox (R. XXII - 535). Both girls identified Guerra as being the one who shot and killed Officer Harris (R. XXII - 452-517).

Another eyewitness, Hilma Galvan, testified that she was walking around her neighborhood that night with two of her neighbor's children, Jose and Armando, when Guerra came speeding around a corner in a black car and almost hit them (R. XXII - 550). Galvan was able to identify Guerra as the driver of the car because he was a customer of the convenience store where she worked (R. XXII - 561-567, 570, 576). Galvan also saw George Brown talking to an officer in a patrol car (R. XXII 553). While standing on the sidewalk in front of her house at 4925 Walker, the third house east of the intersection of Walker and Edgewood, Galvan observed a patrol car and the same black and red car that almost hit her blocking Walker street (R. XXII - 553-554). Galvan also saw Garcia and Flores standing by the front of the black and red car (R. XXII - 557-558). Galvan heard the officer twice tell Guerra to "[c]ome here" and then saw Guerra turn and walk towards the officer (R. XXII - 557). She next heard the sound of shots being fired and saw a "flash" coming from Guerra's hand and then saw the officer fall to the ground (R. XXII - 560).

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

Garcia and her baby across the street[2] (R. XXII - 586-587). Galvan ran inside her house and stayed there until Jose Armijo, Jr. came to her house a few moments later screaming that his father had been shot (R. XXII - 562-565). Galvan ran to the car that had crashed into a tree in front of her house and saw that a man, later identified as Francisco Jose Armijo, Sr., had been shot; Galvan than helped his two-year old daughter from the back seat of the car (R. XXII - 565-566). She identified Guerra as the man whom she saw shoot Officer Harris (R. XXII - 561, 567, 570).

Jose Armijo, Jr. testified that on the evening of July 13, 1982, he and his two-year old sister, Lupita, had accompanied their father, Francisco Jose Armijo, Sr., to the store (R. XXI - 281). Jose stated that while they were driving west on Walker Street on their way home, he saw a black car and a police car blocking the intersection (R. XXI - 281-282). Jose saw the police officer standing behind the open door to his patrol car and observed two people with their hands placed on the hood of the police car (R. XXI - 283). Jose's father stopped his car and Jose observed the man with the long hair, later identified as Guerra, "scratch his back" and then take out a gun and shoot the policeman (R. XXI - 284). After Jose saw the fire coming from Guerra's gun, the policeman fell to the ground and one of the men grabbed the policeman's gun (R. XXI - 285-286).

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

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

subsequent lineup at the police station, he recognized Guerra as the man who shot the police officer and who also shot his father (R. XXI - 290). However, Jose told the police officer at the lineup that he was unable to identify anyone because Guerra lived in the same area of town as he did and he was afraid that if he identified him from the lineup, Guerra would "come and get him" (R. XXI - 290-291).

Patricia Diaz testified that she was driving her car down Walker when she approached a patrol car and a black car with the red top blocking the intersection (R. XXI - 310). Because the intersection was blocked, she stopped her car approximately three to four feet from the black car, which was later identified as the car Guerra was driving (R. XXI - 311). Diaz stated that her headlights were on and she saw Guerra "pointing" towards the officer right before four shots rang out (R. XXI - 312-313, 317, 325). Diaz identified Guerra at the lineup as the man she saw "pointing" towards Officer Harris (R. XXI - 317).

When investigating the scene of the murders, law enforcement officials learned from the eyewitnesses that Guerra and Carrasco had fled in an easterly direction down Walker street, with one man on the north side of the street firing his weapon and the other man on the south side of the street firing his weapon (R. XX - 104-105). Two nine-millimeter cartridges were found on the north side of the street (on the driveway at 4925 Walker) and two cartridges from a .45 caliber pistol were found on the south side of the street (R. XX - 73, 92, 102-103, 143). Immediately after the shooting, law enforcement officials canvassed the neighborhood looking for people with information regarding the shootings (R. XXI - 213-214). Acting on a tip that the suspects might be living in the house at 4907 Rusk, on the corner of Rusk and Dumble, Officers Lawrence Trapagnier and Mike Edwards, along with other Houston Police Department officers, proceeded to that location to coordinate a search for the suspects (R. XXI - 216, XXIII - 648, XXIII

- 667). After searches of the two houses at 4907 Rusk and 4911 Rusk by police officers proved fruitless, Officers Trapagnier and Edwards approached a dark garage behind the house at 4911 Rusk (R. XXI - 669-670). As the officers shined their flashlights in the garage, gunfire erupted and Officer Trapagnier was shot numerous times by one of the suspects, later determined to be Carrasco (R. XXI - 658, 673-675, 678). Other officers, hearing the shots ran to Trepagnier's aid and shot and killed Carrasco (R. XX 21, XXIII - 661). A Browning nine millimeter pistol was found under Carrasco's body (R. XX - 42). Officer Harris' .357 millimeter ammunition was recovered from the waistband of Carrasco during a search at the Harris County Morgue (R. XXI - 202, 209).

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

trial as the individual whom he found crouched behind the horse trailer and subsequently placed under arrest (R. XX - 27).

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

Danita Smith, a chemist with the Houston Police Department, testified in detail concerning the variables that affect the results of a trace metal test, including the fact that it is easier to get a trace metal reading from a deceased person because there is a lack of movement (R. XXI - 180-185). Smith performed trace metal tests on Guerra about 4:45 a.m. July 14th, approximately seven hours after the shootings (R. XXI - 186). She stated that Guerra's hands were very dirty as if he had rubbed them in dirt or as if he had fallen on the ground (R. XXI - 187). When she performed the trace metal test, she was unable to find any type of a pattern on either of hands (R. XXI - 188).

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

Walker (R. XX - 120-121). At the 4911 Rusk location he recovered six nine millimeter cartridges (R. XX - 122). Anderson conducted a test on all of the nine millimeter casings recovered in the vicinity of Edgewood and Walker and determined that they were fired from the nine millimeter gun found underneath Carrasco's body (R. XX - 131). Anderson also determined that the nine millimeter cartridges recovered from the Rusk Street shooting were also fired from the nine millimeter (R. XX - 138). He determined that the .45 caliber cartridges found at or near the scene of the shooting of the officer were fired from the.45 caliber pistol found in the red bandanna (R. XX - 131). Anderson was not able to make a positive identification as to whether the three nine millimeter projectiles found lodged in the house at 4919 Walker street were fired from the particular nine millimeter pistol found under Carrasco ((R. XX - 133-135). He also determined that it was a nine millimeter bullet that killed Francisco Armijo (R. XX - 145). Anderson concluded that, based on his examination of the scene, the location of the projectiles, and his investigation, Officer Harris was killed with a nine millimeter pistol (R. XX - 152).

Dr. Aurelio Espinola, Deputy Chief Medical Examiner for Harris County, testified that he performed the autopsy on the body of Officer Harris (R. XXIII - 683-684). Based on his examination, there were three gunshot wounds of entrance on the left side of Harris' head and three exit wounds on the right side of his head (R. XXIII - 685-692). Dr. Espinola also determined that the each of the first two shots sustained by Harris were fatal (R. XXIII - 695). He concluded that the cause of Harris' death was three gunshot wounds to the head, face and chin (R. XXIII - 696). Dr. Espinola also testified that from his examination of the size of the wounds that a .45 caliber could not have made the wounds, but that a nine millimeter could have made the wounds (R. XXIII - 700). Dr. Espinola also

performed an autopsy on Francisco Jose Armijo and determined that his death was caused by a gunshot wound to the head ((R. XXIII - 697-699).

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

IV.

PETITIONER'S ALLEGATIONS

The Director understands Guerra to be making the following allegations in support of his petition:

1. He is innocent of the crime and is entitled, under the Eighth and Fourteenth Amendments to a procedure to review his evidence of innocence.

2. The evidence was insufficient to support the jury's guilty verdict, in violation of the Fifth and Fourteenth Amendments.

3. The prosecutors engaged in misconduct, in violation of Guerra's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

4. There was an atmosphere of public hostility toward Guerra during his trial that was exacerbated by the prosecutors.

5. The prosecutors violated Guerra's rights under the Fifth, Sixth, and Fourteenth Amendments by appealing to ethnic prejudice when they asked jurors to consider Guerra's status as an illegal alien.

6. Irrelevant and inflammatory victim-impact evidence was introduced at trial, in violation of Guerra's Fifth, Eighth, and Fourteenth Amendment rights.

7. The identification procedures used in the case were so flawed that they violated Guerra's right to due process, guaranteed by the Fifth and Fourteenth Amendments.

8. Trial counsel rendered ineffective assistance, in violation of the Sixth, Eighth, and Fourteenth Amendments.

9. The trial court erred in denying four of Guerra's challenges for cause to venire members, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments.

10. The Texas statutory requirement that peremptory challenges be exercised after each prospective juror is examined is unconstitutional under the Fifth and Fourteenth Amendments.

11. The trial court denied Guerra a fair trial and due process by inquiring into the numerical division of the jury during its deliberations.

12. The jury was prevented from considering that the law of parties does not apply at the punishment phase, in violation of the Eighth and Fourteenth Amendments.

13. The trial court violated Guerra's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by failing to define the operative terms of Article 37.071 of the Texas Code of Criminal Procedure.

14. The loss of State's Exhibit 5 by the custodian of the trial records deprived Guerra of due process, in violation of the Fifth and Fourteenth Amendments.

15. The cumulative effect of the errors at his trial denied Guerra the right to a fundamentally fair trial.

V.

EXHAUSTION OF STATE REMEDIES

As he has framed his allegations in the petition, Guerra has exhausted available state remedies.

VI.

STATE COURT RECORDS

The following records from Guerra's trial and appeal were provided to the Court on February 25, 1993:

> The transcript, twenty-seven volumes of the statement of facts (vols. II-XXVIII), and one exhibit volume in trial court cause number 359805;
>
> The briefs, Court of Criminal Appeals opinions, and miscellaneous motions, papers, and orders in appeal number 69,081.

A copy of the entire state habeas corpus file was provided to the Court on March 3, 1993.

VII.

MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

A. EVEN IF A SHOWING OF ACTUAL INNOCENCE BASED ON NEWLY DISCOVERED EVIDENCE, APART FROM A CONSTITUTIONAL VIOLATION AT TRIAL, WERE SUFFICIENT TO ENTITLE GUERRA TO HABEAS RELIEF, HE HAS NOT SHOWN THE EXISTENCE OF NEWLY DISCOVERED EVIDENCE RELEVANT TO HIS INNOCENCE.

In his first claim for relief, Guerra maintains that newly discovered evidence proves that he is innocent of the crime of which he stands convicted. He asserts that this fact, apart from any constitutional violation that might have occurred at his trial, renders his death sentence invalid under the Eighth and Fourteenth Amendments. He relies on language from the concurring and

dissenting justices in *Herrera v. Collins*, ___ U.S. ___, 113 S.Ct. 853, (1993), that "convincing" or "persuasive" new evidence of actual innocence might entitle a petitioner to federal habeas corpus relief, even in the absence of a constitutional error in the proceedings.

In *Herrera*, the Supreme Court reaffirmed that habeas corpus does not provide a means of reviewing claims of actual innocence based on newly-discovered evidence that are not based on an allegation of an independent constitutional violation. *Herrera v. Collins*, ___ U.S. at ___, 113 S.Ct. at 859-64. The Court noted that habeas corpus exists to insure that a person is not convicted and sentenced in violation of the Constitution, not to correct errors of fact. *Id.* at ___, 113 S.Ct. at 860. The Court rejected the argument that the "fundamental miscarriage of justice" exception permits review of a claim such as Guerra's, noting that this rule merely allows consideration of allegations of constitutional violations that otherwise would be procedurally barred, if the petitioner "*supplements* his constitutional claim with a colorable showing of factual innocence." *Id.* at ___, 113 S.Ct. at 862, *quoting Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 2627 (1986) (emphasis added in *Herrera*). Instead, independent claims of actual innocence due to newly discovered evidence must be addressed to the executive branch, in the form of a clemency request.

The Court did assume for the purposes of deciding the case that when newly discovered evidence presents a "truly persuasive demonstration of actual innocence," a constitutional right to review of the claim exists. *Id.* at ___, 113 S.Ct. at 869. It concluded that the threshold showing to obtain such review "would necessarily be extraordinarily high."[3] *Id.* In Herrera's case, affidavits

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[3]As noted previously, three concurring justices and the three who dissented all expressed the view that it would violate the Eighth Amendment to execute a person if there were some kind of convincing or persuasive showing of newly

offering a different version of events of the murder were held insufficient to make the required showing. *Id.* at ___, 113 S.Ct. at 869.

Guerra likewise is not entitled to review on his claim, but for a different reason. Guerra's argument that he is innocent relies not on newly discovered evidence but merely on his new interpretation of the evidence introduced at his trial. He relies on inconsequential inconsistencies between witnesses' statements and their trial testimony, as well as a new analysis of expert testimony to argue that "new" evidence demonstrates that he could not have committed the murder. But all of the evidence he cites -- the location of Guerra according to witnesses relative to the direction of the fatal shots according to the physical evidence, the ballistics evidence, the fact that Guerra's fingerprints were not discovered on the murder weapon -- was before the jury. In no sense of the term can the evidence be called "newly discovered." Thus, even if his claim of actual innocence could be heard by the Court under the proper circumstances, they are not present in Guerra's case. Relief on this claim must be denied.

B. GUERRA'S CLAIM THAT THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUPPORT THE VERDICT IS BARRED BY HIS FAILURE TO RAISE THE ISSUE ON DIRECT APPEAL; ALTERNATIVELY, THE EVIDENCE PLAINLY WAS SUFFICIENT TO ALLOW A RATIONAL JURY TO FIND GUERRA GUILTY BEYOND A REASONABLE DOUBT.

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discovered evidence of the petitioner's innocence. *See Herrera,* ___ U.S. at ___, 113 S.Ct. at ___ (O'Connor, J., concurring); *id.* at___, 113 S.Ct. at ___ (White, J., concurring); *id.* at ___, 113 S.Ct. at ___ (Blackmon, J., dissenting). The majority opinion found that there was no right to review of independent claims of actual innocence and, therefore, no such violation even in the face of strong evidence of innocence.

As a variation of his first claim, Guerra contends that the evidence introduced at his trial was insufficient to support the jury's guilty verdict. He asserts that the resulting finding of guilt violates the Fifth and Fourteenth Amendments.

The Court need not address the merits of Guerra's claim because he failed to challenge the sufficiency of the evidence on direct appeal. When the last state court to review a claim declines to reach the merits because of the petitioner's failure to comply with a state procedural rule, consideration is barred in federal habeas corpus proceedings unless the petitioner can show cause for his default and resulting prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977). The state court's bar must be honored in federal court as long as the state court expresses its invocation of the procedural bar by a "plain statement." *Harris v. Reed*, 489 U.S. 255, 265, 109 S.Ct. 1038, 1044-45 (1989).

The Court of Criminal Appeals has consistently held that it will not address claims of insufficiency of the evidence in collateral attacks on convictions, *i.e.*, it will not allow a habeas proceeding to be used as a substitute for an appeal. The rule is of long-standing origin and is regularly applied to allegations that the evidence at trial was insufficient to convict. *See, e.g., Ex parte Grantham*, 760 S.W.2d 661 (Tex.Crim.App. 1988); *Ex parte Brown*, 757 S.W.2d 367 (Tex.Crim.App. 1988); *Ex parte Williams*, 703 S.W.2d 674 (Tex.Crim.App. 1986); *Ex parte Banspach*, 91 S.W.2d 365 (Tex.Crim.App. 1936).[4] When Guerra alleged in his state habeas corpus application that the evidence was insufficient to support the verdict, the district attorney responded that review of the claim was barred by the well-settled rule of state procedure. *See Ex parte Guerra*, No.

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[4]The court does allow challenges based on no evidence to support the verdict. However, Guerra does not assert that there was *no* evidence to support the jury's guilty verdict.

24,021-01, Respondent's Original Answer at 13-14. The Court of Criminal Appeals denied relief because, after it reviewed the "application, briefs and record with respect to the allegations made by [Guerra]." *Id.*, Order of January 13, 1993, it determined that there were no controverted, previously unresolved facts material to the legality of Guerra's confinement.

The court could not have reached this conclusion without imposing a procedural bar to review of Guerra's challenge to the sufficiency of the evidence. The court is presumed to know its own law, especially when the state notes the existence of the appropriate rules, and, in the absence of any indication to the contrary, to have applied that law correctly. Nothing in the record indicates that the Court of Criminal Appeals did anything other than correctly apply its settled law. This is all the more so if this Court concludes that the state's response should not be considered because it had not been submitted when the trial court entered its order recommending denial of the application. In that case, the absence of a response acts as a denial of all allegations in the application. Tex. Code Crim. Proc. Ann. art. 11.07 §2(b) (matters alleged in the application not admitted by the state are deemed denied). Thus, unless the state court denied relief on the basis of the procedural bar, there would have been controverted facts regarding the sufficiency of the evidence to convict Guerra, and the Court of Criminal Appeals could not have found otherwise. Consequently, because the state courts declined to review Guerra's claim on the basis of an adequate and independent state law ground, this Court need not reach the merits. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497 (1977).

In the alternative, and without waiving the procedural default argument, the Director asserts that Guerra is not entitled to relief on the merits of his contention. In *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979), the Supreme Court announced the standard for reviewing contentions that the evidence at trial was

insufficient to support the guilty verdict. The issue is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 320, 99 S.Ct. at 2789 (emphasis in original). A reviewing court must make all credibility choices in favor of the state and resolve all conflicts in the testimony in favor of upholding the verdict. *Id.* A federal court considering the sufficiency of the evidence must refer to the elements of the crime as defined by state law.

Guerra was charged with capital murder under Section 19.03(a)(1) of the Texas Penal Code: intentionally or knowingly murdering a person known to be a peace officer acting in the lawful discharge of his duties. The evidence showed that Officer Harris was in a Houston Police Department vehicle at the time he stopped Guerra. The car did not have emergency lights on the top but did have red lights in the grill, which were flashing at the time. Further, Harris was wearing a Houston Police Department uniform. The evidence was undisputed that the car Guerra was driving was stalled in an intersection, blocking traffic, and that Harris was investigating the situation as part of his duties as a police officer.

The record also reflects that five witnesses identified Guerra as the person who shot Officer Harris. At least one of the witnesses was familiar with Guerra because he was a customer in the convenience store where she worked and she had seen him before. The witnesses testified that Guerra pointed a gun at Harris and shot him; there was no evidence of a struggle or of any provocation on Harris' part. Although the murder took place at night, it occurred near an intersection lighted by a street light. In addition, the highbeam headlights on Officer Harris' patrol car were on. Further, Patricia Diaz testified that she had stopped her car approximately three to four feet from the car Guerra was driving and that her headlights were on. Medical and firearms experts testified that Harris was killed with a nine millimeter pistol, and trace metal tests of Carrasco's hands were

inconsistent with his having held such a weapon.[5] Finally, Guerra confessed that he had been present at the scene, although he contended that it was Carrasco who committed the murder.

Viewing the evidence in the light most favorable to the prosecution, it is readily apparent that a rational jury could have found that Guerra knew Officer Harris was a police officer in the lawful discharge of his official duties, and that Guerra intentionally or knowingly caused Harris' death. Although Guerra testified that he did not kill Officer Harris, the jury was free to, and obviously did, disbelieve his version. Guerra also asserts that there were inconsistencies in the testimony of many of the state's witnesses, and that these made their testimony unbelievable and unreliable. However, as he also notes, the inconsistencies in the statements were fully explored during cross-examination, and the jury had the opportunity to decide whether their explanations were credible. Guerra's claim is meritless.

D. GUERRA FAILS TO SHOW THAT HIS JURY WAS INFECTED WITH HOSTILE ATTITUDES TOWARD HIM THAT RESULTED IN AN UNFAIR TRIAL.

At the time of his trial, Guerra was an illegal immigrant. He asserts that there was a pervasive hostile attitude toward illegal aliens in the community during the time of his trial. He also maintains that residents of Houston were outraged by

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[5]Trace metal tests on Guerra's hands showed no evidence of his having handled a weapon. However, both chemists who performed the tests testified that the presence of such things as dirt on the subject's hands can affect the results. Guerra's hands were extremely dirty, as if he had rubbed them in the dirt or had fallen down. Thus, the lack of trace metal on Guerra's hands does not exonerate him. Moreover, all of the witnesses testified that both Guerra and Carrasco had guns in their hands as they ran from the scene. Thus, but for the dirt on Guerra's hands, the tests would have shown that he had handled at least one of the guns found.

the high number of murders of police officers at the time. He contends that these feelings, allegedly fanned by the prosecutors, resulted in his being denied a fair trial by an impartial jury. He also complains that the alleged presence of numerous off-duty, uniformed police officers deprived him of his right to a trial by a fair jury, the presumption of innocence, and the right to confront and cross-examine the spectators as his accusers.

Initially, review of Guerra's claims is foreclosed by his failure to object on these bases at trial. Although most of the venire members were questioned about their exposure to news about the killing, Guerra did not object to any of the jurors who were selected for his trial on the basis that they had formed an opinion about his guilt that they could not put aside. Indeed, Guerra expressly informed the trial court that he did not wish to seek a change of venue and preferred to be tried in Harris County. Tr. 32.[6] Similarly, Guerra did not object to the "hostile environment" in Harris County for illegal aliens. Instead, he was apparently satisfied when questioning of potential jurors revealed no bias or animosity toward illegal aliens on the part of the jurors selected. Finally, Guerra did not object at trial to the alleged presence of uniformed policemen in the courtroom, nor is there any indication in the record to support his assertion. The state noted Guerra's failure to preserve any of these claims for review. As with the allegation that the evidence was insufficient to support the guilty verdict, the state courts' denial of relief because there were no controverted, previously unresolved facts material to Guerra's confinement must be taken as the imposition of the procedural bars to

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[6]The notice was made as an objection to the statutory requirement that unless a motion for change of venue is filed seven days before the pre-trial hearing, the opportunity to change venue is waived. *See* Tex. Code Crim. Proc. Ann. art. 28.01 §1(7). Guerra explained that he could not tell whether a change of venue would be necessary until he had a chance to conduct *voir dire*. He made no attempt to seek a change of venue after jury selection.

review of the merits of the claims. Inasmuch as Guerra offers no cause for his failure to comply with state procedure and no claim of resulting prejudice, review by this Court is barred.

In the alternative, Guerra's allegations do not entitle him to relief. Under the Sixth and Fourteenth Amendments, an accused is entitled to a fair trial before an impartial jury. *Murphy v. Florida,* 421 U.S. 794, 799, 95 S.Ct. 2031, 2036 (1975); *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1971). The Constitution does not, however, require that jurors be completely unaware of the facts and issues to be tried. *Dobbert v. Florida,* 432 U.S. 302, 97 S.Ct. 2290, (1977); *Murphy v. Florida,* 421 U.S. at 799-800, 95 S.Ct. at 2036; *see Patton v. Yount,* 467 U.S. 1025, 1032-34, 104 S.Ct. 2885 (1984) (*voir dire* led to selection of jurors who had forgotten previously held opinions or needed to be persuaded again). Otherwise qualified venire members who possess precon-ceptions as to the defendant's guilt or innocence are not thereby excludable, provided they can set aside their opinions and return a verdict based upon the evidence adduced at trial. *Murphy v. Florida.* 421 U.S. at 800, 95 S.Ct. at 2036; *Irvin v. Dowd,* 366 U.S. at 723, 81 S.Ct. at 1642-43.

Juror exposure to adverse publicity may infringe a criminal defendant's right to be tried before an impartial tribunal. As a general rule, however, the Court has required:

> `that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'

Beck v. Washington, 369 U.S. 541, 558, 82 S.Ct. 955, 964, *quoting United States ex rel. Darcy v. Handy,* 351 U.S. 454, 462, 76 S.Ct. 965, 970 (1956). The federal courts do not exercise supervisory power over state court proceedings, *Mu'Min v.*

Virginia, ___ U.S. ___, ___, 111 S.Ct. 1899, 1903 (1991); *Smith v. Phillips,* 455 U.S. 209, 221, 102 S.Ct. 940, 948 (1982); and even extensive community knowledge about the crime or the accused is not by itself sufficient to violate constitutional guarantees. *Patton v. Yount,* 467 U.S. at 1032-34, 104 S.Ct. at ____.

The Supreme Court has presumed unconstitutional jury bias, in the face of jurors' claims of impartiality, only under circumstances involving a "'trial atmosphere . . . utterly corrupted by press coverage.'" *Dobbert v. Florida,* 432 U.S. at 303, 97 S.Ct. at 2303, *quoting Murphy v. Florida,* 421 U.S. at 798, 95 S.Ct. at 2035. In *Irvin v. Dowd,* for instance, ninety percent of the petit jury venire possessed an opinion as to the defendant's guilt, and news accounts reported the strong and bitter prejudice against him which surfaced during *voir dire* examination. Two-thirds of the jurors who ultimately convicted Irvin and sentenced him to death believed before trial he was guilty, and some jurors indicated that they would require evidence to dispel this preconception. Similarly, in *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417 (1963), the community from which the jury was selected had been saturated with televised accounts of the defendant's extrajudicial confession. Three jurors had viewed the "interview," and two other jurors were deputy sheriffs. In *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507 (1966), pretrial publicity was highly accusatory and inflammatory. The very real possibility of jury prejudice was exacerbated because newsmen virtually took over the courtroom and because the trial judge did nothing to insulate jurors from the invidious and often inaccurate publicity which continued throughout the trial.

Guerra's case is a far cry from those in which bias has been presumed. Indeed, Guerra does not complain directly about the publicity involving his case, but rather focuses on the media coverage of police killings in general during the year. Although he names five jurors who he characterizes as having "followed the

investigation in the press," Petition at 120, the *voir dire* of these individuals reflects only that they had heard of the case from various media sources. *See* R V:660 (juror Douthitt was sure that he had heard of the incident but could not remember details and had no opinion as to Guerra's guilt or innocence); VI:833, 878 (juror Woods had heard of the case, but recalled only that the crime had been committed, a suspect had been apprehended, and he was an illegal alien, but had formed no opinion as to guilt or innocence and could decide the case from the evidence presented); VI:974 (juror Kellogg recalled the incident from seeing television coverage, but formed no opinion about the guilt of the accused and had questions about the way the suspect was apprehended); XIX:3453-54 (juror Petty remembered hearing about the case but did not read enough to form an opinion); XIX:3519 (juror Whiteford remembered the event "vaguely" but could not remember names or details). As Guerra notes, four jurors were even more uncertain about their recollections of the news, two were not questioned at all about their knowledge of the murder, and one denied having heard anything about it before *voir dire.* Petition at 120 n.67. Clearly, there was no showing of bias on the part of the jury because of any pretrial publicity about the crime or about the murder of policemen in general.

Likewise, Guerra's claim that community feeling about illegal aliens created a "hostile environment" fails to show any prejudice among the jurors in his case. Most of the venire members were questioned during *voir dire* about their feelings toward illegal aliens. As Guerra notes, several members of the venire expressed biased attitudes, and each of these was excused for cause. Of those who actually served on the jury, Guerra points to only two who allegedly had unfavorable feelings for illegal aliens. Of these, juror Brennan disagreed with the Supreme Court decision that held that children of illegal aliens have a right to free education. However, he stated that there was no connection between providing

illegal aliens an education and giving a fair trial to an illegal alien accused of murder. He stated that the two concepts needed to be separated and he felt he could give Guerra a fair trial. R III:297.

Juror Whiteford agreed with the prosecutor that no one should be found guilty of any crime simply because he was an illegal alien. R XIX:3552. Then the following exchange took place:

> Q. Of course, the fact that a person is in someone else's country unlawfully or has come into a country illegally could be evidence the jury could consider about what type of person the man is.
>
> MR. ELIZONDO [defense counsel] Objection, Your Honor. That is a misstatement of the law.
>
> THE COURT. Overruled.
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> Q. (By Mr. Moen) I am not talking about guilt or innocence. No man should be found guilty or not guilty because a man is an illegal alien.
>
> I think you agree with me, do you not?
>
> A. Yes, I do.
>
> Q. I am going to ask you one thing. If you agree to serve on the jury panel, I expect you to say by your verdict not guilty if I don't prove my case, and can you do that?

R XIX:3552-53. It is clear that Whiteford merely agreed a second time that a person's status as an illegal alien should not determine whether he is found guilty of a crime. The prosecutor did not receive an answer to his question whether a juror would want to know of the defendant's status for other purposes, and moved on to other topics. When Guerra's attorney questioned Whiteford, he asked about her attitude toward the Supreme Court decision that illegal aliens' children were

entitled to free public education. She replied that children should receive an education if they are going to be in this country, and that they should not be made to suffer for what their parents did. When asked directly if she could give Guerra a fair trial knowing that he was an illegal alien, she responded, "Yes, sir." R XIX:3565.

These are the only two jurors Guerra contends expressed *any* kind of biased attitudes toward illegal aliens. Clearly, counsel were satisfied after *voir dire* that there was no environment of hostility toward illegal aliens that would have prevented Guerra from receiving a fair trial. *Cf. Wainwright v. Witt,* 469 U.S. 412, 431 n.11, 105 S.Ct. 844, 855 n.11 (1985) (counsel's perception at the time that no error was being committed is persuasive evidence that none occurred). This claim is without merit.

Finally, Guerra contends that numerous uniformed police officers attended the trial, sitting in prominent positions, increasing the "hostile environment," and being present only to intimidate the jury and to insure that Guerra was convicted and sentenced to death. He asserts that this violated his rights to a fair trial and to due process.

An accused is entitled to a fair trial, one in which guilt or innocence is determined only by the evidence introduced, "and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky,* 436 U.S. 478, 485, 98 S.Ct. 1930, 1934 (1978). Ordinarily, the adversary system and the presumption of innocence operate to insure a fair result at trail. *Holbrook v. Flynn,* 475 U.S. 560, 567-68, 106 S.Ct. 1340, 1345 (1986). Certain practices and procedures, however, so threaten the integrity of the trial process that courts must subject them to close scrutiny. Thus, trying a defendant in identifiable jail clothing over his objection violates the right to a fair trial. *Estelle v. Williams,* 425 U.S. 501, 504-05, 96 S.Ct.

1691, 1693 (1976). In reviewing a state court practice that is alleged to have infringed on the fairness of a trial, a federal court must

> look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

Holbrook v. Flynn, 475 U.S. at 572, 106 S.Ct. at 1347-48. Here, Guerra has failed to show actual prejudice. Consequently, his claim fails.

In *Flynn,* the Supreme Court held that the presence of numerous armed security officers in the courtroom during a trial of six defendants for the theft of approximately $4 million from a security company was not inherently prejudicial. *Id.* at 569, 106 S.Ct. at 1346. The Court reasoned that jurors might draw a wide range of inferences from the presence of the guards unrelated to the assumption that the defendants were dangerous persons. Moreover, the state's interest in maintaining custody of the defendants and security in the courtroom was a legitimate concern that justified the presence of armed guards. *Id.* at 571-72, 106 S.Ct. at 1347.

Here, assuming *arguendo* that Guerra is correct about the presence, and number, of uniformed policemen in the courtroom, he cannot obtain relief. Assuming that the presence of uniformed police officers as spectators rather than as security guards must be examined for inherent prejudice, Guerra's claim fails. His reliance on *Woods v. Dugger,* 923 F.2d 1454 (11th Cir. 1991), is misplaced. In *Woods,* the defendant was on trial for the murder of a prison guard. The trial took place in a rural area where the prison was a major employer, bringing a sizeable amount of income to the community. Approximately half of the spectators during the trial were prison guards in uniform. The trial took place after

extensive prejudicial publicity in the area. The court of appeals concluded that the guards were present to make one comment to the jury: that the defendant should be convicted and sentenced to death.

The same conclusion cannot be drawn in Guerra's case. It cannot be assumed that jurors would have viewed the presence of off-duty police officers as reflecting anything other than curiosity about the trial of one accused of killing a friend and colleague. The pressures inherent in *Wood*, where jurors could have been expected to be related to, or at least know, prison employees, and perhaps even some of those observing the trial, could not exist in this case, tried in metropolitan Houston. It would be far-fetched and improper to presume that jurors felt pressured to return a guilty verdict and a death sentence simply because there were a number of police officers present in the courtroom.

Similarly, Guerra can show no actual prejudice. The fact that no objection or even notation for the record was made about the presence of the officers strongly suggests that they were not viewed by those in the courtroom as infecting the atmosphere against Guerra as he now contends. *See Lowenfield v. Phelps*, 484 U.S. 231, 240, 108 S.Ct. 546, 552 (1988) (failure to object to court's reading of *Allen* charge a strong indication that it was not viewed as coercive by counsel on the spot who heard it). There is no indication in the record that suggests that the officers were disruptive or demonstrative in any way, nor does the record reflect that jurors were paying undue attention to the police spectators. Guerra's claim lacks merit and relief should be denied.

E. THE PROSECUTORS DID NOT IMPROPERLY EXHORT THE JURY TO CONSIDER GUERRA'S STATUS AS AN ILLEGAL ALIEN IN DECIDING HIS PUNISHMENT.

Guerra contends that the prosecutors appealed to jury prejudice against undocumented Mexican nationals in order to obtain a death sentence for him. He asserts that throughout *voir dire* the prosecutors emphasized Guerra's status as an illegal alien and encouraged jurors during argument to consider that fact in determining what his punishment should be. All of this, he maintains, deprived him of a fair trial and due process.

The Court need not address the merits of this allegation because Guerra did not object to the prosecutors' questions or argument at trial. This failure to preserve the alleged error by contemporaneous objection, and the complete lack of a showing of cause and prejudice are fatal to his claim. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497 (1977). Moreover, it was not the State but Guerra's attorneys who first brought up the issue of Guerra's illegal status during *voir dire.* The record reflects that while questioning the second venireman, Charles Bridges, Guerra's attorney asked if the fact that the defendant was an illegal alien would affect his verdict at either guilt-innocence or punishment. R II:52-53. The prosecutors did not bring up the matter until far along in the jury-selection process, after several other prospective jurors had been questioned about the matter by the defense. Guerra cannot have engaged in a particular practice and then complain because the state does the same thing. Review of this claim is barred in these proceedings.

Without waiving the procedural default defense, the Director submits that Guerra is not entitled to relief on the merits of his allegation. It goes without saying that a conviction and sentence based on prejudice on the part of the jury, rather than evidence offered at trial, violates the defendant's rights under the Sixth

and Fourteenth Amendments. *See Turner v. Murray,* 476 U.S. 28, 106 S.Ct. 1683 (1986). When there exist factors that make it likely that racial or other impermissible types of prejudice could influence the jury's decision, the trial court must, on request, permit questioning of prospective jurors to help eliminate those people with objectionable attitudes who cannot put them aside in reaching a verdict. *Turner v. Murray, supra; Ham v. South Carolina,* 409 U.S. 524, 93 S.Ct. 848 (1973).

In this case, the state did not object to Guerra's questioning venire members about his being an illegal alien, and the court did not prevent the line of inquiry. If, as is apparent, Guerra felt that his status might be a factor in the jury's verdicts, he was entitled to seek out prospective jurors whose biases would interfere with their duty to base their decisions on the evidence, and to have them removed from his jury. That is precisely the course that he pursued in his *voir dire*. The fact that the state asked the same questions of some of the jurors does not convert the practice into a due process violation.

Guerra's argument that the state improperly asked jurors to consider his illegal alien status in determining the proper punishment, besides being barred by his failure to object, is equally unavailing. The record reflects that on three occasions during *voir dire,* the prosecutor mentioned to persons ultimately selected to serve on the jury that, although they could not consider Guerra's illegal alien status to convict him, and could not assess his punishment simply because of his being an illegal alien, it was a factor they could consider in evaluating his character to decide on the appropriate punishment. R XV:2603-04; XVIII:3253; XIX:2552-53.[7] This clearly was proper. The record fails to reflect that the

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[7]In the third instance, Guerra's attorney objected and, although the objection was overruled, the prosecutor reframed his question in such a way that the venireperson did not answer the original question but simply agreed with him

prosecutors were seeking to place Guerra within the framework of a stereotype, labeling all persons illegally in the country as dangerous or potentially dangerous. Instead, and as the prosecutors argued, the jury could take into account the fact that a person in the country illegally had shown a lack of respect for the laws of the country to begin with. From that, and the fact that Guerra had committed other violent crimes, jurors might conclude that there was a probability that he would continue to commit acts of violence, further disregarding the country's laws. To the extent that this assisted them in aswering the second punishment question, *see* Tex. Code Crim. Proc. Ann. art. 37.071(b)(2), it was information that could be considered. Nothing in the record supports Guerra's assertion that the prosecutors were appealing to juror prejudice in noting that Guerra was an illegal alien.

Finally, Guerra alleges that the prosecutor sought to play on prejudicial attitudes on two occasions during argument. Like his other claims, review of this one is barred by his failure to object to the remarks when they were made. Nowhere does Guerra attempt to show cause for his not following state procedure or resulting prejudice. Accordingly, the Court need not address the merits of this allegation. In the alternative, the claim is without merit. Guerra objects to the following two statements in the prosecutor's argument at the punishment phase:

> [Y]our answers will demonstrate what type of person Ricardo Aldape Guerra was while he was in **our** community for less than two months after coming here from Monterrey, Mexico. (emphasis in Guerra's petition).

R XXVII:165.

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again that a defendant's illegal alien status should not be a factor in determining whether he was guilty or innocent. R XIX:2552-53.

> [L]et the other **residents** of 4907 Rusk . . . know just exactly what we as **citizens** of Harris County think about this kind of conduct. . . . (emphasis in petition).

R XXVII:179.

In order for a state habeas petitioner to prevail on a claim that an improper jury argument marred his trial, the asserted error must be of constitutional magnitude. This means that the prosecutorial remarks must be so prejudicial that they render the trial fundamentally unfair. *Ortega v. McCotter,* 808 F.2d 406 (5th Cir. 1987). The trial is rendered fundamentally unfair only if, in the context of the entire trial, the remarks were "crucial, critical, highly significant factors." *Lowery v. Estelle,* 696 F.2d 333, 342 (5th Cir. 1983). The petitioner has the burden of showing that the evidence against him was so insubstantial that but for the remarks of the prosecution, no conviction -- or in this case, death sentence -- would have resulted. *Felde v. Blackburn,* 795 F.2d 400 (5th Cir. 1986). Mere conclusory allegations do not suffice to satisfy the burden of proof. *Id.*

Guerra's attempt to find an appeal to prejudice in the first of the statements above is strained, at best. Viewed in context with the entire argument, it is plain that the reference to "our" community, despite Guerra's unfounded emphasis on the adjective, was part of a plea for law enforcement, a legitimate function of jury argument. *Landry v. State,* 706 S.W.2d 105 (Tex.Crim.App. 1985). The prosecutor reminded the jury over and over that the crime had occurred in their community and that they were the only ones with the power to punish it and to try to prevent other crimes. *See, e.g.,* R XXVIII:167, 168-69, 170.

As for the second example, Guerra selectively edited the statement. The full statement was:

> I know it is not going to be fun and I know it is not going to be easy, but I ask that you return a speedy verdict and you let the other residents at 4907 Rusk

> and you let the people who have the rest of those weapons out there somewhere, you let them know just exactly what we as citizens of Harris County think about this kind of conduct that has been exemplified before you.

R XXVII:178-79. The full statement makes it clear that the prosecutor again was asking the jury to send a message to the rest of the community, including anyone who had come into possession of the weapons that Guerra had stolen five days before the murder, that violent behavior would not be tolerated in Harris County. It was logical to assume that those with whom Guerra was living on Rusk Street would be likely to have shared in the fruits of the gun store robbery, but the prosecutor made it clear that he was including everyone who might have obtained the guns in his warning that the citizens of the community, through its legal system, would not allow violence to go unpunished. By no stretch of the immagination can the two statements be considered improper, much less "crucial, critical, highly signficant factors" in the punishment phase of the trial, such that Guerra's trial was rendered fundamentally unfair. This claim is without merit.

F. THE STATE DID NOT UTILIZE IMPROPER VICTIM-IMPACT EVIDENCE AT THE GUILT-INNOCENCE PHASE OF THE TRIAL.

Guerra alleges that the state relied on emotional appeals to the jury to avenge the deaths of both Officer Harris and Jose Armijo, Sr., relying on the testimony of the widows of both men at the guilt-innocence phase of the trial. In Harris' case, Guerra complains about her testimony concerning his qualities as a husband and father, about the events of the last few days of his life, and that his last words to her on leaving home to go to work the night he was killed were, "I love you." In the case of Armijo, Guerra complains that she was permitted to testify about the traumatic effects his father's death had on her son. He also objects to the prosecutor's statements to the jury that he represented the victims

and their families. He contends that this evidence constituted a violation of his right to due process and a fair trial and sentencing proceeding.

In *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597 (1991), the Supreme Court held that "the Eighth Amendment erects no *per se* bar," to the admission at the punishment phase of a capital murder trial of "victim impact evidence and prosecutorial argument on that topic." *Id.* at ___, 111 S. Ct. at 2609. Where such evidence is unfairly prejudicial, "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at ___, 111 S. ct. at 2608. In so holding, the Court stated that "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in *determining the appropriate punishment.*" *Id.* at ___, 111 S. Ct. at 2605 (emphasis added). Perhaps the most important reason for allowing this type of evidence and argument is that "'the state has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, [there]by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular [her] family.'" *Id.* at ___, 111 S. Ct. at 2608, *quoting Booth v. Maryland*, 482 U.S. 496, 517, 107 S. Ct. 2529, 2540 (1987) (White, J., dissenting).

With respect to the testimony from Harris' widow, assuming *arguendo* that it was erroneously admitted at the guilt-innocence phase of the trial, Guerra cannot show that he is entitled to relief. To prevail on a claim of improperly admitted evidence, a habeas corpus petitioner bears the burden of demonstrating that the evidence "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, ___ U.S. ___, ___, 113 S.Ct. ___, ___, No. 91-7358 (April 21, 1993), *quoting Kotteakos v. United States*, 328 U.S. 750, 776, 66

S.Ct. 1239, 1253 (1946) (*Brecht* attached as Appendix A). It is readily apparent that Guerra cannot meet this burden.

Although Mrs. Harris testified about her husband's qualities as a family man and provided some details about his background, the prosecutor did not dwell on those facts and did not urge them as a reason for finding Guerra guilty. Guerra cites to one portion of the argument at the guilt-innocence phase to support his claim that the state was trying to use emotion to make up for its allegedly otherwise weak case. However, the entire argument referring to Mrs. Harris' testimony is as follows:

> You know, trials like this, murder cases like this make me angry a little bit as a lawyer as far as the law is concerned because you are presented with just the briefest biographical sketch of what type of person Jim Harris really was, and it is not really fair. It is not fair to Jim or his family, that you know so little about what kind of person he was.
>
> Throughout the trial, he is characterized as being a police officer, just a police officer. He was a person working as a police officer. He was not just another statistic, murder statistic here in Houston. He was a good man.
>
> Put it out of your mind he was a police officer. Sure, it enters into this case, but he was not just a police officer, not just a distant figure we can write off. He was a man, a good man, a good member of this community.

R XXV:986-87. This argument took up less than a full page of a twenty-one page argument, the rest of which consisted of a review of the eyewitness, scientific, and circumstantial evidence of Guerra's guilt. Clearly, it cannot be said that this argument and the testimony of Mrs. Harris, if improper, had "substantial

and injurious effect or influence in determining the jury's verdict." Guerra's claim is meritless.

As for Mrs. Armijo's testimony about the effect of her husband's death on their son, the testimony was both relevant and admissible because Guerra had asserted that Jose, Jr. had changed his story, failing to identify Guerra in a lineup the night of the murder and later testifying that he had recognized Guerra in the lineup but failed to identify him out of fear. Mrs. Armijo's testimony was introduced to account for the apparent inconsistency of Jose, Jr.'s testimony. Guerra cannot show that the admission of the testimoy was error, much less that it had an improper influence on the jury's verdict.[8]

L. THE LAW OF PARTIES WAS NOT AN ISSUE IN GUERRA'S CASE.

Relying on the district court decision in *Nichols v. Collins,* 802 F. Supp. 66 (SD Tex. 1992), Guerra asserts that it was constitutional error for the trial court to have refused to instruct the jury that the law of parties did not apply at the guilt-innocence phase of the trial. He contends that he requested such an "anti-parties" instruction and that the court's failure to inform the jury that it could not assess his punishment based on the conduct of another deprived him a jury consideration of mitigating evidence and requires that his sentence be vacated.

Nichols offers no support for Guerra. First, the judgment has currently been stayed pending appeal to the Fifth Circuit, and is of no precedential value. Further, although the case has not been ruled on by the Fifth Circuit yet, it has been expressly disapproved. In *Harris v. Collins,* ___ F.2d ___, No. 92-2918 (5th Cir. April 22, 1993) (attached hereto as Appendix B), a panel of the Fifth Circuit

[8]Under the holding in *Payne,* it clearly was not error to admit the evidence of which Guerra complains at the punishment phase of the trial. Guerra does not and cannot show that the use of the evidence for sentencing purposes amounted to a due process violation.

noted that "[b]esides having had its opinion in regard to sentencing vacated pending appeal, the court in *Nichols* simply did not discuss the controlling law of the circuit in *Bridge [v. Collins*, 963 F.2d 767 (5th Cir. 1992)]." *Id.*, slip op. at 9-10. In *Bridge*, the Fifth Circuit had held that:

> If the jury members believed that Bridge's accomplice killed the victim, they they could have answered "no" to the first question.
>
> . . .
>
> If the jury members believed that Bridge did not shoot the victim, then they could have concluded that Bridge woudl not be a future threat.

Bridge, 963 F.2d at 770. Consequently, controlling circuit precedent forecloses Guerra's claim.

M. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT "REASONABLE DOUBT" AND THE TERMS IN THE PUNISHMENT ISSUES BE DEFINED FOR THE JURY.

Guerra next contends that his Eighth and Ffourteenth Aamendment rights were infringed because the trial court failed to define the following terms used in the special sentencing issues: "beyond a reasonable doubt," "deliberately," "reasonable expectation," "criminal acts of violence," "continuing threat to society," According to Guerra, these undefined terms are impermissibly vague and fail to narrow the class of persons eligible for a death sentence.

Guerra has forfeited federal habeas review of this claim by his noncompliance with the state's contemporaneous objection rule. *See* Tex. Code Crim. Proc. Ann. arts. 36.14, 36.15, 36.19. Guerra has offered neither cause for his failure to comply with state procedure nor resulting prejudice. Consequently, his contention need not be reviewed in these proceedings.

In the alternative, without waiving the procedural defense, review of the allegation is foreclosed by Supreme Court and Fifth Circuit precedent. The undefined terms in the special issues have "a plain meaning of sufficient content that the discretion left to the jury . . . [i]s no more than that inherent in the jury system itself." *Milton v. Procunier,* 744 F.2d 1091, 1096 (5th Cir. 1984) ("deliberately," "probability," "criminal acts of violence"), *cert. denied,* 471 U.S. 1030, 105 S. Ct. 2050 (1985); *Thompson v. Lynaugh,* 821 F.2d 1054, 1060 (5th Cir.) ("deliberately," "reasonable doubt"), *cert. denied & stay denied,* ___ U.S. ___, 108 S. Ct. 5 (1987). Indeed, the undefined terms in the punishment issues contain a "common-sense core of meaning" that juries are capable of understanding. *Pulley v. Harris,* 465 U.S. 37, 49 n.10, 104 S. Ct. 871, 879 n.10 (1984) (*quoting Jurek v. Texas,* 428 U.S. 262, 279, 96 S. Ct. 2950, 2959 (1976) (White, J., concurring).

Moreover, under the Texas capital sentencing scheme, the class of death eligibles is narrowed at the guilt-innocence phase of the trial. That is, the penal statute defining the offense of capital murder, Tex. Penal Code Ann. § 19.03, narrowly circumscribes the categories of murder for which the death penalty is a possible punishment. *Lowenfield v. Phelps,* 484 U.S. at ___, 108 S. Ct. at 554; *Jurek v. Texas,* 428 U.S. at 269-74, 96 S. Ct. at 2955-57. Where the constitutionally required narrowing function is performed at the guilt-innocence phase of the trial, no further narrowing is required at the punishment phase. *Lowenfield, supra.* Consequently, Guerra's allegation that the special issues, without special definitions, fail to perform a narrowing function is insufficient to raise a constitutional issue.

O. GUERRA IS NOT ENTITLED TO RELIEF UNDER THE "CUMULATIVE ERROR" DOCTRINE.

Guerra finally contends that if none of his allegations of constitutional error are sufficient in themselves to warrant the granting of relief, the cumulative effect of all of them requires that relief be granted. He relies on the Fifth Circuit's opinion in *Derden v. McNeil*, 978 F.2d 1453 (5th Cir. 1992) (*en banc*).

In *Derden*, the Fifth Circuit held that the "cumulative error" doctrine would apply subject to certain restrictions. These include: 1) only errors that were not cured at trial by granting objections and instructing the jury to disregard can be considered; 2) errors subject to procedural bars cannot be considered in the analysis; 3) errors of state law only, including the erroneous admission or exclusion of evidence, can be considered only if they were so egregiously unfair as to amount to a due process violation; and 4) the record as a whole must reflect that the errors "more likely than not" caused an unreliable result. Guerra cannot profit from the "cumulative error" doctrine for several reasons.

First, by definition, the cumulative error doctrine requires that error have been committed. With the possible exception of some of the testimony concerning the background of Officer Harris, Guerra has failed to identify any errors in his trial. With respect to the admission of Mrs. Harris' testimony, Guerra has not and cannot demonstrate a due process violation that would allow any possible error to be considered. Second, many of the allegations of error in the trial proceedings, even if they did rise to the level of constitutional error, were not preserved by contemporaneous objections, and thus cannot be included in the cumulative error analysis. Finally, as the Director's motion for summary judgment demonstrtes, it cannot be said that any errors, if they existed, produced an unreliable result. Guerra's assertion that he is entitled to relief because of cumulative error in his trial is without merit.

WHEREFORE, PREMISES CONSIDERED, the Director respectfully requests that the requested relief be denied, and the petition for writ of habeas corpus be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Answer, Motion for Summary Judgment, and Brief in Support has been served by placing same in the United States Mail, postage prepaid, on this the ____ day of May, 1993, addressed to: Mr. Scott J. Atlas, VINSON & ELKINS, 2500 First City Tower, 1001 Fannin, Houston, Texas 77002-6760.

_____
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APPENDIX A

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C

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. *See United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRECHT *v.* ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 91–7358. Argued December 1, 1992—Decided April 21, 1993

At his first-degree murder trial in Wisconsin state court, petitioner Brecht admitted shooting the victim, but claimed it was an accident. In order to impeach this testimony, the State, *inter alia*, made several references to the fact that, before he was given his *Miranda* warnings at an arraignment, Brecht failed to tell anyone with whom he came in contact that the shooting was accidental. The State also made several references to his post-*Miranda*-warning silence in this regard. The jury returned a guilty verdict and Brecht was sentenced to life in prison, but the State Court of Appeals set the conviction aside on the grounds that the State's references to his post-*Miranda* silence violated due process under *Doyle* v. *Ohio*, 426 U. S. 610, and this error was sufficiently "prejudicial" to require reversal. The State Supreme Court reinstated the conviction, holding that the error was "'harmless beyond a reasonable doubt'" under the standard set forth in *Chapman* v. *California*, 386 U. S. 18, 24. The Federal District Court disagreed and set aside the conviction on habeas review. In reversing, the Court of Appeals held that the proper standard of harmless-error review was that set forth in *Kotteakos* v. *United States*, 328 U. S. 750, 776, *i.e.*, whether the *Doyle* violation "'had substantial and injurious effect or influence in determining the jury's verdict.'" Applying this standard, the court concluded that Brecht was not entitled to relief.

Held:

1. The *Kotteakos* harmless-error standard, rather than the *Chapman* standard, applies in determining whether habeas relief must be granted because of unconstitutional "trial error" such as the *Doyle* error at issue. Pp. 6–17.

Syllabus

(a) The State's references to Brecht's post-*Miranda* silence violated *Doyle*. The *Doyle* rule rests on the *Miranda* warnings' implicit assurance that a suspect's silence will not be used against him, and on the fundamental unfairness of using postwarning silence to impeach an explanation subsequently offered at trial. It is conceivable that, once Brecht was given his warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial. The prosecution's references to his pre-*Miranda* silence were, however, entirely proper. Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty. Pp. 6–7.

(b) *Doyle* error fits squarely into the category of constitutional violations characterized by this Court as "trial error." See *Arizona* v. *Fulminante*, 499 U. S. ___, ___. Such error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence to determine its effect on the trial. See *id.*, at ___. This Court has consistently applied the *Chapman* standard in reviewing claims of constitutional error of the trial type on direct review of state and federal criminal proceedings. Pp. 7–9.

(c) It is for the Court to determine what harmless-error standard applies on collateral review of Brecht's *Doyle* claim. Although the Court has applied the *Chapman* standard in a handful of federal habeas cases, *stare decisis* does not preclude adoption of the *Kotteakos* standard here, since the decisions in question never squarely addressed, but merely assumed, *Chapman*'s applicability on collateral review. Nor has Congress provided express guidance on the question. The federal habeas statute is silent as to the applicable standard, and while the federal harmless-error statute appears to echo the *Kotteakos* standard, it has been limited in its application to claims of nonconstitutional error in federal criminal cases. In line with the traditional rule, the Court finds no reason to draw inferences from Congress' failure to enact post-*Chapman* proposals that would have provided a less stringent harmless-error standard on collateral review of constitutional error. Pp. 8–12.

(d) The *Kotteakos* standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and is more likely to promote the considerations underlying this Court's recent habeas jurisprudence. In recognition of the historical distinction between direct review as the principal way to challenge a conviction and collateral review as an extraordinary remedy whose role is secondary and limited, the Court has often applied different standards on habeas than on direct review. It scarcely seems logical to require federal habeas courts to engage in the same approach that

Syllabus

Chapman requires of state courts on direct review, since the latter courts are fully qualified to identify constitutional error and are often better situated to evaluate its prejudicial effect on the trial process. Absent affirmative evidence that state-court judges are ignoring their oath, Brecht's argument is unpersuasive that such courts will respond to the application of *Kotteakos* on federal habeas by violating their Article VI duty to uphold the Constitution. In any event, the additional deterrent effect, if any, of applying *Chapman* on federal habeas is outweighed by the costs of that application, which undermines the States' interest in finality and infringes upon their sovereignty over criminal matters; is at odds with habeas' purpose of affording relief only to those grievously wronged; imposes significant "social costs," including the expenditure of additional time and resources by all of the parties, the erosion of memory and the dispersion of witnesses, and the frustration of society's interest in the prompt administration of justice; and results in retrials that take place much later than those following reversal on direct appeal. This imbalance of costs and benefits counsels in favor of application of the less onerous *Kotteakos* standard on collateral review, under which claimants are entitled to relief for trial error only if they can establish that "actual prejudice" resulted. See *United States* v. *Lane*, 474 U. S. 438, 449. Because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U. S. C. §2111), federal courts may turn to an existing body of case law and, thus, are unlikely to be confused in applying it. Pp. 12–17.

2. It is clear that the *Doyle* error at Brecht's trial did not "substantially influence" the jury's verdict within the meaning of *Kotteakos*, since the record, considered as a whole, demonstrates that the State's references to Brecht's post-*Miranda* silence were infrequent and were, in effect, merely cumulative of the extensive and permissible references to his pre-*Miranda* silence; that the evidence of his guilt was, if not overwhelming, certainly weighty; and that circumstantial evidence also pointed to his guilt. Thus, Brecht is not entitled to habeas relief. Pp. 17–18.

944 F. 2d 1363, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a concurring opinion. WHITE, J., filed a dissenting opinion, in which BLACKMUN, J., joined, and in which SOUTER, J., joined except for the footnote and Part III. BLACKMUN, O'CONNOR, and SOUTER, JJ., filed dissenting opinions.

SUPREME COURT OF THE UNITED STATES

No. 91–7358

TODD A. BRECHT, PETITIONER *v.* GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April 21, 1993]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Chapman* v. *California*, 386 U. S. 18, 24 (1967), we held that the standard for determining whether a conviction must be set aside because of federal constitutional error is whether the error "was harmless beyond a reasonable doubt." In this case we must decide whether the *Chapman* harmless-error standard applies in determining whether the prosecution's use for impeachment purposes of petitioner's post-*Miranda*[1] silence, in violation of due process under *Doyle* v. *Ohio*, 426 U. S. 610 (1976), entitles petitioner to habeas corpus relief. We hold that it does not. Instead, the standard for determining whether habeas relief must be granted is whether the *Doyle* error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946). The *Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our

[1] *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

habeas jurisprudence. Applying this standard, we conclude that petitioner is not entitled to habeas relief.

Petitioner Todd A. Brecht was serving time in a Georgia prison for felony theft when his sister and her husband, Molly and Roger Hartman, paid the restitution for petitioner's crime and assumed temporary custody of him. The Hartmans brought petitioner home with them to Alma, Wisconsin, where he was to reside with them before entering a halfway house. This caused some tension in the Hartman household because Roger Hartman, a local district attorney, disapproved of petitioner's heavy drinking habits and homosexual orientation, not to mention his previous criminal exploits. To make the best of the situation, though, the Hartmans told petitioner, on more than one occasion, that he was not to drink alcohol or engage in homosexual activities in their home. Just one week after his arrival, however, petitioner violated this house rule.

While the Hartmans were away, petitioner broke into their liquor cabinet and began drinking. He then found a rifle in an upstairs room and began shooting cans in the backyard. When Roger Hartman returned home from work, petitioner shot him in the back and sped off in Mrs. Hartman's car. Hartman crawled to a neighbor's house to summon help. (The downstairs phone in the Hartmans' house was inoperable because petitioner had taken the receiver on the upstairs phone off the hook.) Help came, but Hartman's wound proved fatal. Meanwhile, petitioner had driven Mrs. Hartman's car into a ditch in a nearby town. When a police officer stopped to offer assistance, petitioner told him that his sister knew about his car mishap and had called a tow truck. Petitioner then hitched a ride to Winona, Minnesota, where he was stopped by police. At first he tried to conceal his identity, but he later identified himself and was arrested. When he was told that he was being held for the shooting, petitioner replied that "it was a big mistake" and asked

to talk with "somebody that would understand [him]." App. 39, 78. Petitioner was returned to Wisconsin, and thereafter was given his *Miranda* warnings at an arraignment.

Then petitioner was charged with first-degree murder. At trial in the Circuit Court for Buffalo County, he took the stand and admitted shooting Hartman, but claimed it was an accident. According to petitioner, when he saw Hartman pulling into the driveway on the evening of the shooting, he ran to replace the gun in the upstairs room where he had found it. But as he was running toward the stairs in the downstairs hallway, he tripped, causing the rifle to discharge the fatal shot. After the shooting, Hartman disappeared, so petitioner drove off in Mrs. Hartman's car to find him. Upon spotting Hartman at his neighbor's door, however, petitioner panicked and drove away.

The State argued that petitioner's account was belied by the fact that he had failed to get help for Hartman, fled the Hartmans' home immediately after the shooting, and lied to the police officer who came upon him in the ditch about having called Mrs. Hartman. In addition, the State pointed out that petitioner had failed to mention anything about the shooting being an accident to either the officer who found him in the ditch, the man who gave him a ride to Winona, or the officers who eventually arrested him. Over the objections of defense counsel, the State also asked petitioner during cross-examination whether he had told anyone at any time before trial that the shooting was an accident, to which petitioner replied "no," and made several references to petitioner's pretrial silence during closing argument.[2] Finally, the State

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[2]The State's cross-examination of petitioner included the following exchange:

"Q. In fact the first time you have ever told this story is when you testified here today was it not?

offered extrinsic evidence tending to contradict petitioner's story, including the path the bullet traveled through Mr. Hartman's body (horizontal to slightly downward) and the location where the rifle was found after the shooting (outside), as well as evidence of motive (petitioner's hostility toward Mr. Hartman because of his disapproval of petitioner's sexual orientation).

The jury returned a guilty verdict and petitioner was sentenced to life imprisonment. The Wisconsin Court of Appeals set the conviction aside on the ground that the State's references to petitioner's post-*Miranda* silence, see n. 2, *supra*, violated due process under *Doyle* v. *Ohio*, 426 U. S. 610 (1976), and that this error was sufficiently "prejudicial" to require reversal. *State* v. *Brecht*, 138 Wis. 2d 158, 168–169, 405 N. W. 2d 718, 723 (1987). The Wisconsin Supreme Court reinstated the conviction. Although it agreed that the State's use of petitioner's post-*Miranda* silence was impermissible, the court determined that this

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"A. You mean the story of actually what happened?

"Q. Yes.

"A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir." App. 22–23.

Then on re-cross-examination, the State further inquired:

"Q. Did you tell anyone about what had happened in Alma?

"A. No I did not." *Id.*, at 23.

During closing argument, the State urged the jury to "remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence . . . ." *Id.*, at 30. It also made the following statement with regard to petitioner's pre-trial silence: "He sits back here and sees all of our evidence go in and then he comes out with this crazy story . . . ." *Id.*, at 31. Finally, during its closing rebuttal, the State said: "I know what I'd say [had I been in petitioner's shoes], I'd say, 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story." *Id.*, at 36.

error "'was harmless beyond a reasonable doubt.'" *State* v. *Brecht*, 143 Wis. 2d 297, 317, 421 N. W. 2d 96, 104 (1988) (quoting *Chapman* v. *California*, 386 U. S. 18, 24 (1967)). In finding the *Doyle* violation harmless, the court noted that the State's "improper references to Brecht's silence were infrequent," in that they "comprised less than two pages of a 900 page transcript, or a few minutes in a four day trial in which twenty-five witnesses testified," and that the State's evidence of guilt was compelling. 143 Wis. 2d, at 317, 421 N. W. 2d, at 104.

Petitioner then sought a writ of habeas corpus under 28 U. S. C. § 2254, reasserting his *Doyle* claim. The District Court agreed that the State's use of petitioner's post-*Miranda* silence violated *Doyle*, but disagreed with the Wisconsin Supreme Court that this error was harmless beyond a reasonable doubt, and set aside the conviction. *Brecht* v. *Abrahamson*, 759 F. Supp. 500 (WD Wis. 1991). The District Court based its harmless-error determination on its view that the State's evidence of guilt was not "overwhelming," and that the State's references to petitioner's post-*Miranda* silence, though "not extensive," were "crucial" because petitioner's defense turned on his credibility. *Id.*, at 508. The Court of Appeals for the Seventh Circuit reversed. It, too, concluded that the State's references to petitioner's post-*Miranda* silence violated *Doyle*, but it disagreed with both the standard that the District Court had applied in conducting its harmless-error inquiry and the result it reached. 944 F. 2d 1363, 1368 and 1375–1376 (1991).

The Court of Appeals held that the *Chapman* harmless-error standard does not apply in reviewing *Doyle* error on federal habeas. Instead, because of the "prophylactic" nature of the *Doyle* rule, 944 F. 2d, at 1370, as well as the costs attendant to reversing state convictions on collateral review, *id.*, at 1373, the Court of Appeals held that the standard for determining whether petitioner was entitled to habeas relief was whether the *Doyle* violation

"'had substantial and injurious effect or influence in determining the jury's verdict,'" 944 F. 2d, at 1375 (quoting *Kotteakos* v. *United States*, 328 U. S., at 776). Applying this standard, the Court of Appeals concluded that petitioner was not entitled to relief because, "given the many more, and entirely proper, references to [petitioner's] silence preceding arraignment," he could not contend with a "straight face" that the State's use of his post-*Miranda* silence had a "substantial and injurious effect" on the jury's verdict. *Id.*, at 1376.

We granted certiorari to resolve a conflict between the Courts of Appeals on the question whether the *Chapman* harmless-error standard applies on collateral review of *Doyle* violations, 504 U. S. —— (1992),[3] and now affirm.

We are the sixth court to pass on the question whether the State's use for impeachment purposes of petitioner's post-*Miranda* silence requires reversal of his murder conviction. Petitioner urges us to even the count, and decide matters in his favor once and for all. He argues that the *Chapman* harmless-error standard applies with equal force on collateral review of *Doyle* error. According to petitioner, the need to prevent state courts from relaxing their standards on direct review of *Doyle* claims, and the confusion which would ensue were we to adopt the *Kotteakos* harmless-error standard on collateral review, require application of the *Chapman* standard here. Before considering these arguments, however, we must first characterize the nature of *Doyle* error itself.

In *Doyle* v. *Ohio*, 426 U. S., at 619, we held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." This rule "rests on 'the fundamental

[3] Compare *Bass* v. *Nix*, 909 F. 2d 297 (CA8 1990) (The *Chapman* harmless-error standard governs in reviewing *Doyle* violations on collateral review).

unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *Wainwright* v. *Greenfield*, 474 U. S. 284, 291 (1986) (quoting *South Dakota* v. *Neville*, 459 U. S. 553, 565 (1983)). The "implicit assurance" upon which we have relied in our *Doyle* line of cases is the right-to-remain-silent component of *Miranda*. Thus, the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, *Jenkins* v. *Anderson*, 447 U. S. 231, 239 (1980), or after arrest if no *Miranda* warnings are given, *Fletcher* v. *Weir*, 455 U. S. 603, 606–607 (1982) *(per curiam)*. Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty. See 447 U. S., at 239.

This case illustrates the point well. The first time petitioner claimed that the shooting was an accident was when he took the stand at trial. It was entirely proper —and probative—for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone before the time he received his *Miranda* warnings at his arraignment about the shooting being an accident. Indeed, if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately following the shooting. On the other hand, the State's references to petitioner's silence after that point in time, or more generally to petitioner's failure to come forward with his version of events at any time before trial, see n. 2, *supra*, crossed the *Doyle* line. For it is conceivable that, once petitioner had been given his *Miranda* warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial.

The Court of Appeals characterized *Doyle* as "a prophylactic rule." 944 F. 2d, at 1370. It reasoned that, since

the need for *Doyle* stems from the implicit assurance that flows from *Miranda* warnings, and "the warnings required by *Miranda* are not themselves part of the Constitution," "*Doyle* is . . . a prophylactic rule designed to protect another prophylactic rule from erosion or misuse." *Ibid.* But *Doyle* was not simply a further extension of the *Miranda* prophylactic rule. Rather, as we have discussed, it is rooted in fundamental fairness and due process concerns. However real these concerns, *Doyle* does not "'overprotec[t]'" them. *Duckworth* v. *Eagan*, 492 U. S. 195, 209 (1989) (O'CONNOR, J., concurring). Under the rationale of *Doyle*, due process is violated whenever the prosecution uses for impeachment purposes a defendant's post-*Miranda* silence. *Doyle* thus does not bear the hallmarks of a prophylactic rule.

Instead, we think *Doyle* error fits squarely into the category of constitutional violations which we have characterized as "'trial error.'" See *Arizona* v. *Fulminante*, 499 U. S. ——, —— (1991) (slip op., at 6). Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." *Id.*, at —— (slip op., at 6). At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.*, at —— (slip op., at 8). The existence of such defects—deprivation of the right to counsel,[4] for example—requires automatic reversal of the conviction because they infect the entire trial process. See *id.*, at ——. Since our landmark decision in *Chapman* v. *California*, 386 U. S. 18 (1967), we have applied the harmless-beyond-a-reasonable-doubt standard in reviewing claims of constitutional error of the

[4] *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

trial type.

In *Chapman*, we considered whether the prosecution's reference to the defendants' failure to testify at trial, in violation of the Fifth Amendment privilege against self-incrimination,[5] required reversal of their convictions. We rejected the argument that the Constitution requires a blanket rule of automatic reversal in the case of constitutional error, and concluded instead "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.*, at 22. After examining existing harmless-error rules, including the federal rule (28 U. S. C. §2111), we held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, at 24. The State bears the burden of proving that an error passes muster under this standard.

Chapman reached this Court on direct review, as have most of the cases in which we have applied its harmless-error standard. Although we have applied the *Chapman* standard in a handful of federal habeas cases, see, *e.g.*, *Yates* v. *Evatt*, 500 U. S. —— (1991); *Rose* v. *Clark*, 478 U. S. 570 (1986); *Milton* v. *Wainwright*, 407 U. S. 371 (1972); *Anderson* v. *Nelson*, 390 U. S. 523 (1968) *(per curiam)*, we have yet squarely to address its applicability on collateral review.[6] Petitioner contends that we are bound by these habeas cases, by way of *stare decisis*, from

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[5] *Griffin* v. *California*, 380 U. S. 609 (1965).

[6] In *Greer* v. *Miller*, 483 U. S. 756 (1987), we granted certiorari to consider the same question presented here but did not reach this question because we concluded that no *Doyle* error had occurred in that case. See 483 U. S., at 761, n. 3, and 765. But see *id.*, at 768 (STEVENS, J., concurring in judgment) ("I believe the question presented in the certiorari petition—whether a federal court should apply a different standard in reviewing *Doyle* errors *in a habeas corpus action*—should be answered in the affirmative") (emphasis in original).

holding that the *Kotteakos* harmless-error standard applies on habeas review of *Doyle* error. But since we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits. See *Edelman v. Jordan*, 415 U. S. 651, 670–671 (1974).

The federal habeas corpus statute is silent on this point. It permits federal courts to entertain a habeas petition on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States," 28 U. S. C. § 2254(a), and directs simply that the court "dispose of the matter as law and justice require," § 2243. The statute says nothing about the standard for harmless-error review in habeas cases. Respondent urges us to fill this gap with the *Kotteakos* standard, under which an error requires reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U. S., at 776. This standard is grounded in the federal harmless-error statute. 28 U. S. C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").[7] On its face § 2111 might seem to address the

[7] In *Kotteakos*, we construed § 2111's statutory predecessor, 28 U. S. C. § 391. Section 391 provided: "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U. S. C. § 391 (1925–1926 ed.). In formulating § 391's harmless-error standard, we focused on the phrase "affect the substantial rights of the parties," and held that the test was whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U. S., at 776. Although Congress tinkered with the language of § 391 when it enacted § 2111 in its place in 1949, Congress left untouched the phrase "affect the

situation at hand, but to date we have limited its application to claims of nonconstitutional error in federal criminal cases. See, *e. g.*, *United States* v. *Lane*, 474 U. S. 438 (1986).

Petitioner asserts that Congress' failure to enact various proposals since *Chapman* was decided that would have limited the availability of habeas relief amounts to legislative disapproval of application of a less stringent harmless-error standard on collateral review of constitutional error. Only one of these proposals merits discussion here. In 1972, a bill was proposed that would have amended 28 U. S. C. § 2254 to require habeas petitioners to show that "a different result would probably have obtained if such constitutional violation had not occurred." 118 Cong. Rec. 24936 (1972) (quoting S. 3833, 92d Cong., 2d Sess. (1972)). In response, the Attorney General suggested that the above provision be modified to make habeas relief available only where the petitioner "'suffered a substantial deprivation of his constitutional rights at his trial.'" 118 Cong. Rec. 24939 (1972) (quoting letter from Richard G. Kleindienst, Attorney General, to Emanuel Celler, Chairman of the House Committee on the Judiciary (June 21, 1972)). This language of course parallels the federal harmless-error rule. But neither the Attorney General's suggestion nor the proposed bill itself was ever enacted into law.

As a general matter, we are "reluctant to draw inferences from Congress' failure to act." *Schneidewind* v. *ANR Pipeline Co.*, 485 U. S. 293, 306 (1988) (citing *American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 416–418 (1967)); *Red Lion Broadcast-*

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substantial rights of the parties." Thus, the enactment of § 2111 did not alter the basis for the harmless-error standard announced in *Kotteakos*. If anything, Congress' deletion of the word "technical," makes § 2111 more amenable to harmless-error review of constitutional violations. Cf. *United States* v. *Hasting*, 461 U. S. 499, 509–510, n. 7 (1983).

ing Co. v. *FCC*, 395 U. S. 367, 381, n. 11 (1969)). We find no reason to depart from this rule here. In the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies on collateral review of petitioner's *Doyle* claim. We have filled the gaps of the habeas corpus statute with respect to other matters, see, *e.g.*, *McCleskey* v. *Zant*, 499 U. S. ——, —— (1991); *Wainwright* v. *Sykes*, 433 U. S. 72, 81 (1977); *Sanders* v. *United States*, 373 U. S. 1, 15 (1963); *Townsend* v. *Sain*, 372 U. S. 293, 312–313 (1963), and find it necessary to do so here. As always, in defining the scope of the writ, we look first to the considerations underlying our habeas jurisprudence, and then determine whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefits of its application on collateral review.

The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence. See, *e.g.*, *Wright* v. *West*, 505 U. S. ——, —— (1992) (opinion of THOMAS, J.); *Teague* v. *Lane*, 489 U. S. 288, 306 (1989) (opinion of O'CONNOR, J.); *Pennsylvania* v. *Finley*, 481 U. S. 551, 556–557 (1987); *Mackey* v. *United States*, 401 U. S. 667, 682 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). Direct review is the principal avenue for challenging a conviction. "When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983).

In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary

remedy, "a bulwark against convictions that violate 'fundamental fairness.'" *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982) (quoting *Wainwright* v. *Sykes*, *supra*, at 97 (STEVENS, J., concurring)). "Those few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Fay* v. *Noia*, 372 U. S. 391, 440–441 (1963). See also *Kuhlmann* v. *Wilson*, 477 U. S. 436, 447 (1986) (plurality opinion) ("The Court uniformly has been guided by the proposition that the writ should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice") (quoting *Fay* v. *Noia*, *supra*, at 440–441); *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (STEVENS, J., concurring in judgment) (Habeas corpus "is designed to guard against extreme malfunctions in the state criminal justice systems"). Accordingly, it hardly bears repeating that "'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *United States* v. *Frady*, 456 U. S. 152, 165 (1982) (quoting *United States* v. *Addonizio*, 442 U. S. 178, 184 (1979)).[8]

Recognizing the distinction between direct and collateral review, we have applied different standards on habeas than would be applied on direct review with respect to matters other than harmless-error analysis. Our recent retroactivity jurisprudence is a prime example. Although new rules always have retroactive application to criminal cases on direct review, *Griffith* v. *Kentucky*, 479 U. S. 314, 320–328 (1987), we have held that they seldom have retroactive application to criminal cases on federal habeas,

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[8]For instance, we have held that an error of law does not provide a basis for habeas relief under 28 U. S. C. § 2255 unless it constitutes "'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States* v. *Timmreck*, 441 U. S. 780, 783 (1979) (quoting *Hill* v. *United States*, 368 U. S. 424, 428 (1962)).

Teague v. *Lane*, *supra*, at 305–310 (opinion of O'CONNOR, J.). Other examples abound throughout our habeas cases. See, *e.g.*, *Pennsylvania* v. *Finley*, 481 U. S. 551, 555–556 (1987) (Although the Constitution guarantees the right to counsel on direct appeal, *Douglas* v. *California*, 372 U. S. 353, 355 (1963), there is no "right to counsel when mounting collateral attacks"); *United States* v. *Frady*, *supra*, at 162–169 (While the federal "plain error" rule applies in determining whether a defendant may raise a claim for the first time on direct appeal, the "cause and prejudice" standard applies in determining whether that same claim may be raised on habeas); *Stone* v. *Powell*, 428 U. S. 465, 489–496 (1976) (Claims under *Mapp* v. *Ohio*, 367 U. S. 643 (1961), are not cognizable on habeas as long as the state courts have provided a full and fair opportunity to litigate them at trial or on direct review).

The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. See, *e.g.*, *Wright* v. *West*, *supra*, at —— (opinion of THOMAS, J.); *McCleskey* v. *Zant*, 499 U. S., at ——; *Wainwright* v. *Sykes*, 433 U. S., at 90. We have also spoken of comity and federalism. "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle* v. *Isaac*, *supra*, at 128. See also *Coleman* v. *Thompson*, 501 U. S. ——, —— (1991); *McCleskey*, *supra*, at ——. Finally, we have recognized that "[l]iberal allowance of the writ . . . degrades the prominence of the trial itself," *Engle*, *supra*, at 127, and at the same time encourages habeas petitioners to relitigate their claims on collateral review. See *Rose* v. *Lundy*, 455 U. S. 509, 547 (1982) (STEVENS, J.,

dissenting).

In light of these considerations, we must decide whether the same harmless-error standard that the state courts applied on direct review of petitioner's *Doyle* claim also applies in this habeas proceeding. We are the sixth court to pass on the question whether the State's use for impeachment purposes of petitioner's post-*Miranda* silence in this case requires reversal of his conviction. Each court that has reviewed the record has disagreed with the court before it as to whether the State's *Doyle* error was "harmless." State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. See *Rushen* v. *Spain*, 464 U. S. 114, 120 (1983) *(per curiam)*. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

Petitioner argues that application of the *Chapman* harmless-error standard on collateral review is necessary to deter state courts from relaxing their own guard in reviewing constitutional error and to discourage prosecutors from committing error in the first place. Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution. See *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884). Federalism, comity, and the constitutional obligation of state and federal courts all counsel against any presumption that a decision of this Court will "deter" lower federal or state courts from fully performing their sworn duty. See *Engle*, *supra*, at 128; *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 263–265 (1973) (Powell, J., concurring). In any event, we think the costs of applying the *Chapman* standard on federal habeas out-

weigh the additional deterrent effect, if any, which would be derived from its application on collateral review.

Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a "'reasonable possibility'" that trial error contributed to the verdict, see *Chapman* v. *California*, 386 U. S., at 24 (quoting *Fahy* v. *Connecticut*, 375 U. S. 85, 86 (1963)), is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has "grievously wronged." Retrying defendants whose convictions are set aside also imposes significant "social costs," including the expenditure of additional time and resources for all the parties involved, the "erosion of memory" and "dispersion of witnesses" which accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of "society's interest in the prompt administration of justice." *United States* v. *Mechanik*, 475 U. S. 66, 72 (1986) (internal quotation marks omitted). And since there is no statute of limitations governing federal habeas, and the only laches recognized are those which affect the State's ability to defend against the claims raised on habeas, retrials following the grant of habeas relief ordinarily take place much later than do retrials following reversal on direct review.

The imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error. The *Kotteakos* standard, we believe, fills the bill. The test under *Kotteakos* is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U. S., at 776. Under this standard, habeas petitioners may obtain plenary review of their constitu-

tional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice." See *United States* v. *Lane*, 474 U. S. 438, 449 (1986). The *Kotteakos* standard is thus better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases. Moreover, because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U. S. C. §2111), federal courts may turn to an existing body of case law in applying it. Therefore, contrary to the assertion of petitioner, application of the *Kotteakos* standard on collateral review is unlikely to confuse matters for habeas courts.

For the foregoing reasons, then, we hold that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type.[9] All that remains to be decided is whether petitioner is entitled to relief under this standard based on the State's *Doyle* error. Because the Court of Appeals applied the *Kotteakos* standard below, we proceed to this question ourselves rather than remand the case for a new harmless-error determination. Cf. *Yates* v. *Evatt*, 500 U. S. ——, —— (1991). At trial, petitioner admitted shooting Hartman, but claimed it was an accident. The principal question before the jury, therefore, was whether the State met its burden in proving beyond a reasonable doubt that the shooting was intentional. Our inquiry here is whether, in light of the record as a whole, the State's improper use for impeach-

[9] Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. *Greer* v. *Miller*, 483 U. S. 756, 769 (1987) (STEVENS, J., concurring in judgment). We, of course, are not presented with such a situation here.

ment purposes of petitioner's post-*Miranda* silence, see n. 2, *supra*, "had substantial and injurious effect or influence in determining the jury's verdict." We think it clear that it did not.

The State's references to petitioner's post-*Miranda* silence were infrequent, comprising less than two pages of the 900-page trial transcript in this case. And in view of the State's extensive and permissible references to petitioner's pre-*Miranda* silence—*i.e.*, his failure to mention anything about the shooting being an accident to either the officer who found him in the ditch, the man who gave him a ride to Winona, or the officers who eventually arrested him—its references to petitioner's post-*Miranda* silence were, in effect, cumulative. Moreover, the State's evidence of guilt was, if not overwhelming, certainly weighty. The path of the bullet through Mr. Hartman's body was inconsistent with petitioner's testimony that the rifle had discharged as he was falling. The police officers who searched the Hartmans' home found nothing in the downstairs hallway which could have caused petitioner to trip. The rifle was found outside the house (where Hartman was shot), not inside where petitioner claimed it had accidently fired, and there was a live round rammed in the gun's chamber, suggesting that petitioner had tried to fire a second shot. Finally, other circumstantial evidence, including the motive proffered by the State, also pointed to petitioner's guilt.

In light of the foregoing, we conclude that the *Doyle* error which occurred at petitioner's trial did not "substantially influence" the jury's verdict. Petitioner is therefore not entitled to habeas relief, and the judgment of the Court of Appeals is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 91-7358

TODD A. BRECHT, PETITIONER *v.* GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April 21, 1993]

JUSTICE STEVENS, concurring.

The Fourteenth Amendment prohibits the deprivation of liberty "without due process of law"; that guarantee is the source of the federal right to challenge state criminal convictions that result from fundamentally unfair trial proceedings. Neither the term "due process," nor the concept of fundamental unfairness itself, is susceptible of precise and categorical definition, and no single test can guarantee that a judge will grant or deny habeas relief when faced with a similar set of facts. Every allegation of due process denied depends on the specific process provided, and it is familiar learning that all "claims of constitutional error are not fungible." *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982) (STEVENS, J., dissenting). As the Court correctly notes, constitutional due process violations vary dramatically in significance; harmless trial errors are at one end of a broad spectrum, and what the Court has characterized as "structural" defects—those that make a trial fundamentally unfair even if they do not affect the outcome of the proceeding—are at "the other end of the spectrum," *ante*, at 8. Although Members of the Court have disagreed about the seriousness of the due process violation identified in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), in this case we unanimously agree that a constitutional

violation occurred; moreover, we also all agree that some version of harmless-error analysis is appropriate.

We disagree, however, about whether the same form of harmless-error analysis should apply in a collateral attack as on a direct appeal, and, if not, what the collateral attack standard should be for an error of this kind. The answer to the first question follows from our long history of distinguishing between collateral and direct review, see, *e.g.*, *Sunal* v. *Large*, 332 U. S. 174, 178 (1947), and confining collateral relief to cases that involve fundamental defects or omissions inconsistent with the rudimentary demands of fair procedure. See, *e.g.*, *United States* v. *Timmreck*, 441 U. S. 780, 783 (1979), and cases cited therein. The Court answers the second question by endorsing Justice Rutledge's thoughtful opinion for the Court in *Kotteakos* v. *United States*, 328 U. S. 750 (1946). *Ante*, at 1, 17. Because that standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; places the burden on prosecutors to explain why those errors were harmless; requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts, I am convinced that our answer is correct. I write separately only to emphasize that the standard is appropriately demanding.

As the Court notes, *ante*, at 10, n. 7, the *Kotteakos* standard is grounded in the 1919 federal harmless-error statute. Congress had responded to the widespread concern that federal appellate courts had become "impregnable citadels of technicality," *Kotteakos*, 328 U. S., at 759, by issuing a general command to treat error as harmless unless it "is of such a character that its natural effect is to prejudice a litigant's substantial rights." *Id.*, at 760–761. *Kotteakos* plainly stated that unless an error is merely "technical," the burden of sustaining a verdict by demonstrating that the error was harmless rests on the

prosecution.[1] A constitutional violation, of course, would never fall in the "technical" category.

Of particular importance, the statutory command requires the reviewing court to evaluate the error in the context of the entire trial record. As the Court explained: "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Id.*, at 762.

To apply the *Kotteakos* standard properly, the reviewing court must, therefore, make a *de novo* examination of the trial record. The Court faithfully engages in such *de novo* review today, see *ante*, at 17–18, just as the plurality did in the dispositive portion of its analysis in *Wright* v. *West*, 505 U. S. ___, ___–___ (1992) (opinion of THOMAS, J.) (slip op., at 17–18). The *Kotteakos* requirement of *de novo* review of errors that prejudice substantial rights—as all constitutional errors surely do—is thus entirely consistent with the Court's longstanding commitment to the *de novo* standard of review of mixed questions of law and fact in habeas corpus proceedings. See *Wright* v. *West*, 505 U. S., at ___–___ (O'CONNOR, J., concurring in judgment) (slip op., at 2–7).

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[1] "It is also important to note that the purpose of the bill in its final form was stated authoritatively to be 'to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded.' H. R. Rep. No. 913, 65th Cong., 3d Sess., 1. But that this burden does not extend to all errors appears from the statement which follows immediately. 'The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation rest upon the one who claims under it.' *Ibid.; Bruno* v. *United States*, [308 U. S. 287, 294 (1939)]; *Weiler* v. *United States*, 323 U. S. 606, 611 [(1945)]." *Kotteakos* v. *United States*, 328 U. S. 750, 760–761 (1946).

The purpose of reviewing the entire record is, of course, to consider all the ways that error can infect the course of a trial. Although THE CHIEF JUSTICE properly quotes the phrase applied to the errors in *Kotteakos* ("'substantial and injurious effect or influence in determining the jury's verdict' "), *ante*, at 1, 6, 16, 18, we would misread *Kotteakos* itself if we endorsed only a single-minded focus on how the error may (or may not) have affected the jury's verdict. The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place.[2] *Kotteakos* is full of warnings to avoid that result. It requires a reviewing court to decide that "the error did not influence the jury," *id.*, at 764, and that "the judgment was not substantially swayed by the error," *id.*, at 765. In a passage that should be kept in mind by all courts that review trial transcripts, Justice Rutledge wrote that the question is *not*

> "were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> "This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record."

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[2] "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.*, at 765.

Id., at 764 (citations omitted).

The *Kotteakos* standard that will now apply on collateral review is less stringent than the *Chapman* v. *California*, 386 U. S. 18 (1967), standard applied on direct review. Given the critical importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem—a point well illustrated by the differing opinions expressed by THE CHIEF JUSTICE and by JUSTICE KENNEDY in *Arizona* v. *Fulminante*, 499 U. S. ___, ___, ___ (1991). While THE CHIEF JUSTICE considered the admission of the defendant's confession harmless error under *Chapman*, see 499 U. S., at ___ (dissenting opinion) (slip op., at 10–11), JUSTICE KENNEDY's cogent analysis demonstrated that the error could not reasonably have been viewed as harmless under a standard even more relaxed than the one we announce today. See *id.*, at ___ (opinion concurring in judgment) (slip op., at 1–2). In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.

Although our adoption of *Kotteakos* does impose a new standard in this context, it is a standard that will always require "the discrimination . . . of judgment transcending confinement by formula or precise rule. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 240 [(1940)]."[3] 328 U. S., at 761. In my own judgment, for the reasons explained by THE CHIEF JUSTICE, the *Doyle* error that took place in respondent's trial did not have a substantial and injurious effect or influence in determining the jury's

[3]Justice Rutledge continued: "That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another." *Id.*, at 761.

verdict. Accordingly, I concur in the Court's opinion and judgment.

SUPREME COURT OF THE UNITED STATES

No. 91–7358

TODD A. BRECHT, PETITIONER *v.* GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April 21, 1993]

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, and with whom JUSTICE SOUTER joins in part, dissenting.

Assuming that petitioner's conviction was in fact tainted by a constitutional violation that, while not harmless beyond a reasonable doubt, did not have "substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946), it is undisputed that he would be entitled to reversal in the state courts on appeal or in this Court on certiorari review. If, however, the state courts erroneously concluded that no violation had occurred or (as is the case here) that it was harmless beyond a reasonable doubt, and supposing further that certiorari was either not sought or not granted, the majority would foreclose relief on federal habeas review. As a result of today's decision, in short, the fate of one in state custody turns on whether the state courts properly applied the federal Constitution as then interpreted by decisions of this Court, and on whether we choose to review his claim on certiorari. Because neither the federal habeas corpus statute nor our own precedents can support such illogically disparate treatment, I dissent.

I

A

Chapman v. *California*, 386 U. S. 18 (1967), established the federal nature of the harmless-error standard to be applied when constitutional rights are at stake. Such rights, we stated, are "rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.'" *Id.*, at 21 (footnote omitted). Thus,

> "[w]hether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is *every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.* With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Ibid.* (emphasis added).

Chapman, it is true, never expressly identified the source of this harmless-error standard. But, whether the standard be characterized as a "necessary rule" of federal law, *ibid.*, or criticized as a quasi-constitutional doctrine, see *id.*, at 46, 51 (Harlan, J., dissenting), the Court clearly viewed it as essential to the safeguard of federal constitutional rights. Otherwise, there would have been no justification for imposing the rule on state courts. Compare *id.*, at 48–51 (Harlan, J., dissenting). As far as I can tell, the majority does not question *Chapman's* vitality on direct review and, therefore, the federal and constitutional underpinnings on which it rests.

That being so, the majority's conclusion is untenable. Under *Chapman*, federal law requires reversal of a state conviction involving a constitutional violation that is not

harmless beyond a reasonable doubt. A defendant whose conviction has been upheld despite the occurrence of such a violation certainly is "in custody in violation of the Constitution or laws . . . of the United States," 28 U. S. C. §2254(a), and therefore is entitled to habeas relief. Although we have never explicitly held that this was the case, our practice before this day plainly supports this view, as the majority itself acknowledges. See, *e.g.*, *Rose* v. *Clark*, 478 U. S. 570, 584 (1986); see also *ante*, at 9.

B

The Court justifies its decision by asserting that "collateral review is different than direct review," *ante*, at 12, and that "we have applied different standards on habeas than would be applied on direct review with respect to matters other than harmless-error analysis." *Id.*, at 13. All told, however, it can only uncover a single example of a constitutional violation that would entitle a state prisoner to relief on direct but not on collateral review. Thus, federal habeas review is not available to a defendant claiming that the conviction rests on evidence seized in violation of the Fourth Amendment, even though such claims remain cognizable in state courts. *Stone* v. *Powell*, 428 U. S. 465 (1976). I have elsewhere stated my reasons for disagreeing with that holding, *id.*, at 536–537 (WHITE, J., dissenting), but today's decision cannot be supported even under *Stone*'s own terms.

Stone was premised on the view that the exclusionary rule is not a "personal constitutional right," *id.*, at 486, and that it "does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel." *Kimmelman* v. *Morrison*, 477 U. S. 365, 392 (1986) (Powell, J., concurring in judgment). In other words, one whose conviction rests on evidence obtained in a search or seizure that violated the Fourth Amendment is deemed not to be unconstitutionally detained. It is no surprise,

then, that the Court of Appeals in this case rested its decision on an analogy between the rights guaranteed in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), and those at issue in *Stone*. See 944 F. 2d 1363, 1371–1372 (CA7 1991). *Doyle*, it concluded, "is . . . a prophylactic rule designed to protect another prophylactic rule from erosion or misuse." 944 F. 2d, at 1370.

But the Court clearly and, in my view, properly rejects that view. Indeed, it repeatedly emphasizes that *Doyle* "is rooted in fundamental fairness and due process concerns," that "due process is violated whenever the prosecution uses for impeachment purposes a defendant's post-*Miranda* silence," and that it "does not bear the hallmarks of a prophylactic rule." *Ante*, at 8. Because the Court likewise leaves undisturbed the notion that *Chapman*'s harmless-error standard is required to protect constitutional rights, see *supra* at 2, its conclusion that a *Doyle* violation that fails to meet that standard will not trigger federal habeas relief is inexplicable.

II

The majority's decision to adopt this novel approach is far from inconsequential. Under *Chapman*, the state must prove beyond a reasonable doubt that the constitutional error "did not contribute to the verdict obtained." *Chapman*, *supra*, at 24. In contrast, the Court now invokes *Kotteakos* v. *United States*, 328 U. S. 750 (1946)—a case involving a nonconstitutional error of trial procedure—to impose on the defendant the burden of establishing that the error "resulted in 'actual prejudice.' " *Ante*, at 17. Moreover, although the Court of Appeals limited its holding to *Doyle* and other so-called "prophylactic" rules, 944 F. 2d, at 1375, and although the parties' arguments were similarly focused, see Brief for Respondent 36–37; Brief for United States as *Amicus Curiae* 16, 19, n. 11, the Court extends its holding to all "constitutional error[s] of the trial type." *Ante*, at 17. Given that

all such "trial errors" are now subject to harmless-error analysis, see *Arizona* v. *Fulminante*, 499 U. S. __, __ (1991), and that "most constitutional errors" are of this variety, *id.*, at __, the Court effectively has ousted *Chapman* from habeas review of state convictions.* In other words, a state court determination that a constitutional error—even one as fundamental as the admission of a coerced confession, see *Fulminante*, *supra*, at __—is harmless beyond a reasonable doubt has in effect become unreviewable by lower federal courts by way of habeas corpus.

I believe this result to be at odds with the role Congress has ascribed to habeas review which is, at least in part, to deter both prosecutors and courts from disregarding their constitutional responsibilities. "[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Desist* v. *United States*, 394 U. S. 244, 262–263 (1969) (Harlan, J., dissenting); see also *Teague* v. *Lane*, 489 U. S. 288, 306 (1989) (plurality opinion). In response, the majority characterizes review of the *Chapman* determination by a federal habeas court as "scarcely . . . logical," *ante*, at 15, and, in any event, sees no evidence that deterrence is needed. *Ibid.* Yet the logic of such practice is not ours to assess for, as Justice Frankfurter explained,

> "Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as

*As I explained in *Fulminante*, I have serious doubt regarding the effort to classify in systematic fashion constitutional violations as either "trial errors"—that are subject to harmlessness analysis—or "structural defects"—that are not. See 499 U. S., at ___ (WHITE, J., dissenting).

> the federal courts to respect rights under the United States Constitution. . . . But the wisdom of such a modification in the law is for Congress to consider . . . ." *Brown* v. *Allen*, 344 U. S. 443, 499–500 (1953) (opinion of Frankfurter, J.).
>
> "[T]he prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress . . . provided it should not have." *Id.*, at 500.

See also *Reed* v. *Ross*, 468 U. S. 1, 10 (1984). As for the "empirical evidence" the majority apparently seeks, I cannot understand its import. Either state courts are faithful to federal law, in which case there is no cost in applying the *Chapman* as opposed to the *Kotteakos* standard on collateral review; or they are not, and it is precisely the role of habeas corpus to rectify that situation.

Ultimately, the central question is whether States may detain someone whose conviction was tarnished by a constitutional violation that is not harmless beyond a reasonable doubt. *Chapman* dictates that they may not; the majority suggests that, so long as direct review has not corrected this error in time, they may. If state courts remain obliged to apply *Chapman*, and in light of the infrequency with which we grant certiorari, I fail to see how this decision can be reconciled with Congress' intent.

III

Our habeas jurisprudence is taking on the appearance of a confused patchwork in which different constitutional rights are treated according to their status, and in which the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review. I believe this picture bears scant

resemblance either to Congress' design or to our own precedents. The Court of Appeals having yet to apply *Chapman* to the facts of this case, I would remand to that court for determination of whether the *Doyle* violation was harmless beyond a reasonable doubt. I dissent.

SUPREME COURT OF THE UNITED STATES

No. 91-7358

TODD A. BRECHT, PETITIONER *v.* GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April 21, 1993]

JUSTICE BLACKMUN, dissenting.

I agree that "today's decision cannot be supported even under *Stone*'s own terms," *ante*, at 3 (WHITE, J., dissenting). Therefore, I join JUSTICE WHITE's dissent in its entirety.

SUPREME COURT OF THE UNITED STATES

No. 91-7358

TODD A. BRECHT, PETITIONER *v.* GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April 21, 1993]

JUSTICE O'CONNOR, dissenting.

I have no dispute with the Court's observation that "collateral review is different from direct review." *Ante*, at 12. Just as the federal courts may decline to adjudicate certain issues of federal law on habeas because of prudential concerns, see *Withrow* v. *Williams*, 5— U. S. ___, ___ (1993) (slip op., at 4); *id.*, at ___ (O'CONNOR, J., concurring in part and dissenting in part) (slip op., at 3–4), so too may they resolve specific claims on habeas using different and more lenient standards than those applicable on direct review, see, *e.g.*, *Teague* v. *Lane*, 489 U. S. 288, 299–310 (1989) (habeas claims adjudicated under the law prevailing at time conviction became final and not on the basis of intervening changes of law). But decisions concerning the Great Writ "warrant restraint," *Withrow*, 5— U. S., at ___, (O'CONNOR, J., concurring in part and dissenting in part) (slip op., at 4), for we ought not take lightly alteration of that "'fundamental safeguard against unlawful custody,'" *id.*, at ___ (slip op., at 2), (quoting *Fay* v. *Noia*, 372 U. S. 391, 449 (1963) (Harlan, J., dissenting)).

In my view, restraint should control our decision today. The issue before us is not whether we should remove from the cognizance of the federal courts on habeas a discrete

prophylactic rule unrelated to the truthfinding function of trial, as was the case in *Stone* v. *Powell*, 428 U. S. 465, (1976), and more recently in *Withrow* v. *Williams*, *supra*. Rather, we are asked to alter a standard that not only finds application in virtually every case of error but that also may be critical to our faith in the reliability of the criminal process. Because I am not convinced that the principles governing the exercise of our habeas powers—federalism, finality, and fairness—counsel against applying *Chapman*'s harmless-error standard on collateral review, I would adhere to our former practice of applying it to cases on habeas and direct review alike. See *ante*, at 9. I therefore respectfully dissent.

The Court begins its analysis with the nature of the constitutional violation asserted, *ante*, at 6–9, and appropriately so. We long have recognized that the exercise of the federal courts' habeas powers is governed by equitable principles. *Fay* v. *Noia*, *supra*, at 438; *Withrow*, *supra*, at ___ (O'CONNOR, J., concurring in part and dissenting in part) (slip op., at 3–4). And the nature of the right at issue is an important equitable consideration. When a prisoner asserts the violation of a core constitutional privilege critical to the reliability of the criminal process, he has a strong claim that fairness favors review; but if the infringement concerns only a prophylactic rule, divorced from the criminal trial's truthfinding function, the prisoner's claim to the equities rests on far shakier ground. Thus, in *Withrow* v. *Williams*, this Court declined to bar relitigation of *Miranda* claims on habeas because *Miranda* is connected to the Fifth Amendment and the Fifth Amendment, in turn, serves the interests of reliability. *Withrow*, *supra*, at ___ (slip op., at 10–11). I dissented because I believe that *Miranda* is a prophylactic rule that actually impedes the truthseeking function of criminal trials. 5— U. S., at 4, 6–12. See also *Stone* v. *Powell*, 428 U. S. 465, 486, 490 (1976) (precluding review of exclusionary rule violations

in part because the rule is judicially fashioned and interferes with the truthfinding function of trial).

Petitioner in this case alleged a violation of *Doyle* v. *Ohio*, 426 U. S. 610 (1976), an error the Court accurately characterizes as constitutional trial error. *Ante*, at 8–9. But the Court's holding today, it turns out, has nothing to do with *Doyle* error at all. Instead, the Court announces that the harmless-error standard of *Chapman* v. *California*, 386 U. S. 18, 24 (1967), which requires the prosecution to prove constitutional error harmless beyond a reasonable doubt, no longer applies to *any* trial error asserted on habeas, whether it is a *Doyle* error or not. In *Chapman*'s place, the Court substitutes the less rigorous standard of *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946). *Ante*, at 17.

A repudiation of the application of *Chapman* to *all* trial errors asserted on habeas should be justified, if at all, based on the nature of the *Chapman* rule itself. Yet, as JUSTICE WHITE observes, *ante*, at 2 (dissenting opinion), one searches the majority opinion in vain for a discussion of the basis for *Chapman*'s harmless-error standard. We are left to speculate whether *Chapman* is the product of constitutional command, or a judicial construct that may overprotect constitutional rights. More important, the majority entirely fails to discuss the *effect* of the *Chapman* rule. If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side—the possibility that an error may have caused the conviction of an actually innocent person—is sufficient by itself to permit plenary review of the prisoner's federal claim. *Withrow*, *supra*, at ___ (slip op., at 4) (O'CONNOR, J., concurring in part and dissenting in part) (citing cases). Whatever the source of the *Chapman* standard, the equities may favor its application on habeas if it substantially promotes the central goal of the criminal justice system—accurate determinations of guilt and innocence. See *Withrow*, *supra*, at ___–___ (slip op., at

9–11) (reasoning that, although *Miranda* may be a prophylactic rule, the fact that it is not "divorced" from the truthfinding function of trial weighs in favor of its application on habeas); *Teague*, 489 U. S., at 313 (if absence of procedure seriously diminishes likelihood of accurate conviction, new rule requiring such procedure may be retroactively applied on habeas).

In my view, the harmless-error standard often will be inextricably intertwined with the interest of reliability. By now it goes without saying that harmless-error review is of almost universal application; there are few errors that may not be forgiven as harmless. *Arizona* v. *Fulminante*, 499 U. S. ___, ___ (1991) (slip op., at 5–6). For example, we have recognized that a defendant's right to confront the witnesses against him is central to the truthfinding function of the criminal trial. See, *e.g.*, *Maryland* v. *Craig*, 497 U. S. 836, 845–847 (1990); *Ohio* v. *Roberts*, 448 U. S. 56, 65 (1980); *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895); see also 3 W. Blackstone, Commentaries 373–374 (1768). But Confrontation Clause violations are subject to harmless-error review nonetheless. See *Coy* v. *Iowa*, 487 U. S. 1012, 1021–1022 (1988). When such an error is detected, the harmless-error standard is crucial to our faith in the accuracy of the outcome: The absence of full adversary testing, for example, cannot help but erode our confidence in a verdict; a jury easily may be misled by such an omission. Proof of harmlessness beyond a reasonable doubt, however, sufficiently restores confidence in the verdict's reliability that the conviction may stand despite the potentially accuracy impairing error. Such proof demonstrates that, even though the error had the *potential* to induce the jury to err, in fact there is no reasonable possibility that it did. Rather, we are confident beyond a reasonable doubt that the error had no influence on the jury's judgment at all. Cf. *In re Winship*, 397 U. S. 358, 363–364 (1970) (proof of guilt

beyond a reasonable doubt indispensable to community's respect and confidence in criminal process).

At least where errors bearing on accuracy are at issue, I am not persuaded that the *Kotteakos* standard offers an adequate assurance of reliability. Under the Court's holding today, federal courts on habeas are barred from offering relief unless the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Ante*, at 16 (quoting *Kotteakos*, *supra*, at 776). By tolerating a greater probability that an error with the potential to undermine verdict accuracy was harmful, the Court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial. Of course, the Constitution does not require that every conceivable precaution in favor of reliability be taken; and certainly 28 U. S. C. § 2254 does not impose such an obligation on its own. Indeed, I agree with the Court that habeas relief under § 2254 is reserved for those prisoners "whom society has grievously wronged." *Ante*, at 16. But prisoners who may have been convicted mistakenly because of constitutional trial error *have* suffered a grievous wrong and ought not be required to bear the greater risk of uncertainty the Court *now* imposes upon them. Instead, where constitutional error may have affected the accuracy of the verdict, on habeas we should insist on such proof as will restore our faith in the verdict's accuracy to a reasonable certainty. Adherence to the standard enunciated in *Chapman* requires no more; and the equities require no less.

To be sure, the harmless-error inquiry will not always bear on reliability. If the trial error being reviewed for harmlessness is not itself related to the interest of accuracy, neither is the harmless-error standard. Accordingly, in theory it would be neither illogical nor grudging to reserve *Chapman* for errors related to the accuracy of the verdict, applying *Kotteakos*' more lenient rule whenever the error is of a type that does not impair

confidence in the trial's result. But the Court draws no such distinction. On the contrary, it holds *Kotteakos* applicable to *all* trial errors, whether related to reliability or not. The Court does offer a glimmer of hope by reserving in a footnote the possibility of an exception: *Chapman* may remain applicable, it suggests, in some "unusual" cases. But the Court's description of those cases suggests that its potential exception would be both exceedingly narrow and unrelated to reliability concerns. See *ante*, at 17, n. 9 (reserving the "possibility that in an unusual case, a deliberate and especially egregious error of the trial type" or error "combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even it did not substantially influence the jury's verdict").

But even if the Court's holding were limited to errors divorced from reliability concerns, the decision nevertheless would be unwise from the standpoint of judicial administration. Like JUSTICE WHITE, I do not believe we should turn our habeas jurisprudence into a "patchwork" of rules and exceptions without strong justification. *Ante*, at 6 (dissenting opinion). The interest of efficiency, always relevant to the scope of habeas relief, see, *e.g.*, *Stone*, 428 U. S., at 491, n. 31; *Withrow*, 5— U. S., at ___-___ (slip op., at 11–13); *id.*, at ___-___ (O'CONNOR, J., dissenting) (slip op., at 12–17), favors simplification of legal inquiries, not their multiplication. A rule requiring the courts to distinguish between errors that affect accuracy and those that do not, however, would open up a whole new frontier for litigation and decision. In each case, the litigants would brief and federal judges would be required to decide whether the particular error asserted relates to accuracy. Given the number of constitutional rules we have recognized and the virtually limitless ways in which they might be transgressed, I cannot imagine that the benefits brought by such litigation could outweigh the costs it would impose.

In fact, even on its own terms the Court's decision buys the federal courts a lot of trouble. From here on out, prisoners undoubtedly will litigate—and judges will be forced to decide—whether each error somehow might be wedged into the narrow potential exception the Court mentions in a footnote today. Moreover, since the Court only mentions the *possibility* of an exception, all concerned must also address whether the exception exists at all. I see little justification for imposing these novel and potentially difficult questions on our already overburdened justice system.

Nor does the majority demonstrate that the *Kotteakos* standard will ease the burden of conducting harmless-error review in those cases to which it does apply. Indeed, as JUSTICE STEVENS demonstrates in his concurrence, *Kotteakos* is unlikely to lighten the load of the federal judiciary at all. The courts still must review the entire record in search of conceivable ways the error may have influenced the jury; they still must conduct their review *de novo*; and they still must decide whether they have sufficient confidence that the verdict would have remained unchanged even if the error had not occurred. See *ante*, at 3–4. The only thing the Court alters today is the degree of confidence that suffices. But *Kotteakos*' threshold is no more precise than *Chapman*'s; each requires an exercise of judicial judgment that cannot be captured by the naked words of verbal formulae. *Kotteakos*, it is true, is somewhat more lenient; it will permit more errors to pass uncorrected. But that simply reduces the number of cases in which relief will be granted. It does not decrease the burden of identifying those cases that warrant relief.

Finally, the majority considers the costs of habeas review generally. *Ante*, at 16. Once again, I agree that those costs—the effect on finality, the infringement on state sovereignty, and the social cost of requiring retrial, sometimes years after trial and at a time when a new

trial has become difficult or impossible—are appropriate considerations. See *Withrow*, 5— U. S., at ___–___ (O'CONNOR, J., concurring in part and dissenting in part) (slip op., at 8–9); see also *id.*, at ___, ___ (slip op., at 5, 13); *Stone*, *supra*, at 489–491. But the Court does not explain how those costs set the harmless-error inquiry apart from any other question presented on habeas; such costs are inevitable *whenever* relief is awarded. Unless we are to accept the proposition that denying relief whenever possible is an unalloyed good, the costs the Court identifies cannot by themselves justify the lowering of standards announced today. The majority, of course, does not contend otherwise; instead, it adheres to our traditional approach of distinguishing between those claims that are worthy of habeas relief and those that, for prudential and equitable reasons, are not. Nonetheless, it seems to me that the Court's decision cuts too broadly and deeply to comport with the equitable and remedial nature of the habeas writ; it is neither justified nor justifiable from the standpoint of fairness or judicial efficiency. Because I would remand to the Court of Appeals for application of *Chapman*'s more demanding harmless-error standard, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 91-7358

TODD A. BRECHT, PETITIONER *v.* GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April 21, 1993]

JUSTICE SOUTER, dissenting.

I join in all but the footnote and Part III of JUSTICE WHITE's dissent, subject only to the caveat that I do not mean to indicate an opinion on the merits of *Stone* v. *Powell*, 428 U. S. 465 (1976).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2918

CURTIS PAUL HARRIS,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

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

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Thirteen years ago, Curtis Paul Harris was first convicted of murder in a Texas court and was sentenced to death. He has since been tried, convicted and sentenced to death again, and he has unsuccessfully sought relief on direct appeal and by habeas corpus in state court. These protracted proceedings lend new meaning to the phrase "exhaustion" of state remedies.[1] After Harris filed a federal petition for writ of habeas corpus, the district court, in a very thoughtful opinion, denied relief on all

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[1] Each time Harris appealed on direct review to the Texas Court of Criminal Appeals, that court took three years to address his case.

claims and refused to grant a certificate of probable cause to appeal. Harris now appeals to this court for a certificate of probable cause. We deny the application.

FACTS AND PROCEDURAL HISTORY

On the night of December 11, 1978, Curtis Paul Harris, James Manuel, Curtis's girlfriend Valerie Rencher and his brother Danny Harris drove their car to visit a friend in Bryan. Upon arriving at the friend's house they discovered she was not there. Their car would not start, and the three men began to beat up the car and tear up the interior.[2]

When no neighbor could be found to help with the car the group walked down the road and flagged a passing pick-up truck. A would-be Good Samaritan, Tim Merka, stopped his truck and attempted for 20-25 minutes to repair their car. Frustrated at the car's continued breakdown, the group decided to take Merka's truck. Danny pushed Merka down and pinned him to the ground. While Danny sat on Merka's chest, Curtis Harris began to beat him in the head with an automobile jack. Valerie Rencher testified that she begged him to stop but Harris hit the victim at least six more times. Merka died of severe injuries to the head and brain. He suffered fifteen head lacerations that were consistent with having been inflicted by a bumper jack shaft and ratchet mechanism.

The group's destructive instincts were not yet sated. Leaving Merka's body in a ditch, they absconded with his pick-up,

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[2] This account is primarily taken from the opinion set forth in the Texas Court of Criminal Appeals. Harris v. State, 738 S.W.2d 207, 213-15, 224-25 (en banc).

appropriated his shotgun and drove to a U-Totem store in Waller, which they robbed at gunpoint of the cash in the till and a change bottle that contained donations for the Multiple Sclerosis Society. Upon their return to Bryan about midnight, Danny Harris secreted Merka's truck. The truck was found at 10:00 a.m. on December 12, 1978 on the Old Mumford Road in Bryan approximately four blocks from the Harris house.

Harris was found guilty based particularly on the testimony of his girlfriend Valerie Rencher and the testimony of the U-Totem clerk who saw him during the robbery in which Merka's shotgun was used. Physical evidence against him included Merka's Texas A&M identification card, gun case and payment book, which were found in the woods behind Harris's home. The jury found Harris guilty of murder and sentenced him to death. The Texas Court of Criminal Appeals reversed Harris' convictions due to improper restrictions on cross-examination, Harris v. State, 642 S.W.2d 471 (Tex. Crim. App. 1982), but he was retried and again sentenced to death. The conviction was affirmed by the Texas Court of Criminal Appeals, Harris v. State, 738 S.W.2d 207 (Tex. Crim. App. 1987) and petition for writ of certiorari was denied by the U.S. Supreme Court. Harris v. Texas, 484 U.S. 872, 108 S. Ct. 207, 98 L.Ed.2d 158 (1987). Having exhausted state collateral remedies, Harris next applied for a stay of execution in the United States District Court for the Southern District of Texas. Eventually, the district court denied relief and denied Harris's request for a

certificate of probable cause to appeal. He now appeals the denial of the certificate of probable cause to this court.

Harris argues four issues in his effort to obtain CPC. First, he asserts that the prosecutor utilized peremptory challenges in a racially discriminatory way. Second, he states under the Texas death penalty law, the jury was unable to consider and give effect to mitigating evidence of Harris' role in committing the offense. Third, he contends that the trial court violated his due process rights by "testifying" into the record about events surrounding the separation of jurors. He finally argues that two prospective jurors were improperly excused for cause in violation of Witherspoon v. Illinois.

DISCUSSION

This court lacks jurisdiction to hear an appeal in this case unless a certificate of probable cause is granted. Fed. R. App. Proc. 22(b). To obtain a certificate of probable cause, Harris must "make a substantial showing of the denial of a federal right." Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983); Jones v. Whitley, 938 F.2d 536, 539 (5th Cir. 1991, cert. denied, ____ U.S. _____, 112 S. Ct. 8, 115 L.Ed.2d 1093 (1991). To sustain this burden, Harris "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further". Barefoot, 463 U.S. at 493 n.4, 103 S. Ct. at 3394 n.4.

A. Batson Claim.

Harris initially seeks a certificate of probable cause to review his claim that the prosecutor utilized a peremptory challenge in a racially discriminatory fashion, violating Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). The prospective juror was Georgia Fay Harris, a black woman. The record reflects that Harris's counsel did not object at trial to the exclusion of Ms. Harris. For this reason, we must follow established circuit precedent and find that Harris failed to assert a proper Batson claim as a matter of federal law. Batson, 476 U.S. at 100, 106 S. Ct. at 1725; Wilkerson v. Collins, 950 F.2d 1054, 1063 (5th Cir. 1992); United States v. Erwin, 793 F.2d 656, 667 (5th Cir. 1986). As we held in Wilkerson, 950 F.2d at 1063, the fact that the state habeas court later considered on the merits the prosecutor's alleged racial use of preemptory challenges does not cure the defect, fatal to federal review, of failure to object timely to the peremptory strike. See also Jones v. Butler, 864 F.2d 348, 369 (5th Cir. 1988) (on pet. for reh.).

Harris asserts that Powers v. Ohio, ____ U.S. ____, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991) announced a new rationale for Batson which would dispense with the contemporaneous objection rule in order to preserve jurors' equal protection rights. This is not correct. Powers applied Batson to peremptory challenges of jurors of a different race from the defendant. Nothing in Powers changes the procedure appropriate for asserting a Batson claim. Further, Powers itself strongly suggests that a contemporaneous objection

must be made. Powers, ____ U.S. at ____, 111 S. Ct. at 1371-72 (the trial court has a duty to make a prompt inquiry during voir dire concerning improper exclusion of jurors when the issue is raised). This circuit has continued to apply the rule of contemporaneous objection even after Powers. Wilkerson, 950 F.2d 1062-63. We may not consider this argument further.[3]

B. Possible Mitigating Evidence.

Harris asserts that according to the law of parties instruction given to the jury during the guilt phase of the trial the jury was never required to decide whether the petitioner physically caused the death of Merka in order to find him guilty of capital murder. Harris also asserts that the penalty phase inquiries posed by Texas law to the jury failed to allow them to give mitigating effect to his allegedly less culpable role in the offense.[4] Taken together, these conditions are said to render

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[3] Harris tries to circumvent our federal contemporaneous-objection rule by asserting that race was so plainly a ground for the prosecutor's exclusion of Ms. Harris that no objection was needed to preserve the error. We disagree. The purpose of the prosecutor's question, as he explained to the state habeas court, was to ascertain whether Ms. Harris might feel an affinity, or "kinship", for Curtis Harris, because they were from the same town, of the same race and had the same last name. He pointed out that he would not have needed to make this inquiry if Ms. Harris had been white. The state habeas court accepted this reason, as well as several others articulated by the prosecutor, and found that the peremptory strike was not exercised discriminatorily. Harris has mischaracterized the state court's finding as permitting a "race-plus" peremptory strike after Batson. Even if there were no federal contemporaneous-objection component to a Batson claim, we would be bound by the state court's finding. 28 U.S.C. § 2254(d).

[4] Under the law in effect when Harris committed his crime, the jury must answer "yes" to two questions before the defendant may be sentenced to death:

Texas law unconstitutional under Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934 (1989).

The most serious weakness of this argument is its lack of evidentiary support. It was uncontroverted that Harris struck the deceased with an automobile jack. There was no direct evidence that any other person struck Merka with a jack or any instrument. The evidence was likewise uncontroverted that every blow delivered to the defendant's head could have been fatal, and Merka's hair and blood were found on the jack. Although a hammer found under Merka's body could have been used as the murder weapon, blood was found only on its handle, a spot inconsistent with aggressive use.

Substantively, Harris's argument has been undercut by the recent Supreme Court decision in Graham v. Collins, ____ U.S. ____, 113 S.Ct. 892, ____ L.Ed.2d ____ (1993). Graham reviewed this court's en banc decision holding that the Texas death sentencing statutory provisions sufficiently allow a jury to consider the mitigating effect of a defendant's youth at the time he committed a capital offense. Graham v. Collins, 950 F.2d 1009, 1027 (5th Cir. 1992). Graham was decided under the principle of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989) and couched as a

---

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Tex. Crim. Proc. Code Ann. Art. 37.071(b) (Vernon 1981).

decision whether an extension of Penry to youth is a "new rule" not cognizable on habeas, yet it makes clear that Penry is limited in scope. The Supreme Court noted that Penry addressed an atypical factual scenario, evidence that was a double-edged sword. The primary relevance of Penry's substantial evidence of retardation lay in its aggravating effect and its tendency to prove Penry's future dangerousness, while its mitigating effect on the future dangerousness issue was too tenuous to overcome the aggravating impact. ____ U.S. at _____, 113 S. Ct. at 900-901. Thus, while Penry's jury had no reliable means of giving mitigating effect to his retardation as presented, Graham's evidence of youth, transient childhood, and good character "was not beyond the jury's effective reach". ____ U.S. at _____, 113 S. Ct. at 902.

In this case, the only other person who could have struck a fatal blow to Merka was Danny Harris as he bestrode Merka's chest. But the possibility that Harris did not fatally wound Merka, as in Graham, was not beyond the effective reach of the jury in regard to either of the special issues. This court has succinctly answered Harris's Penry/Graham argument in a pre-Graham case, in which the defendant alleged that the jury could not give mitigating effect to the possibility that an accomplice might have killed the victim. In Bridge v. Collins, 963 F.2d 767, 770 (5th Cir. 1992), it was pointed out:

> If the jury members believed that Bridge's accomplice killed the victim, then they could have answered "no" to the first question.
>
> . . .

> If the jury members believed that Bridge did not shoot the victim, then they could have concluded that Bridge would not be a future threat.

Id. See also, Drew v. Collins, 964 F.2d 411, 421 (5th Cir. 1992).

Harris attempts to distinguish Bridge on the basis that Harris could have been convicted under the law of parties even though the jury believed he had not killed Merka. Then, according to the argument, the jury could have answered both special punishment issues without considering that Harris did not actually kill Merka. This argument derives from a recent district court opinion. Nichols v. Collins, 802 F.Supp. 66 (S.D. Tex. 1992). For several reasons, it is unpersuasive. First, Harris's argument ignores the law of this circuit that a jury need only be provided one fair vehicle for considering mitigating evidence. White v. Collins, 959 F.2d 1319, 1322-23 (5th Cir. 1992), cert. denied, ____ U.S. ____, 112 S. Ct. 1714, 118 L.Ed.2d 419 (1992)); Boyde v. California, 494 U.S. 370, 382 n.5, 110 S. Ct. 190, 199 n.5, 108 L.Ed.2d 316 (1990). Second, the state points out that in Drew and in Bridge the jury was instructed to convict under the law of parties. Drew, 964 F.2d at 421; Drew v. State, 743 S.W.2d 207, 214 n.3 (Tex. Crim. App. 1987) (describing the facts of Drew). These cases are not factually distinguishable. Third, Harris's reliance on Nichols[5] is unavailing. Besides having had its opinion in regard to sentencing vacated pending appeal, the court in Nichols simply did not discuss the controlling law of the circuit in

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[5] Nichols has been stayed in part pending appeal to the Fifth Circuit, Nichols v. Collins, No. 92-2720 (Dec. 30, 1992).

Bridge. Nichols, 802 F.Supp. at 71-72. Fourth, the Supreme Court's decision in Graham appears to vitiate any legitimate disagreement among jurors otherwise attributable to Nichols.

C. The Judge's Statements.

During his trial, Harris moved for mistrial under state law based on the allegations of an improper separation of the jury. In denying the petitioner's motion, the trial judge described on the record the events surrounding his supervision of the jury while they transported their cars from the county parking lot to parking spaces underneath the courthouse before commencing deliberations. The separation occurred after the jury had been given the charge at the end of the guilt\innocence phase of the trial. After providing his recollection of the event, the trial judge testified that he was "positive that none of the jurors had access to any information or contact with any other person during this process." Harris contends that under Tyler v. Swenson, 427 F.2d 412 (8th Cir. 1970), this action offended his due process rights.[6] Tyler, however, stands only for the proposition that when the testimony of the trial judge addresses material and disputed facts, a due process violation may occur. Tyler, 427 F.2d at 417.

In this case, the trial judge merely offered his recollections of matters within the judge's observations of the trial. Harris offered no evidence contrary to the trial judge's statements. Compare Harris v. State, 738 S.W.2d at 223 (noting

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6. Brown v. Lynaugh, 843 F.2d 849 (5th Cir. 1989), cited by Harris, is inapposite to this case as in Brown, the judge testified on a matter of guilt. Id. at 849.

"[none of the judge's] statements were refuted"), with Tyler, 427 F.2d at 417 (noting the testimony of the judge "must be challenged by the petitioner"). Thus, under Tyler, Harris fails to demonstrate a material conflict regarding disputed facts.

D. The Exclusion of Jurors Easley and Koy for Cause.

Finally, Harris contends that the prosecutor improperly challenged for cause two prospective jurors, Easley and Koy, in a manner that evaded and violated the Supreme Court's decision in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968). Harris admits that the state may challenge jurors for cause on the basis of state law even if their answers regarding capital punishment did not entitle the state to a strike under Witherspoon. Brooks v. Estelle, 697 F.2d 586, 589-90 (5th Cir. 1982). Harris contends, however, that in questioning the potential venirepersons the prosecutor acted differently toward another member who voiced no personal concern about the death penalty but gave the same answers to the questions regarding minimum punishment under state law as Easley and Koy. Harris alleges that the prosecution's use of a state law principle to challenge for cause a juror perceived to be "soft" on the death penalty is a subterfuge designed to circumvent Witherspoon.[7]

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[7] Harris's citation to Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed. 759 (1965), in an effort to show that the prosecutor used his questioning for an improper purpose, is inapposite. Witherspoon-excludables are not a cognizable group for constitutional purposes, Lockhart v. McCree, 476 U.S. 162, 174, 106 S. Ct. 1758, 1765, 90 L.Ed.2d 137 (1986).

Whether this argument has merit is not for us to say in the first instance on a federal writ of habeas corpus. Under the Teague rule, supra, it would manifestly be a "new rule" of constitutional criminal procedure to require courts to examine a prosecutor's conduct in voir dire to determine whether the prosecutor pretextually used answers to questions not related to Witherspoon qualification to disqualify jurors who had not run afoul of Witherspoon when directly questioned about their views of the death penalty. Further, this "new rule" does not fall under either of the exceptions to Teague, for if accepted, it neither makes conduct beyond the reach of criminal law nor is it implicit in our concept of ordered liberty. We decline to reach the merits of this argument.

CONCLUSION

Because Harris has raised no issues on which reasonable jurists could disagree, we are compelled to **DENY** Harris' motion for CPC.

Motion for CPC DENIED.

CC: Team
R. Aldo
Stan
Tom
Sandra
ecf. Pilgo

17

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 *TEXAS DEPARTMENT OF CRIMINAL* *JUSTICE, INSTITUTIONAL DIVISION,* Respondent	§	

ORDER

Be it remembered that on this _____ day of _____, 1993, came on to be heard Respondent's Second Unopposed Motion for Extension of Time, and the Court after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that Respondent's Motion for Extension of Time be, and it is hereby, GRANTED. Respondent shall file his answer on or before May 14, 1993.

SIGNED on this the 6th day of May, 1993, at Houston, Texas.

KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

RECEIVED
MAY 03 1993

April 29, 1993

The Honorable Michael Milby, Clerk
United States District Court
Southern District of Texas
Houston Division
P.O. Box 61010
Houston, Texas 77208

Re: *Guerra v. Collins,* No. H-93-290

Dear Sir:

Enclosed please find the original and one (1) copy of **Respondent's Second Unopposed Motion for Extension of Time** to be filed among the papers in the above referenced cause. Also enclosed for the convenience of the Court is a proposed Order.

By copy of this letter, I am forwarding a copy of this instrument to the Petitioner's attorney.

Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

Thank you for your kind assistance in this matter.

Sincerely,

William C. Zapalac

WILLIAM C. ZAPALAC
Assistant Attorney General
Enforcement Division
(512) 463-2080

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

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 TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	

RESPONDENT'S SECOND UNOPPOSED MOTION FOR EXTENSION OF TIME

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent ("the Director"), by the Attorney General of Texas, and files this Second Unopposed Motion for Extension of Time. The Director would respectfully show the Court as follows:

I.

The Court has previously granted the Director's first motion for a two-week extension of time to file his response in this cause. The answer currently is due on April 30, 1993.

II.

Undersigned counsel for the Director has substantially completed the response, but has been unable to finish the necessary investigation to fully answer the allegations made in the petition. During the past two weeks, in addition to working on the answer in this case, counsel has had to complete briefs for the Fifth Circuit in *Callins v. Collins,* No. 92-1699, a death-penalty case, and *Wiley v. Collins,* No. 92-8680. In addition, counsel was required to prepare for and attend depositions on April 26, 28, and 29 in the consolidated death-penalty cases of

Spence v. Collins, Nos. H-91-3718 and H-92-117, in anticipation of a May 28, 1993, hearing before Judge Black. Counsel also must prepare for and attend oral argument in the Fifth Circuit on May 3 in *Marquez v. Collins,* No. 92-5642, also a death-penalty case. Due to these obligations, it has not been possible to complete the answer in this case in time for filing by the current due date. An additional two weeks will be adequate time to prepare an appropriate response to the petition.

III.

This motion is made not for purposes of delay but so that the claims in the petition can be fully investigated and a proper response prepared, so that the Court can resolve the contentions as the law and the facts dictate.

WHEREFORE, PREMISES CONSIDERED, the Director respectfully requests two weeks, until May 14, 1993, to file his response in this case.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

William C. Zapalac

WILLIAM C. ZAPALAC*
Assistant Attorney General
Southern District #8615

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Fax No. (512) 463-2084

ATTORNEYS FOR RESPONDENT

*Counsel of record

CERTIFICATE OF CONFERENCE

I. William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that on April 29, 1993, I conferred by telephone with J. Scott Atlas, attorney for Petitioner, about the contents of this motion and he stated that he does not oppose it.

William C. Zapalac
WILLIAM C. ZAPALAC
Assistant Attorney General

CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Second Unopposed Motion for Extension of Time has been served by placing same in the United States Mail, postage prepaid, on this the 29th day of April, 1993, addressed to: Mr. J. Scott Atlas, 2500 First City Tower, 1001 Fannin, Houston, Texas 77002-6760.

William C. Zapalac
WILLIAM C. ZAPALAC
Assistant Attorney General

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	§	
TEXAS DEPARTMENT OF CRIMINAL	§	
JUSTICE, INSTITUTIONAL DIVISION,	§	
Respondent	§	

ORDER

Be it remembered that on this _____ day of _____, 1993, came on to be heard Respondent's Second Unopposed Motion for Extension of Time, and the Court after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that Respondent's Motion for Extension of Time be, and it is hereby, GRANTED. Respondent shall file his answer on or before May 14, 1993.

SIGNED on this the _____ day of _____, 1993, at Houston, Texas.

_____
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

cc: Ricardo Team Stan Tom Gee Sandra + 5 cys

15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 21 1993
Michael N. Milby, Clerk
By Deputy:

o.f. pltgs

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 TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	

RECEIVED
APR [illegible] 1993
S.J.A.

ORDER

CAME ON this day for consideration **Respondent's First Unopposed Motion for Extension of Time**, and the Court having considered said Motion is of the opinion that it has merit and should be GRANTED.

It is therefore, ORDERED, ADJUDGED and DECREED that Respondent's time for filing an answer or responsive pleading should be and hereby is extended up to and including the 30th day of April, 1993.

SIGNED on this the 20th day of April, 1993, at Houston, Texas.

JUDGE PRESIDING

4:93-cv-00290

Scott J Atlas, Esq. ea
Vinson & Elkins
1001 Fannin
Ste 2500
Houston, TX 77002

---

cc: Ricardo
cc: Tom Gee
Stan
Sandra
Team
4cy-m
O-f. pledge

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 15, 1993

RECEIVED
APR 19 1993
S.J.A.

The Honorable Michael N. Milby, Clerk
United States District Court
Southern District of Texas
Houston Division
P.O. Box 61010
Houston, Texas 77208

Re: *Ricardo Aldape Guerra v. Collins,* No. H-93-290

Dear Sir:

Enclosed for filing in the above numbered and styled cause is the original and one copy of **Respondent's First Unopposed Motion for Extension of Time**. Also enclosed for the convenience of the Court is a proposed Order. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed self-addressed envelope.

By copy of this letter, I am forwarding a copy of the same to the attorney for petitioner. Thank you for your kind assistance in this matter.

Sincerely yours,

William C. Zapalac

WILLIAM C. ZAPALAC
Assistant Attorney General
(512) 463-2080

WCZ/br
Enclosure
c: Mr. Scott J. Atlas
VINSON & ELKINS
2500 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760

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 *TEXAS DEPARTMENT OF CRIMINAL* *JUSTICE, INSTITUTIONAL DIVISION,* Respondent	§ § § §	

RESPONDENT'S FIRST UNOPPOSED MOTION FOR EXTENSION OF TIME

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent ("the Director"), by the Attorney General of Texas, and files this First Unopposed Motion for Extension of Time. The Director would respectfully show the Court as follows.

I.

This Court has directed that the Director file an answer to the petition for writ of habeas corpus filed by Petitioner ("Guerra") by April 16, 1993. Due to the following reasons, it has not been possible to complete the response, and the Director requests an additional two weeks to file his pleading in this cause.

II.

Since the Court's scheduling order on February 22, 1993, the undersigned has had to appear at oral argument in the Fifth Circuit in *Clark v. Collins,* No. 91-2026, a death-penalty case, on March 2; respond to the motion for evidentiary hearing in this case by March 15; prepare a post-hearing brief in *Allridge v. Collins,* No. 4:92-CA-202Y, a death-penalty case, due March 15; handle the litigation preceding the execution of Carlos Santana on March 23; complete a brief

in opposition in the Supreme Court in *Blue v. Texas,* No. 92-7919, a death-penalty case, due April 9; make three out-of-town trips to interview witnesses and review documents in preparation for depositions and an evidentiary hearing in *Spence v. Collins,* Nos. H-91-3718 and H-92-117, both death-penalty cases; and begin preparation of a Fifth Circuit brief in *Callins v. Collins,* No. 92-1699, a death-penalty case, due April 19, and for which no extensions will be granted.

III.

Due to these responsibilities, it has not been possible to complete the investigation and research necessary to respond to the sixteen claims, plus numerous sub-claims, contained in the 285-page petition. The additional fourteen days will be sufficient to permit an appropriate response to be completed and filed.

IV.

This motion is not made for purposes of delay but so that a proper response to the petition can be prepared to assist the Court in resolving the issues presented.

WHEREFORE, PREMISES CONSIDERED, the Director respectfully requests an extension of time, until April 30, 1993, to file his response in this case.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that on April 13, 1993, I conferred by telephone with Scott J. Atlas, attorney for Petitioner, and he stated that he would not oppose the granting of a motion for extension of time for up to three weeks.

WILLIAM C. ZAPALAC
Assistant Attorney General

CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's First Unopposed Motion for Extension of Time has been served by placing same in the United States Mail, postage prepaid, on this the 15th day of April, 1993, addressed to: Mr. Scott J. Atlas, VINSON & ELKINS, 2500 First City Tower, 1001 Fannin Street, Houston, Texas 77002-6760.

WILLIAM C. ZAPALAC
Assistant Attorney General

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

RICARDO ALDAPE GUERRA	§	
Petitioner	§	
	§	
v.	§	Civil Action No. H-93-290
	§	
JAMES A. COLLINS, DIRECTOR	§	
TEXAS DEPARTMENT OF CRIMINAL	§	
JUSTICE, INSTITUTIONAL DIVISION,	§	
Respondent	§	

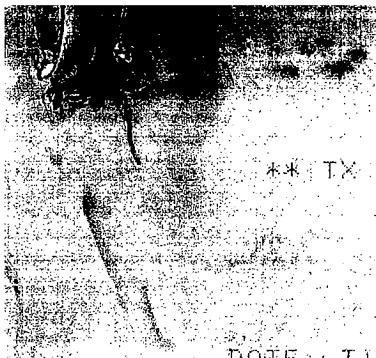
ORDER

CAME ON this day for consideration **Respondent's First Unopposed Motion for Extension of Time**, and the Court having considered said Motion is of the opinion that it has merit and should be GRANTED.

It is therefore, ORDERED, ADJUDGED and DECREED that Respondent's time for filing an answer or responsive pleading should be and hereby is extended up to and including the 30th day of April, 1993.

SIGNED on this the _____ day of _____, 1993, at Houston, Texas.

_____
JUDGE PRESIDING



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CC: Team
co-counsel
(Tom, Stan)
D-F-P (Hope)

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

RECEIVED
APR 13 1993
S.J.A.

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

MOTION FOR LEAVE TO FILE
AMICI CURIAE BRIEF
SUPPORTING THE PETITIONER

The American Immigration Lawyers Association, the American Immigration Law Foundation, the Anti-Defamation League, the Hispanic Bar Association, the Lawyers Committee for Civil Rights Under Law of Texas, the League of United Latin American Citizens, the Mexican American Bar Association of Texas, the Mexican American Bar Association of Houston, the Mexican American Bar Association of San Antonio, the Mexican American Legal Defense and Education Fund, the National Association for the Advancement of Colored People, the National Bar Association, the Texas Catholic Conference, and the Texas Criminal Defense Lawyers Association move for leave to file the attached amici curiae brief in support of the Petitioner.

Amici curiae believe that the attached brief would be of substantial assistance to the Court in resolving certain of the Petitioner's claims relating to the admissibility in a capital

sentencing proceeding of an individual's alleged undocumented immigration into the United States. Amici curiae have substantial experience and expertise with respect to the federal immigration laws. Moreover, the legal issues involved here strike at the core of amici curiae's historic concerns. Amici curiae were permitted to submit a brief to the Texas Court of Criminal Appeals in this case, and have continued to follow Mr. Aldape Guerra's progress closely.

For these reasons, and the reasons stated in the Statement of Interest in the accompanying brief, amici curiae request leave to file the accompanying brief.

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Norma Cantu
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Respectfully submitted,

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ATTORNEYS FOR AMICI CURIAE

April 12, 1993

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

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

AMICI CURIAE BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ET AL. SUPPORTING THE PETITIONER

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ATTORNEYS FOR AMICI CURIAE

AMICI CURIAE

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

The American Immigration Lawyers Association ("AILA") is a national non-profit association of over 3,300 attorneys and law professors who practice and teach in the field of immigration, nationality and naturalization law. Through its thirty-three chapters and seventy-five national committees, AILA provides its members with continuing legal education, information, and professional services, and participates actively in litigation involving issues within its expertise. Over the past year, AILA has submitted amicus curiae briefs in approximately eight cases, including Kofa v. INS, No. 92-1246 (4th Cir. argued Dec. 12, 1992); Fatin v. INS, No. 92-3346 (3d Cir. appeal docketed July 7, 1992); and De Osorio v. INS, No. 92-2290 (4th Cir. appeal docketed Oct. 22, 1992). AILA is an Affiliated Organization of the American Bar Association ("ABA") and is represented in the ABA's House of Delegates.

AMERICAN IMMIGRATION LAW FOUNDATION

Through its non-profit advocacy and litigation program, the American Immigration Law Foundation ("AILF") participates in judicial proceedings to represent the public interest in the fair and just administration of immigration and nationality laws and policies. Over the past year, AILF has submitted amicus curiae briefs in approximately six cases, including Barr v. Catholic Social Services, Inc., 112 S. Ct. 2990 (1992), granting petition

for cert. in Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914 (5th Cir. 1992); and Hatian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3287 (U.S. Sept. 22, 1992) (No. 92-528).

ANTI-DEFAMATION LEAGUE

The Anti-Defamation League ("ADL"), one of the nation's oldest civil rights organizations, was founded in 1913 to promote good will among all races, ethnic groups and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all . . . and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." Throughout its history, ADL has worked to combat exactly the kind of prejudicial stereotypes at issue in this case, stereotypes that threaten the foundation of mutual tolerance and respect upon which America's diverse and pluralistic society rests.

THE HISPANIC BAR ASSOCIATION

The Hispanic Bar Association ("HisBA") was created in 1987. Among other things, HisBA seeks to improve education and community awareness of state and local issues of concern to Hispanics.

THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF TEXAS

The Lawyers Committee for Civil Rights Under Law of Texas (the "Texas Lawyers Committee") is part of a national network of

non-partisan, non-profit offices founded in 1963 at the request of President John F. Kennedy to provide legal services to victims of racial discrimination. The Texas Lawyers Committee focuses its resources on providing legal services to immigrants and refugees in Texas. The cases in which the Texas Lawyers Committee recently has been involved include Tekach ex rel. Ruano v. Trominski, No. M-92-087 (S.D. Tex. filed Apr. 15, 1992); Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992); Ignacio v. INS, 955 F.2d 295 (5th Cir. 1992); Estay-Wolleter v. INS, No. 92-70485 (9th Cir. petition filed July 10, 1992); De Osorio v. INS, No. 92-2290 (4th Cir. appeal docketed Oct. 22, 1992); and Barreiro v. INS, No. 92-2093, 1993 WL 86943 (1st Cir. Mar. 31, 1993).

LEAGUE OF UNITED LATIN AMERICAN CITIZENS

The League of United Latin American Citizens ("LULAC") is the oldest and largest Hispanic organization in the United States. LULAC currently has approximately 110,000 members in forty-five states. LULAC was founded in 1929 "to seek justice and equality of treatment in accordance with the law of the land." Its members are committed to the fight against ignorance and discrimination. LULAC-sponsored lawsuits have resulted in landmark court decisions abolishing Hispanic school segregation, guaranteeing Hispanics the right to sit on juries, and laying much of the groundwork for passage of the 1964 Voting Rights Act.

THE MEXICAN AMERICAN BAR ASSOCIATIONS OF TEXAS, HOUSTON, AND SAN ANTONIO

The Mexican American Bar Associations of Texas, Houston, and San Antonio (together "MABA") were established for the purpose of protecting the interests of the public in general and Mexican Americans in particular. Since its inception, MABA has been on the cutting edge in the protection of the rights of the Hispanic community in the courts. The issues MABA has tackled over the past two decades include school desegregation, the right to a free public education, and fair representation of the Hispanic community in government, including the Texas state courts. The cases in which MABA has participated include Plyler v. Doe, 457 U.S. 202 (1982), and LULAC v. Clements, 984 F.2d 634 (5th Cir. 1993).

THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

The Mexican American Legal Defense and Education Fund ("MALDEF") is a national non-profit association which has litigation and advocacy programs in the areas of immigration, employment, education, voting rights and language rights. As a voice for Latinos in the United States, MALDEF has offices in California, Texas, Illinois, and Washington, D.C. Over the past year, MALDEF has submitted amicus curiae briefs in several cases, including City of Burlington v. Dague, 112 S. Ct. 2638 (1992), and Perales v. Thornborgh, 967 F.2d 798 (2d Cir. 1992), petition

for cert. filed sub nom. Barr v. Perales, 61 U.S.L.W. 3205 (U.S. Sept. 9, 1992) (No. 92-451).

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

The National Association for the Advancement of Colored People ("NAACP") is the nation's oldest and largest civil rights organization. The NAACP was established in 1909 to empower and protect African-Americans and other minorities under the Constitution through principles of equal justice under law. Its principal objects are to ensure the political, educational, social and economic equality of minority groups and individuals; to achieve equality of rights and eliminate race and ethnic prejudice among all people in the United States; to remove all barriers of racial discrimination through democratic processes and to take all lawful action to secure the exercise of constitutional rights and the protection of civil liberties and personal dignity. The NAACP has over 500,000 members with more than 2100 branches in the 50 states, the District of Columbia and abroad. Since its early days, the NAACP has been instrumental in securing passage of all civil rights legislation in this century, and remains committed to the full enforcement of these laws. It is also active in the executive, legislative and judicial processes to insure equity and fairness in such areas as education, housing, voting, employment, political representation,

health care, the administration of justice and the criminal justice system.

NATIONAL BAR ASSOCIATION

The National Bar Association was founded in 1925 in Des Moines, Iowa and is the oldest and largest minority bar association in America. The purpose of the National Bar Association is "to advance the science of jurisprudence, uphold the honor of the legal profession, promote social intercourse among the members of the bar, and protect the civil and political rights of all citizens of the several states of the United States." The National Bar Association now is composed of 12 regions, 76 affiliate chapters and includes a network of over 15,000 lawyers, judges, law faculty and administrators.

THE TEXAS CATHOLIC CONFERENCE

The Texas Catholic Conference is the statewide association of the fourteen Roman Catholic Diocese in Texas. The Texas Catholic Conference participates as amicus curiae in legal proceedings to the extent appropriate to advocate positions that are consistent with Catholic social teachings.

THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

The Texas Criminal Defense Lawyers Association ("TCDLA") is a non-profit organization of over 1300 attorneys throughout Texas. The purposes of TCDLA include the protection of

individual rights guaranteed by the United States and Texas Constitutions and resistance against efforts to curtail those rights. From time to time, TCDLA, acting through its amicus curiae committee, files briefs with this Honorable Court in cases that, like this one, raise important constitutional issues.

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

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

AMICI CURIAE BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ET AL., SUPPORTING THE PETITIONER

Amici curiae submit this brief to assist the Court in determining whether immigration to the United States without proper documentation can be considered by a capital sentencing jury as evidence of "the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" within the meaning of the Texas capital sentencing statute.[1/] For the reasons stated below, the answer to that question must be no.

1/ In 1991, the Texas capital sentencing statute was amended. The new statute, like the old one, requires a capital sentencing jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." See Tex. Code Crim. Proc. Ann. art. 37.071.2(b)(1) (West Supp. 1993); Tex. Code Crim. Proc. Ann. art. 37.071.2(b)(1) (West 1981). Thus in all pertinent respects, the statute in effect during Mr. Aldape Guerra's 1983 trial is the same as the currently effective statute.

STATEMENT OF INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the numerous public interest organizations. Together, amici curiae represent scholars, practicing attorneys, and community leaders who are united in their dedication to exposing and eradicating unlawful prejudice against immigrants and other minorities, particularly in the context of criminal proceedings, where the power of the State weighs most heavily. In pursuing their common objective, amici curiae have acquired extensive experience and expertise concerning the federal immigration laws, public misperceptions about immigrants, and the constitutional proscriptions against prosecutorial appeals to bias and fear against aliens. This case strikes at the core of those concerns.

BACKGROUND

Mr. Aldape Guerra's jury was directed at his trial to answer three "special issues." The special issues were: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would

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(Footnote continued from previous page)

result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to provocation, if any, by the deceased. Tex. Code Crim. Proc. Ann. art. 37.071.2(b)(1) (West 1981). The State had the burden of proving beyond a reasonable doubt that the answer to each of those issues was affirmative. Id.; Jurek v. Texas, 428 U.S. 262, 269 (1976).

The State was permitted to rely on Mr. Aldape Guerra's undocumented entry into the United States in seeking affirmative answers to the special issues. The only special issue to which the State conceivably can contend that undocumented entry had any relevance is the second, the probability that Mr. Aldape Guerra would commit criminal acts of violence in the future. That is the only special issue that called for evidence unrelated to the crime for which Mr. Aldape Guerra was being sentenced. Moreover, at trial, the State argued that it was the second special issue to which Mr. Aldape Guerra's entry without documentation was relevant. Tr. vol. 12 at 2133 ("You can certainly use that as evidence in deciding what type of person he is to question 2."); id. vol. 18 at 3213-14 ("You could consider that evidence as to what type of person the Defendant is when you answer Question No. 2.").

In support of its claim that Mr. Aldape Guerra's undocumented entry was relevant and admissible in determining Mr. Aldape Guerra's probability of future dangerousness, the State argued to the Texas Court of Criminal Appeals as follows:

> In the punishment phase of a capital murder trial, the State may present evidence of unadjudicated offenses to show the jury "what kind of person the accused is." The comment by the prosecutor that the jurors could consider the applicant's immigration status to determine character is comparable to informing the jurors that they can consider prior instances of criminal trespass.

Respondent's Original Answer at 60, Ex Parte Ricardo Aldape Guerra, No. 359805-A (Tex. Crim. App. Jan. 13, 1993) (answer filed Nov. 5, 1992). In a one page, unpublished order from which two Justices dissented, the Texas Court of Criminal Appeals upheld this position. Ex Parte Ricardo Aldape Guerra, No. 359805-A (Tex. Crim. App. order Jan. 13, 1993) (per curiam) (Clinton and Maloney, J.J., dissenting).

SUMMARY OF ARGUMENT

Undocumented immigration to the United States is not probative of an individual's probability of future criminal activity. The federal government and, to amici curiae's knowledge, every state other than Texas that has considered the issue, agree that entry without proper documentation is not relevant in evaluating an individual's moral character or potential danger to the community. Empirical data confirm that,

if anything, undocumented immigrants are less likely than the general population to commit future crimes, not more so.

Arguments concerning undocumented entry not only lack probative value, but also are highly inflammatory and unfairly prejudicial. Studies of public attitudes show that, both nationally and in Houston, undocumented immigrants have been subjected by the public to extremely negative and factually unsupportable stereotypes. Among other things, undocumented immigrants are viewed as being more likely than the population at large to commit crimes, a perception that is flatly contradicted by the data.

Even assuming undocumented entry could have sufficient probative value to outweigh the risk of unfair prejudice, such evidence, at a minimum, would have to be accompanied by clear instructions to the jury distinguishing its proper and improper uses. Certainly the jury could not constitutionally be permitted to believe that it might sentence an individual to death on the basis of prejudice and fear against a group to which the individual merely belongs.

The State used evidence of Mr. Aldape Guerra's immigration status here in a way that created an impermissible risk that he would be condemned to die on the basis of racial and ethnic bias, rather than his own individual culpability. Mr. Aldape Guerra's sentence of death therefore was imposed in violation of bedrock Eighth and Fourteenth amendment principles and must be reversed.

ARGUMENT

The United States Constitution limits the types of prior "criminal" acts a jury can consider in sentencing a defendant.[2/] While the precise contours of these limitations have not been fully articulated by the U.S. Supreme Court, certain broad principles are well established, at least in the context of capital sentencing. First, the Fourteenth Amendment requires that the probative value of a prior criminal act must outweigh any risk of unfair prejudice.[3/] In addition, the Eighth Amendment requires that evidence of a prior criminal act must not provoke a capital sentence that is based on prejudice or other factors unrelated to the defendant's individual moral culpability.[4/] If evidence susceptible of both a proper and an improper use or appeal is submitted to a jury, the Eighth Amendment further requires, at a minimum, that it be accompanied by careful limiting instructions.[5/] All of these principles were violated here.

2/ See generally Parke v. Raley, 113 S. Ct. 517, 522 (1992).

3/ E.g., Payne v. Tennessee, 111 S. Ct. 2597, 2612 (1991) (O'Connor, J., concurring); id. at 2614-15 (Souter, J., concurring).

4/ E.g., Stringer v. Black, 112 S. Ct. 1130, 1139 (1992); Furman v. Georgia, 408 U.S. 238, 255-57 (1972) (Douglas, J., concurring).

5/ Walton v. Arizona, 497 U.S. 639, 652-55 (1990).

A. ANY PROBATIVE VALUE OF AN INDIVIDUAL'S IMMIGRATION STATUS IS FAR OUTWEIGHED BY THE RISK OF UNFAIR PREJUDICE

While some types of "criminal" behavior may help predict an individual's propensity to commit future crimes, undocumented entry, as a matter of law and fact, does not. Moreover, unlike other crimes, evidence of undocumented entry identifies an individual as a member of a group that historically has suffered debilitating discrimination and prejudice. These factors distinguish undocumented entry from other "crimes" and mandate an appropriately tailored ruling on its admissibility in capital sentencing.

1. The Federal Government and States Other than Texas Agree that Undocumented Immigration Is Not Evidence of Future Dangerousness

Undocumented entry is a unique offense. It is a non-violent, administrative violation for which a person can be convicted without any showing of evil intent or ill-will towards any other human being. Many who enter without documentation "do so for the best of motives -- to seek a better life for themselves and their families." H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 46, reprinted in 1986 U.S.C.C.A.N. 5649, 5650. Indeed, it often may be their very aversion to political or social violence that prompts them to abandon their homes. Undocumented immigrants are made eligible for civil and criminal penalties under federal law not for the retributive or

rehabilitative reasons society might punish criminal trespass or similar crimes, but instead out of a perceived need simply to control their numbers. Thus, the federal government historically has found in the vast majority of cases that punitive measures against individual undocumented immigrants are inappropriate.

By statute, undocumented immigration is classified as a misdemeanor. 8 U.S.C. § 1325(a) (Supp. III 1991). The misdemeanor penalty that technically is available, however, rarely is sought by federal prosecutors or imposed by the federal courts. Instead, undocumented entry is consciously treated in a non-criminal manner by the federal government in the exercise of its prosecutorial discretion in almost all cases. INS v. Lopez-Mendoza, 468 U.S. 1032, 1042-43 (1984) ("only a very small percentage of arrests of aliens are intended or expected to lead to criminal prosecutions" for undocumented entry); see also 3 Charles Gordon & Stanley Mailman, Immigration Law and Procedure § 74.02[1][b][ii] (1986). In 1990, for example, the federal government obtained criminal convictions for undocumented entry or reentry against less than 1% of the undocumented immigrants apprehended. App. 1 Table 1A.

The federal government similarly chooses in the vast majority of cases not to initiate civil deportation proceedings. In 1982, the year of Mr. Aldape Guerra's trial, and during the entire ten-year period from 1981 through 1990, the federal government brought civil deportation proceedings against less

than 2% of the undocumented immigrants apprehended. Id. Tables 1B, 1C. Even where deportation proceedings are initiated, an immigrant still may seek numerous forms of relief from deportation, including asylum,[6/] withholding of deportation,[7/] suspension of deportation,[8/] and registry.[9/]

Most of the immigrants who were apprehended between 1981 and 1990 but were not subjected to criminal or civil penalties departed the United States voluntarily in order to avoid legal proceedings being initiated against them. Id. Many, however, were permitted to stay. Id. Even those who depart voluntarily may apply immediately for lawful readmission into the United States. 8 U.S.C. §§ 1151, 1182, 1154 (1988 & Supp. III 1991).[10/]

Undocumented entry is considered irrelevant under these provisions and others in determining whether an individual deserves to be excluded from our society or otherwise branded a danger to the community. Thus, federal law provides that an

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6/ 8 U.S.C. § 1158 (1988 & Supp. III 1991).

7/ 8 U.S.C. § 1253(h) (1988 & Supp. III 1991).

8/ 8 U.S.C. § 1254(a) (Supp. III 1991).

9/ 8 U.S.C. § 1259 (1988 & Supp. III 1991).

10/ A person deported involuntarily may reenter legally five years after deportation. See 8 U.S.C. § 1182(a), (a)(6)(B) (Supp. III 1991). This section of the immigration statute lists the grounds which preclude a person from ever entering the United States. Deportation for undocumented entry is not included. Cf. Hernandez-Casillas v. INS, No. 92-4033 (5th Cir. filed Jan. 14, 1992).

immigrant who is convicted of a "serious criminal offense" and who is a "danger to the community" is ineligible for political asylum or withholding of deportation. 8 U.S.C. §§ 1253(h), 1188 (1988 & Supp. III 1991); 8 C.F.R. § 20.814(c)(1) (1992). Entry without documentation is not included in the list of factors considered in such cases.[11/] Moreover, under federal law, "good moral character" is a statutory requirement for numerous forms of discretionary relief from deportation and for naturalization. 8 U.S.C. §§ 1254(e), 1254(a), 1259, 1427(a)(3) (1988 & Supp. III 1991). Entry without documentation also is not evidence, however, under these provisions.[12/]

To amici curiae's knowledge, every state other than Texas that has considered the relevance of an individual's immigration status to future dangerousness or character similarly has concluded that undocumented entry, without more, has no probative weight. Thus, for example, in State v. Zavala-Ramos, 840 P.2d

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11/ Crimes such as drug trafficking, arson, armed robbery and burglary have been construed as serious and dangerous crimes under these provisions. Ramirez-Ramos v. INS, 814 F.2d 1394 (9th Cir. 1987); McMullen v. INS, 788 F.2d 591 (9th Cir. 1986); Crespo-Gomez v. Richard, 780 F.2d 932 (11th Cir. 1986); Frentescu, 18 I&N Dec. 244 (BIA 1982). A person who commits a felony, a crime of violence or drunken driving which results in personal injury also has committed a "serious criminal offense." 8 U.S.C. § 1101(h) (Supp. III 1991).

12/ 8 U.S.C. § 1101(f) (1988 & Supp. III 1991). "Good moral character" is a statutory requirement for numerous forms of discretionary relief from deportation and for naturalization. Id. §§ 1254(e), 1254(a), 1259, 1427(a)(3).

1314, 1316 (Or. Ct. App. 1992), the court held that "a defendant's current illegal immigration status cannot, per se, be considered to be an aggravating factor" in a sentencing decision. Similarly, in Portillo v. United States, 609 A.2d 687, 691 (D.C. 1992), the court held that "the prosecutor could not properly use [the defendant's] illegal status to argue against his general credibility." See also United States v. Gloria, 494 F.2d 477, 481 (5th Cir.) (assisting an immigrant's entry without documentation is not a "crime of moral turpitude" or "fraudulent and dishonest conduct," and therefore is inadmissible as impeachment), cert. denied, 419 U.S. 995 (1974).

Congress also has recognized that undocumented entry is not an indication of bad character. In enacting a broad amnesty statute that permits hundreds of thousands of undocumented immigrants to obtain lawful permanent residence and United States citizenship, Congress acknowledged that undocumented immigrants "have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars." H.R. Rep. No. 682, at 49, reprinted in 1986 U.S.C.C.A.N. at 5653; see also id. at 105, reprinted in 1986 U.S.C.C.A.N. at 5709 (Statement of Edwin Meese, III) ("We must recognize the fact that some people, having entered this country illegally a substantial number of years ago, have set down roots here and become productive members of American society"). In enacting legislation that allows relatives of aliens granted amnesty to stay in the United States,

Congress concluded that undocumented aliens have made significant economic and social contributions to this nation. H.R. Rep. No. 723(I), 101st Cong., 2d Sess. 37-38, reprinted in 1990 U.S.C.C.A.N. 6710, 6716-17. The State's broad and unqualified assertion here that undocumented immigrants are "dangerous" cannot be reconciled with these findings.

2. Empirical Data Show that Undocumented Entrants Are Less Likely to Commit Future Crimes, Not More So

The available empirical data also do not support the State's use of undocumented entry as evidence of future dangerousness. While some "crimes" may indeed be probative of an individual's probability of future criminal acts, see Parke v. Raley, 113 S. Ct. 517, 522 (1993), precisely the opposite is true of undocumented entry. For example, in 1989-1990, 1.64% of the United States population was in the care or custody of a corrections agency. App. 2 Table 2A. By contrast, during that same time period, fewer than 1% of the undocumented immigrants in the United States had been convicted of a crime or deported for criminal or immoral behavior. Id. Table 2B. Together, these statistics indicate that undocumented immigrants are less likely than the rest of the population to engage in criminal activity. Id. Table 2C.

Similarly, data from the State of Texas confirm that there is a lower crime rate among undocumented immigrants than among

the population at large. Although the precise number of undocumented Mexican immigrants residing in Texas is unclear, amici curiae estimate that roughly .11% of the undocumented Mexican immigrants residing in Texas in 1990 were incarcerated in a Texas state prison. App. 3 Table 3A. By contrast, the Texas state prison population included more than twice that percentage of the Texas population at large. Id. Table 3B. These statistics suggest that undocumented Mexican immigrants in Texas are less likely to commit crimes, not more so. Certainly they demonstrate that there can be no empirical support for the position advocated by the State.

3. Evidence of Undocumented Immigration Is Highly Inflammatory and Unfairly Prejudicial

Even assuming undocumented entry could have some probative value under the Texas sentencing criteria, it would be far outweighed by the risk of unfair prejudice. No amount of probative weight can justify reliance on sentencing factors that appeal to racial or other prejudices "of a serious character," Aldridge v. United States, 283 U.S. 308, 313 (1931), or that "give[] room for the play of such prejudices," Furman, 408 U.S. at 242 (Douglas, J., concurring). Thus, sentencing criteria that implicate racial and other prejudices have been found unconstitutional even where, unlike here, they arguably may be relevant to the probability that a capital defendant will commit

future crimes[13/] or to an element of the crime for which the defendant has been convicted.[14/] As the Supreme Court explained in Gardner v. Florida, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." 430 U.S. 349, 358 (1977) (emphasis added); see also Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (capital sentencing should be imposed as a "reasoned moral response") (emphasis added and omitted) (citations omitted); Gholson v. Estelle, 675 F.2d 734, 738 (5th Cir. 1982) ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence . . . .").

These established constitutional principles would be violated by using undocumented entry as a sentencing criterion. Social science studies have established conclusively what anyone could easily perceive: immigrants, particularly those who are poor and desperate enough to enter the United States without documentation, are victims of precisely the sorts of "serious"

13/ See, e.g., Furman, 408 U.S. at 364-65, 365 n.154 (Marshall, J., concurring) (although as a matter of statistics it would appear that men are more likely than women to commit murder and blacks are more likely than whites to commit crimes, gender and race may not be taken into account in capital sentencing).

14/ E.g., Commonwealth v. Tirado, 375 A.2d 336 (Pa. 1977) (granting a new trial where the prosecution was permitted to question a witness concerning the importance among Puerto Rican males of saving face in public confrontations).

racial and ethnic prejudices that the Supreme Court has warned against. Reliance on evidence of undocumented entry is wrong not only because it places an individual defendant at risk of an unconstitutional sentence of death, but also because it perpetuates and panders to destructive and unjustifiable fears.

A recent study of reports in the national media around the time of Mr. Aldape Guerra's trial explains that during the 1970s, the most common media photographs of undocumented immigrants showed one or more such individuals being apprehended or handcuffed by INS. Celestino Fernandez, Newspaper Coverage of Undocumented Mexican Immigration During the 1970s: A Qualitative Analysis of Pictures and Headings, in History, Culture and Society: Chicano Studies in the 1980s 185 (1983). By way of contrast, "exceptionally few" photographs of undocumented entrants aroused compassion or empathy. Id. at 186-87. The result was to create a widespread public perception that undocumented immigrants are more likely than others to engage in criminal activity, although the empirical data suggest precisely the opposite. Id. at 186.

In addition, national media headlines overwhelmingly have created a negative image of undocumented Mexican immigrants taking jobs away from Americans or siphoning away public relief funds. Id. at 190-94. Such headlines and stories have been published notwithstanding contemporaneous social science research exposing the inaccuracy of such images. Id. The negative images

reflected by the media nevertheless continue to be accepted by Americans as true. Id. at 196.

The results of this national study are similar to those found in a study of reports in the two major daily newspapers serving the Houston metropolitan area from 1978 until 1986. See App. 4 (Affidavit of Emilio Zamora, Ex Parte Ricardo Aldape Guerra, No. 359805 (Tex. Crim. App. Jan. 13, 1993) (affidavit filed Dec. 22, 1992)). In Houston, non-Hispanics have been the most prominent participants in the public discourse concerning immigrants and immigration, and their opinions about immigrants have been overwhelmingly negative. Id. para. 6(b), (c). In fact, for each instance in which immigrants have been portrayed in a positive way by the Houston papers, there are two instances in which they have been portrayed in a negative way. Id. para. 6(d). The most dramatic ratios were observed in the areas of crime and the economy, with positive to negative ratios of one to nine. Id. para. 6(e), (f), (g). Overall, media reports have reflected and significantly advanced negative and inaccurate public opinions towards immigrants in the Houston area. See id. para. 6(j).

For example, letters to the editor published in Houston newspapers around the time of Mr. Aldape Guerra's trial reflect the then-prevalent public belief that undocumented immigrants were "causing a national crime wave." See First Application for a Writ of Habeas Corpus at 122 n.68, Guerra v. Collins, Civ. No.

H-93-290 (S.D. Tex. application filed Feb. 1, 1993) ("Application"). Others compared undocumented Mexican immigrants to "roaches in the night" who "slither across the border . . . snatching up jobs Americans so desperately need." Id. These articles are alarming not only for the deep and disturbed emotions they display, but also because they are untrue.

B. AT A MINIMUM, EVIDENCE OF UNDOCUMENTED ENTRY WOULD HAVE TO BE ACCOMPANIED BY STRICT INSTRUCTIONS DEFINING ITS RELEVANCE

Even where a prior "criminal" act has some legitimate probative weight that is not outweighed by the risk of unfair prejudice, the Supreme Court has been careful to emphasize the requirement that "[t]he defendants' interests are protected by limiting instructions." Spencer v. Texas, 385 U.S. 554, 561 (1967). The instructions in a capital case must inform the jury exactly how the prior criminal act relates to the statutory sentencing criteria. See generally Maynard v. Cartwright, 486 U.S. 356, 361-63 (1988). There can be no question that the Constitution would be violated if a capital sentencing jury somehow were permitted to hear evidence of undocumented entry believing that the death penalty could be imposed on the basis of prejudices and stereotypes against immigrants in general. E.g., Zant v. Stephens, 462 U.S. 862, 879 (1983).

C. THE STATE VIOLATED THE APPLICABLE CONSTITUTIONAL PRINCIPLES HERE

The State in this case made a blatant appeal to the inaccurate, stereotypical impressions of illegal entrants that are likely to have been harbored by members of Mr. Aldape Guerra's jury. Thus, during voir dire, the State asserted that knowing someone is an undocumented immigrant gives an "indication of the type of person he is" and instructed four of Mr. Aldape Guerra's jurors that they could consider his immigration status during the punishment phase of the trial. One juror, for example, was told:

> Q. Of course, the fact that a person is in someone else's country unlawfully or has come into a country illegally could be evidence the jury could consider about what type of person the man is.
>
> MR. ELIZONDO: Objection, Your Honor. That is a misstatement of the law.
>
> THE COURT: Overruled.

Tr. vol. 19, at 3552-53; see also id. vol. 15, at 2603-04; vol. 18, at 3253-54; vol. 17, at 2925.

In closing argument at the sentencing phase of Mr. Aldape Guerra's trial, the State echoed this instruction, saying:

> [Y]our answers [to the special questions] will demonstrate what type of person Ricardo Aldape Guerra was while he was in our community for less than two months after coming here from Monterrey, Mexico, in May.

Id. vol. 27, at 165. The Prosecution continued by urging the jury to "let the other residents of 4907 Rusk" -- where

Mr. Aldape Guerra lived with other undocumented Mexican nationals -- "know just exactly what we citizens of Harris County think about this kind of conduct." Id. at 179 (emphasis added).

Several members of Mr. Aldape Guerra's venire candidly admitted the sort of bias to which these arguments appealed, expressing the belief that undocumented immigrants should not have the same rights as citizens. Application at 129 n.73. Several citizens selected for the jury expressed reservations concerning Mr. Aldape Guerra's immigration status. Id. at 128-29. One juror acknowledged that Mr. Aldape Guerra's status as an undocumented immigrant would affect her view of "the type of person he is." Id. at 129. Mr. Aldape Guerra's status as an undocumented immigrant was later discussed by the jury during deliberations on guilt or innocence, although not even the State suggests that undocumented entry had any relevance there. Id. at 130. The effect of the prosecution's arguments was further demonstrated by the occurrence of a Ku Klux Klan demonstration outside the Harris County Court building following Mr. Aldape Guerra's sentencing, where marchers carried signs saying "Houston will not tolerate illegal alien crimes." Id. at 128.

The trial court's errors were compounded by the failure to provide the jury with any meaningful instructions on the use of Mr. Aldape Guerra's undocumented entry. At no time was the jury told how Mr. Aldape Guerra's immigration status might be relevant to any of the special issues. Rather than explaining the

purported relevance of that evidence, the prosecution instead was permitted to give the jury unbridled discretion to consider Mr. Aldape Guerra's "illegal alien" status however and for whatever purpose it chose. Indeed, a reasonable juror could even have understood the State's closing argument as an open endorsement of racial and ethnic prejudice against immigrants. There can be no question, therefore, that Mr. Aldape Guerra's death sentence cannot stand.

CONCLUSION

Mr. Aldape Guerra's sentence of death should be vacated.

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ATTORNEYS FOR AMICI CURIAE

April 12, 1993

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

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

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of April, 1993, I served, by first class mail, postage prepaid, copies of the foregoing Motion for Leave to File Amici Curiae Brief and Amici Curiae Brief Supporting the Petitioner, on the following:

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APPENDIX

APPENDIX ONE

THE FEDERAL GOVERNMENT RARELY BRINGS CRIMINAL OR CIVIL CHARGES AGAINST UNDOCUMENTED IMMIGRANTS

Table 1A

Criminal Charges Brought Against Undocumented Immigrants

1990

Undocumented Immigrants Apprehended	1,169,939	100.00%
Convctions for Undocumented Entry or Reentry	8,606	0.73%

Source: Immigration & Naturalization Service, U.S. Dep't of Justice, 1990 Statistical Yearbook of the Immigration & Naturalization Service 166 Table 57, 181 Table 73 (INS No. M-367, 1991).

Table 1B

Civil Deportation Charges
Brought Against Undocumented Immigrants

1981 THROUGH 1990

Undocumented Immigrants Apprehended	11,883,328	100.00%
Deported After Civil Deportation Proceedings	210,649	1.77%
Required to Depart Under Voluntary Departure	9,952,050	83.74%
Permitted to Remain in the United States	1,720,769	14.48%

Source: 1990 Statistical Yearbook of the Immigration & Naturalization Service 166 Table 57.

Table 1C

Criminal or Civil Deportation Charges
Brought Against Undocumented Immigrants

1982

Undocumented Immigrants Apprehended	970,246	100.00%
Subjected to Criminal Prosecution for Immigration Violations	16,737	1.73%
Deported After Civil Deportation Proceedings	14,153	1.45%
Required to Depart Under Voluntary Departure	809,577	83.44%

Source: Immigration & Naturalization Service, U.S. Dep't of Justice, 1982 Statistical Yearbook of the Immigration & Naturalization Service Tables ENF 1.1 & LIT 1 (1983).

APPENDIX TWO

NATIONAL STATISTICS SHOW THAT UNDOCUMENTED IMMIGRANTS ARE LESS LIKELY TO COMMIT CRIMES

Table 2A

United States Population Convicted of a Crime

1989-1990

United States Population	248,709,873	100.00%
United States Population in Care or Custody of a Corrections Agency	4,100,000	1.64%

Sources: Immigration & Naturalization Service, U.S. Dep't of Justice, Immigration Act of 1990 Report on Criminal Aliens 3 (Apr. 1992); Dep't of Commerce, 1990 Census of Population and Housing 59 Table 2 (GPO No. 1990 CPH-1-1, Mar. 1992).

Table 2B

Less Than One Percent of all Undocumented Immigrants Were Convicted of a Crime or Deported for Criminal or Immoral Behavior

1986, 1990[1/]

Undocumented Immigrants	5,600,000	100.00%
Undocumented Immigrants Convicted of a Crime	45,155	0.80%
Undocumented Immigrants Deported for Criminal or Immoral Conduct	8,160	0.14%

Sources: Immigration Act Of 1990 Report on Criminal Aliens 14; 1990 Statistical Yearbook of the Immigration and Naturalization Service 172 Table 63 (1991); Congressional Budget Office Statistics, reprinted in 1986 U.S.C.C.A.N. at 5736.

1/ The estimated undocumented immigrant population stated in this Table 2B is a 1986 estimate. The other numbers stated in this Table 2B are from 1990. The Congressional Budget Office, whose 1986 estimate of the undocumented immigrant population is used here, has indicated that the number of undocumented immigrants would be higher in 1990 than it was in 1986. 1986 U.S.C.C.A.N. at 5736.

Table 2C

Comparison of Tables 2A, 3B

1986, 1989, 1990

Percentage of United States Population in Care of Custody of a Corrections Agency	1.64%
Percentage of Undocumented Immigrants Convicted of a Crime or Deported for Criminal or Immoral Conduct	0.94%

Sources: Tables 2A, 2B.

APPENDIX THREE

TEXAS STATISTICS SHOW THAT UNDOCUMENTED IMMIGRANTS ARE LESS LIKELY TO COMMIT CRIMES

Table 3A

Mexican Immigrants Imprisoned in Texas

1990

Undocumented Hispanics in Texas	1,171,774[2/]	100.00%
Mexican Immigrants Imprisoned in Texas	1,354[3/]	0.11%

Sources: Texas Department of Criminal Justice Statistics (Appendix 5); 1990 Census of Population and Housing 59 Table 2 (1992); Karen A. Woodrow & Jeffrey S. Passel, Post ICRA Undocumented Immigration to the United States, in 13 Population & Dev't Rev. 48 Table 2.4 (1987).

2/ Amici curiae have been unable to locate precise statistics on the number of undocumented Mexican immigrants residing in Texas. Amici curiae therefore developed the estimate that appears in this Table 3A as follows. The 1990 Census states that there were 4,339,905 Hispanics residing in Texas in 1990. Dep't of Commerce, 1990 Census of Population and Housing 59 Table 2. It has been estimated that 27% of the Mexican immigrants residing in the United States in June 1988 were undocumented. Karen A. Woodrow & Jeffrey S. Passel, Post ICRA Undocumented Immigration to the United States, in 13 Population & Dev't Rev. 48 Table 2.4 (1987). Using 27% as a rough approximation, it is estimated that 1,171,774 of the 4,339,905 Hispanics residing in Texas in 1990 were undocumented. Obviously, since not all Hispanics are Mexican, the figure for Mexican immigrants would be lower.

3/ This number includes both documented and undocumented Mexican immigrants. The figure for undocumented immigrants therefore would be even lower.

Table 3B

Texas Population Imprisoned

Texas Population	16,986,510	100.00%
Texans Imprisoned	49,316	0.29%

Sources: 1990 Census of Population and Housing 59 Table 2; Texas Department of Criminal Justice Statistics (Appendix 5).

Table 3C

Comparison of Tables 3A, 3B

Percentage of Texans Imprisoned	.29%
Percentage of Mexican Immigrants Imprisoned in Texas	.11%

Sources: Tables 3A, 3B.

APPENDIX FOUR

AFFIDAVIT OF EMILIO ZAMORA, EX PARTE RICARDO ALDAPE GUERRA, NO. 359805 (TX. CRIM. APP. JAN. 13, 1993) (AFFIDAVIT FILED DEC. 22, 1992)

IN THE TEXAS COURT OF CRIMINAL APPEALS

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

Ex Parte RICARDO ALDAPE GUERRA,

Applicant.

Cause No. 359805

Affidavit of Dr. Emilio Zamora

I Dr. EMILIO ZAMORA, hereby declare, under penalty of perjury, as follows:

1. I am an Associate Professor of History and Graduate Studies Director in the Department of History at the University of Houston, Houston, Texas. I obtained my B.A. in education, History, and Spanish from Texas A&I University, Kingsville, in 1969; my M.A. in History and Spanish from Texas A&I University, Kingsville, in 1972; and my Ph.D. in History from the University of Texas at Austin, in 1983. I teach and research in the following fields: Mexican American History; Texas History; and U.S. Labor History.

2. I am a principal investigator on the Aldape-Guerra Research Project (the "Project"), which was initiated to measure public opinion towards immigrants and immigration in Houston during 1982. The other principal investigators on the Project are Drs. Angela Valenzuela and Nestor Rodriguez. Dr. Valenzuela is an Assistant Professor in the Sociology

Department of Rice University, Houston, Texas. She obtained her Ph.D. from Stanford University in 1990. Dr. Rodriguez is an Associate Professor of Sociology and Graduate Director in the Sociology Department of the University of Houston. He obtained his Ph.D. from the University of Texas at Austin in 1981.

3. The Project collected data for its investigation by analyzing the content of selected materials that appeared in the Houston Post and the Houston Chronicle in 1982. These materials included 124 Post articles, 77 Chronicle editorials, and 42 letters to the editor of the Chronicle. The Houston Post and the Houston Chronicle were selected because they are the two major dailies that served the Houston metropolitan area in 1982.

4. We randomly selected a sample of editorials and letters that appeared in each paper during 1982. This procedure generated 183 random dates for each paper. Fifteen University of Houston student researchers were assigned approximately 22 dates each and instructed: (a) to locate and xerox editorials and letters about aliens, immigrants, and immigration in the microfilmed copies of the two newspapers; and (b) to count the total number of editorials and letters regardless of the topics addressed by the writers. The articles, on the other hand, were accessed by utilizing an annual index prepared by the Houston Post. Another group of eight students located the articles and xeroxed them.

5. The principal investigators next tabulated the positive and negative opinions with an intake table that identified the opinion maker and the areas of opinion, e.g., crime, economics, education. The principal investigators tabulated each stated opinion as a positive or negative expression attributed to an individual. The coding operation thus rendered numerical quantities amenable to data processing. The manifest content of a phrase or sentence in the form of an opinion provided the basis for the primary objective of the project: to count the frequency of positive and negative opinions according to key variables that would allow us to specify the source and focus of these opinions.

6. The project completed its Preliminary Report in August, 1992. The Preliminary Report reaches the following conclusions:

(a) Immigrants and immigration, particularly from Mexico, were important topics in public communications in 1982;

(b) Non-Hispanics were the most prominent participants in the public discourse concerning immigrants and immigration;

(c) Non-Hispanics were overwhelmingly negative in their opinions about immigrants and immigration;

(d) The overall positive to negative opinion ratio observed in the data was one to two. In other words, for each instance in which immigrants were

portrayed in a positive way, there were two instances in which they were portrayed in a negative way;

(e) The most dramatic ratios were observed in the areas of crime, social services, and the economy;

(f) With respect to the articles discussing crime, the positive to negative ratio was one to nine. Thus, for each instance in which immigrants were portrayed in a positive way, there were nine instances in which they were portrayed in a negative way;

(g) With respect to articles discusing social services, the positive to negative ratio, once again, was one to nine;

(h) With respect to articles discussing the economy, the positive to negative ratio was one to three;

(i) The only area in which the data showed more positive than negative opinions was civil rights. This was in large part due to opinions on behalf of immigrant rights by Mexican American civil rights organizations. With respect to civil rights, the positive to negative ratio was sixteen to one; and

(j) Overall, the data show that public communications in the Houston Post and the Houston Chronicle during 1982 reflected and significantly

advanced negative public opinions towards immigrants and immigration.

7. I anticipate that the Project will complete its final Report by January 1, 1993. The conclusions stated in the Final Report will not be substantially different from the conclusions stated above.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dr. Emilio Zamora

Signed and sworn to before me
this 18th day of December, 1992.

Notary Public

My Commission expires: 8/8/93

APPENDIX FIVE

STATISTICS FROM THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE INSTITUTIONAL DIVISION

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

James A. Collins, Director

P. O. Box 99 • Huntsville, Texas 77342-0099 • (409) 295-6371

November 13, 1992

Julia Sullivan
McKenna & Cuneo
1575 Eye Street NW
Washington D.C. 20005

Dear Ms. Sullivan:

Please find enclosed the information you requested. Information on citizenship is self-reported by the inmate and has not been verified.

If you have any questions, please contact me at 409-294-6449.

Sincerely,

Billy M. Birmingham, Chief of
Operations & Statistical Analysis

BMB/shf

Enclosure

xc: File

CITIZENSHIP

CODE	FREQUENCY	PERCENTAGE	CUM. PERCENT
Unclassified	5,922	12.109	12.109
AC	2	0.004	12.113
AT	2	0.004	12.117
BB	1	0.002	12.119
BD	1	0.002	12.121
BH	1	0.002	12.123
BM	2	0.004	12.127
CB	54	0.109	12.236
CC	128	0.259	12.495
CD	6	0.012	12.507
CJ	4	0.008	12.515
CN	1	0.002	12.517
CO	2	0.004	12.521
CR	2	0.004	12.525
DK	1	0.002	12.527
DR	14	0.028	12.555
EL	88	0.178	12.733
EN	6	0.012	12.745
ED	2	0.004	12.749
EU	3	0.006	12.755
GC	1	0.002	12.757
GF	9	0.018	12.775
GT	10	0.020	12.795
GY	2	0.004	12.799
HD	27	0.054	12.853
HT	3	0.006	12.859
HU	1	0.002	12.861
IT	2	0.004	12.865
IR	5	0.010	12.875
IS	3	0.006	12.881
IT	1	0.002	12.883
JA	4	0.008	12.891
JM	50	0.101	12.992
JO	1	0.002	12.994
KR	1	0.002	12.996
LN	2	0.004	13.000
LS	5	0.010	13.010
MM	1,354	2.745	15.755
MQ	1	0.002	15.757
MZ	1	0.002	15.759
NG	11	0.022	15.781
NU	6	0.012	15.793
PT	3	0.006	15.799
PK	2	0.004	15.803
PM	7	0.014	15.817
PR	45	0.091	15.908
PT	2	0.004	15.912
PU	5	0.010	15.922
RU	1	0.002	15.924
SF	1	0.002	15.926
SP	1	0.002	15.928

ACTIVE POPULATION 5 OF 12/31/90 AGE 74
CITIZENSHIP

CODE	FREQUENCY	PERCENTAGE	CUM. PERCENT
TT	5	0.010	15.938
US	41,380	83.907	99.845
VI	1	0.002	99.847
VM	56	0.113	99.960
VZ	6	0.012	99.972
WG	1	0.002	99.974
XN	6	0.012	99.986
YG	1	0.002	99.988
YY	1	0.002	99.990
TOTAL	49,316		

CITIZENSHIP CODES (NCIC)

AA ALBANIA
AC AFRICA
AD ANDORRA
AF AFGHANISTAN
AI ANTIGUA
AM AMERICAN SAMOA
AN ALGERIA
AO ANGOLA
AS AUSTRALIA
AT ARGENTINA
AU AUSTRIA
AY ANTARTICA

BB BARBADOS
BD BAHAMA ISLANDS
BE BAHREIN ISLANDS
BG BELGIUM
BH BRITISH HONDURAS
BI BURUNDI
BM BERMUDA
BN BHUTAN
BR BURMA
BT BOTSWANA
BU BULGARIA
BV BOLIVIA
BX BRUNEI
BZ BRAZIL

CB COLOMBIA
CC CUBA
CD CANADA
CF CHAD
CG CAROLINE ISLANDS
CJ CAMBODIA
CK CZECHOSLOVAKIA
CM CAMEROON
CN CHINA
CP CAYMAN ISLANDS
CQ CHILE
CR COSTA RICA
CS CYPRUS
CV CAPE VERDE
CW CENTRAL AFRICAN REPUBLIC
CX CONGO
CY CEYLON
CZ CANAL ZONE

DH DAHOMEY
DK DENMARK
DM DOMINICA
DR DOMINICAN REPUBLIC

EK EQUATORIAL GUINEA
EL EL SALVADOR
EM EAST GERMANY
EN ENGLAND
EO ETHIOPIA
ES ESTHONIA
EU ECUADOR
EY EGYPT

FD FINLAND
FJ FIJI ISLANDS
FN FRANCE

GB GABON
GC GREECE
GE GERMANY
GG GHANA
GI GUINEA
GJ GRENADA
GK GAMBIA
GM GUAM
GN GREENLAND
GP GUADELOUPE
GT GUATEMALA
GY GUIANA

HD HONDURAS
HK HONG KONG
HT HAITI
HU HUNGARY

IC ICELAND
IE IRELAND
II INDIA
IO INDONESIA
IQ IRAQ
IR IRAN
IS ISRAEL
IT ITALY
IY IVORY COAST

CITIZENSHIP CODES (NCIC)

JA JAPAN
JM JAMAICA
JO JORDAN

KE KENYA
KR KOREA
KU KUWAIT

LB LIBERIA
LE LESOTHO
LH LITHUANIA
LI LIECHTENSTEIN
LN LEBANON
LS LAOS
LT LATVIA
LX LUXEMBOURG
LY LIBYA

MF MALAWI
MG MONGOLIA
MH MARSHALL ISLANDS
MJ MONACO
MK MARIANAS ISLANDS
ML MALI
MM MEXICO
MP MALAGASY REPUBLIC
MQ MOROCCO
MU MAURITANIA
MV MALDIVES
MW MIDWAY ISLANDS
MY MALTATANIA
MZ MALAYSIA

NE ETHERLANDS
NG NIGERIA
NI NORTHERN IRELAND
NN NIGER
NG NO NEW GUINEA
NP NEPAL
NQ NEW CALEDONIA
NR NAURU
NU NICARAGUA
NW NORWAY
NX NETHERLANDS ANTILLES
NZ NEW ZEALAND

PC PITCAIRN ISLAND
PI PHILIPPINES
PK PAKISTAN
PM PANAMA
PO POLAND
PR PUERTO RICO
PT PORTUGAL
PU PERU
PV PARAGUAY

QA QATAR

RE REUNION
RH RHODESIA
RU RUMANIA
RW RWANDA

SA SIERRA LEONE
SB SAUDI ARABIA
SE SEYCHELLES
SF SOUTH AFRICA
SG SENEGAL
SH SN MARINO
SJ SOUTH-WEST AFRICA
SK SIKKIM
SM SOMALIA
SP SPAIN
SO SWEDEN
SR SINGAPORE
SS SCOTLAND
ST SOUTHERN YEMEN
SU SUDAN
SV SVALBARD
SW SWAZILAND
SX SOVIET UNION
SY SYRIA
SZ SWITZERLAND

TC TRUCIAL STATES
TG TONGA
TH THAILAND
TO TOGO
TT TRINIDAD-TOBAGO
TU TUNISIA
TY TURKEY
TZ TANZANIA

UA UNITED ARAB REPUBLIC
UG UGANDA
US UNITED STATES
(IF AMERICAN CITIZEN W/UNKNOWN STATE OF BIRTH)
UV UPPER VOLTA

CITIZENSHIP CODES (NCIC)

UY URUGUAY

VI VIRGIN ISLANDS
VM VIET NAM
VZ VENEZUELA

WG WEST GERMANY
WK WAKE ISLAND
WL WALES
WN WEST INDIES
WS WESTERN SAMOA

YE YEMEN
YG YUGOSLAVIA
YY OTHER

ZB MARTINIQUE
ZC SURINAM
ZM ZAMBIA

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April 5, 1993

United States District Court
Southern District of Texas
FILED

APR - 5 1993

Michael N. Milby, Clerk

By Messenger

Hon. Michael Milby, Clerk
United States District Court
United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

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Sincerely,

Scott J. Atlas

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1064:0399:2580
c:\aldape\milby.apr

Enclosures

cc: William C. Zapalac - by telecopy and regular mail
Ricardo Aldape Guerra
Kari Sckerl
Hon. Thomas Gibbs Gee
Stanley Schneider

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FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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v.	§	Civil Action No. H-93-290
JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice,	§	
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1. The State Incorrectly Describes the Standard by Which a Federal Habeas Petitioner Can Obtain an Evidentiary Hearing.

6. "It is well established . . . that a federal habeas petitioner is entitled to an evidentiary hearing on a viable issue when he did not receive a full, fair, and adequate hearing thereon in State court." Application at 49 (quoting Williams v. Whitley, 920 F.2d 132, 134 (5th Cir. 1991)); see id. at 49-50, 53-54 (citing cases). Guerra received no such hearing in the state court. The State argues that "[n]o hearing is needed" where the Texas Court of Criminal Appeals denies relief on the trial court's ***deemed*** finding that no controverted facts exist. Response at 2. The State cites no authority for its position

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8. The second case cited by the State -- Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) -- is cited for the proposition that an evidentiary hearing cannot be held absent a showing of cause and prejudice. See Response at 6. But Keeney is not applicable for two reasons. First, the issue in Keeney was not whether a federal court should rely on a state court's decision to grant or deny a evidentiary hearing, but what test a petitioner must meet to obtain a federal hearing after, through his own neglect, he failed to take advantage of the opportunity to fully develop facts in a previous state post-

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Thus, the respondent in Keeney received a full-dress post-conviction hearing in state court. Id. The Keeney court repeatedly recognized the importance of granting a petitioner a "full factual development of a claim." Id. at 1719-20 ("[E]ncouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity . . . ."; "[E]nsuring that full factual development takes place in the earlier, state-court proceedings, the cause-and-prejudice standard plainly serves the interest of judicial economy."; "[E]nsuring the full factual development of a claim takes place in state court channels the resolution of the claim to the most appropriate forum.").

a hearing.

10. Despite Keeney's inapplicability, the State argues that "the same principle [Keeney's cause and prejudice standard] applies" because "[t]he reason" no hearing was held was because Guerra "did not preserve the claimed errors at trial or because his pleadings were insufficient." Response at 6. This argument fails for several reasons. First, the State finds nonexistent language in the Texas Court of Criminal Appeals' order. The Court of Criminal Appeals never held that Guerra "did not preserve the claimed errors at trial or . . . [that] his pleadings were insufficient." Id. at 6. The State divines this holding out of the air. If the State were correct in inferring such a ruling, a federal court could ***never*** conduct an evidentiary hearing once a state court, however arbitrarily, refused to hold one. This simply is not the law.

11. The failure of the State's arguments is further revealed by its disingenuous attempt to explain and expand the Texas Court of Criminal Appeals' holding by stating that the Court "partially relied" on the State's response to Guerra's state court habeas application. Response at 3. ***Nowhere*** in its opinion did the Texas Court of Criminal Appeals state, or even imply, that it relied on ***any*** argument raised by the State. See App. 223.

2. Guerra Meets the Federal Standard for a Hearing Because He Has Alleged Facts that, if True, Entitle Him to Relief.

12. The State argues that Guerra failed to plead facts that would entitle him to an evidentiary hearing. Response at 3. A few examples should suffice to refute this

claim. First, in his state and federal habeas petitions, Guerra alleged numerous instances of police misconduct. For example, he contends that recently he uncovered proof that on the night of the shooting the police were told by several witnesses that Guerra's hands were empty at the time of the shooting or that Guerra was standing in a location in which he could not have been the shooter.[4] The police either wrongfully omitted this information from the witness statements or pressured witnesses into adopting words deliberately phrased to create the misimpression either that Guerra was the shooter or that the witnesses had seen nothing helpful to Guerra's defense. E.g., Application at 68.[5]

13. Second, Guerra deserves a hearing to prove instances of prosecutorial misconduct. For example, Guerra can demonstrate that prosecutors deliberately gave the jury knowingly false information by repeatedly, over defense objections, asking a witness about a murder in a cemetery on the same night as the Harris murder and implying Guerra's complicity in the murder even though the State knew that no such murder had occurred. See id. at 84-87; see also id. at 87-91. The trial transcript contains the prosecutor's questions. S.F. Vol. 23 at 746-47. At an evidentiary hearing Guerra can

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[4] Police experts' testimony and the physical evidence demonstrated that the shooter must have been standing east of the murder victim, Officer Harris. But several witnesses told police that Guerra was standing south of Harris. See Application at 56 n.30.

[5] The State complains that Guerra failed to name the witnesses and quote the changed language. Response at 3. This detail is not required, however. Guerra need only meet his burden of alleging facts that, if true, would establish a constitutional violation.

prove that (1) about a week after the shooting of Office Harris, the alleged cemetery murder victim told Houston police Detective L.E. Webber that she had been neither murdered nor assaulted, and (2) despite receiving this information, the State attempted to implicate Guerra in this fictitious murder in order to prejudice the jury against Guerra.

14. Third, Guerra has alleged that the police used improper investigative techniques. E.g., id. at 51-52. The State claims that even if these claims are true, they are irrelevant and no hearing is needed because the in-court identifications would have been admissible due to their independent origin. Response at 4. But the State misinterprets Guerra's argument. At a hearing Guerra will show that the witnesses' in-court identifications were irreparably tainted by the improper police and prosecutorial procedures used before and during trial.[9]

15. If Guerra can prove either prejudicial police intimidation that cowed witnesses into covering up clearly exculpatory evidence, or improper investigative procedures that irreparably tainted in-court identifications, then Guerra should be entitled to relief. Accordingly, he should receive an opportunity to prove these allegations at a

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[9] In addition, the State asserts that Guerra's actual innocence claim is barred absent a showing of a constitutional violation, Response at 5, in light of Herrera v. Collins, 113 S. Ct. 853 (1993). But six of the nine justices in Herrera explicitly left open the possibility that a sufficiently strong showing of factual innocence ***alone*** could provide a basis for federal habeas relief. See Application at 55-62. At an evidentiary hearing, Guerra will prove that his original attorneys' failure to discover exculpatory evidence at trial resulted from the State's concealment of such evidence. See id. at 66-74.

hearing.

C. Guerra Is Not Barred from Raising Any of His Claims.

16. The State argues repeatedly that Guerra is barred from raising many of his claims because he failed to object at trial. See, e.g., id. at 4. But since there was no finding of waiver in the state habeas court, there can be no procedural default here. Ylst v. Nunnemaker, 111 S.Ct. 2590, 2594 (1991) (federal habeas review is not precluded unless the last state court rendering an explained judgment explicitly based its decision on a procedural default); see also Harris v. Reed, 489 U.S. 255, 263 (1989) ("[A] procedural default does not bar consideration of a federal claim on . . . habeas review unless the state court rendering a judgment in the case *'clearly and expressly' states* that its judgment rests on a state procedural bar") (emphasis added).

17. In sum, the State argues that this Court can deny Guerra an evidentiary hearing by relying on a "deemed" finding that all factual issues were resolved against Guerra and were based on waiver. But there were no real "findings," and none could have been made because no fact hearing was held. Moreover, there was no waiver because the state habeas court made no finding, explicit or inferred, of procedural default. Guerra requests an evidentiary hearing so that he can have one opportunity, for the first time, to develop the facts fully and etablish the unconstitutionality of his conviction and sentence.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: _____

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**ATTORNEYS FOR APPLICANT,
RICARDO ALDAPE GUERRA**

OF COUNSEL:

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Schneider & McKinney
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Houston, Texas 77046
(713) 961-5901

STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT OF VERIFICATION

I, SCOTT J. ATLAS, upon oath state that I have read the foregoing Petitioner Ricardo Aldape Guerra's Reply to Respondent's Response to Petitioner's Motion for Evidentiary Hearing and Brief in Support; I am familiar with its contents; and to the best of my knowledge and belief the matters set forth therein are true and correct.

Scott J. Atlas

Subscribed and sworn to before me this 5th day of April, 1993.

Notary Public

My commission expires:

3-5-97

MARK S. BRAINERD
Notary Public, State of Texas
My Commission Expires
03/05/97

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by certified mail, return receipt requested, on William C. Zapalac, Assistant Attorney General; Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station, Austin, Texas 78711, on the 5th day of April, 1993.

Scott J. Atlas

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---

[3/] The Oregon trial court granted the respondent, a Cuban immigrant with little education and almost no knowledge of English, an evidentiary hearing on his claim that his plea of *nolo contendere* to first-degree manslaughter had not been knowing and intelligent and therefore was invalid because his court-appointed translator had not translated accurately and completely for him the *mens rea* element of the crime in question. 112 S. Ct. at 1716. After the hearing, the trial court dismissed respondent's petition, finding that the respondent's interpreter had correctly, fully, and accurately translated communications between the respondent and his attorney. Id. at 1717. The state court affirmed, and the state supreme court denied review. Id. Thereafter, the respondent sought a federal evidentiary hearing on the same issue raised in the state court proceeding: whether the *nolo contendere* plea was unconstitutional. Id. The federal district court found that the respondent's failure to develop critical facts relevant to his federal claim was the result of inexcusable neglect in failing to develop these facts at the state post-conviction hearing. Id.

Thus, the respondent in Keeney received a full-dress post-conviction hearing in state court. Id. The Keeney court repeatedly recognized the importance of granting a petitioner a "full factual development of a claim." Id. at 1719-20 ("[E]ncouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity . . . ."; "[E]nsuring that full factual development takes place in the earlier, state-court proceedings, the cause-and-prejudice standard plainly serves the interest of judicial economy."; "[E]nsuring the full factual development of a claim takes place in state court channels the resolution of the claim to the most appropriate forum.").

a hearing.

10. Despite Keeney's inapplicability, the State argues that "the same principle [Keeney's cause and prejudice standard] applies" because "[t]he reason" no hearing was held was because Guerra "did not preserve the claimed errors at trial or because his pleadings were insufficient." Response at 6. This argument fails for several reasons. First, the State finds nonexistent language in the Texas Court of Criminal Appeals' order. The Court of Criminal Appeals never held that Guerra "did not preserve the claimed errors at trial or . . . [that] his pleadings were insufficient." Id. at 6. The State divines this holding out of the air. If the State were correct in inferring such a ruling, a federal court could ***never*** conduct an evidentiary hearing once a state court, however arbitrarily, refused to hold one. This simply is not the law.

11. The failure of the State's arguments is further revealed by its disingenuous attempt to explain and expand the Texas Court of Criminal Appeals' holding by stating that the Court "partially relied" on the State's response to Guerra's state court habeas application. Response at 3. ***Nowhere*** in its opinion did the Texas Court of Criminal Appeals state, or even imply, that it relied on ***any*** argument raised by the State. See App. 223.

2. Guerra Meets the Federal Standard for a Hearing Because He Has Alleged Facts that, if True, Entitle Him to Relief.

12. The State argues that Guerra failed to plead facts that would entitle him to an evidentiary hearing. Response at 3. A few examples should suffice to refute this

claim. First, in his state and federal habeas petitions, Guerra alleged numerous instances of police misconduct. For example, he contends that recently he uncovered proof that on the night of the shooting the police were told by several witnesses that Guerra's hands were empty at the time of the shooting or that Guerra was standing in a location in which he could not have been the shooter.[4/] The police either wrongfully omitted this information from the witness statements or pressured witnesses into adopting words deliberately phrased to create the misimpression either that Guerra was the shooter or that the witnesses had seen nothing helpful to Guerra's defense. E.g., Application at 68.[5/]

13. Second, Guerra deserves a hearing to prove instances of prosecutorial misconduct. For example, Guerra can demonstrate that prosecutors deliberately gave the jury knowingly false information by repeatedly, over defense objections, asking a witness about a murder in a cemetery on the same night as the Harris murder and implying Guerra's complicity in the murder even though the State knew that no such murder had occurred. See id. at 84-87; see also id. at 87-91. The trial transcript contains the prosecutor's questions. S.F. Vol. 23 at 746-47. At an evidentiary hearing Guerra can

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[4/] Police experts' testimony and the physical evidence demonstrated that the shooter must have been standing east of the murder victim, Officer Harris. But several witnesses told police that Guerra was standing south of Harris. See Application at 56 n.30.

[5/] The State complains that Guerra failed to name the witnesses and quote the changed language. Response at 3. This detail is not required, however. Guerra need only meet his burden of alleging facts that, if true, would establish a constitutional violation.

prove that (1) about a week after the shooting of Office Harris, the alleged cemetery murder victim told Houston police Detective L.E. Webber that she had been neither murdered nor assaulted, and (2) despite receiving this information, the State attempted to implicate Guerra in this fictitious murder in order to prejudice the jury against Guerra.

14. Third, Guerra has alleged that the police used improper investigative techniques. E.g., id. at 51-52. The State claims that even if these claims are true, they are irrelevant and no hearing is needed because the in-court identifications would have been admissible due to their independent origin. Response at 4. But the State misinterprets Guerra's argument. At a hearing Guerra will show that the witnesses' in-court identifications were irreparably tainted by the improper police and prosecutorial procedures used before and during trial.[6/]

15. If Guerra can prove either prejudicial police intimidation that cowed witnesses into covering up clearly exculpatory evidence, or improper investigative procedures that irreparably tainted in-court identifications, then Guerra should be entitled to relief. Accordingly, he should receive an opportunity to prove these allegations at a

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[6/] In addition, the State asserts that Guerra's actual innocence claim is barred absent a showing of a constitutional violation, Response at 5, in light of Herrera v. Collins, 113 S. Ct. 853 (1993). But six of the nine justices in Herrera explicitly left open the possibility that a sufficiently strong showing of factual innocence ***alone*** could provide a basis for federal habeas relief. See Application at 55-62. At an evidentiary hearing, Guerra will prove that his original attorneys' failure to discover exculpatory evidence at trial resulted from the State's concealment of such evidence. See id. at 66-74.

hearing.

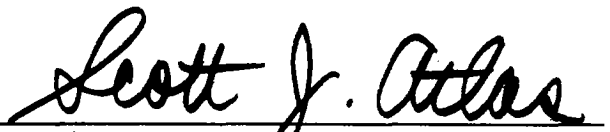
C. Guerra Is Not Barred from Raising Any of His Claims.

16. The State argues repeatedly that Guerra is barred from raising many of his claims because he failed to object at trial. See, e.g., id. at 4. But since there was no finding of waiver in the state habeas court, there can be no procedural default here. Ylst v. Nunnemaker, 111 S.Ct. 2590, 2594 (1991) (federal habeas review is not precluded unless the last state court rendering an explained judgment explicitly based its decision on a procedural default); see also Harris v. Reed, 489 U.S. 255, 263 (1989) ("[A] procedural default does not bar consideration of a federal claim on . . . habeas review unless the state court rendering a judgment in the case ***'clearly and expressly' states*** that its judgment rests on a state procedural bar") (emphasis added).

17. In sum, the State argues that this Court can deny Guerra an evidentiary hearing by relying on a "deemed" finding that all factual issues were resolved against Guerra and were based on waiver. But there were no real "findings," and none could have been made because no fact hearing was held. Moreover, there was no waiver because the state habeas court made no finding, explicit or inferred, of procedural default. Guerra requests an evidentiary hearing so that he can have one opportunity, for the first time, to develop the facts fully and etablish the unconstitutionality of his conviction and sentence.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: 

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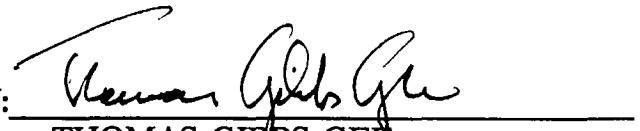
BY: 

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**ATTORNEYS FOR APPLICANT,
RICARDO ALDAPE GUERRA**

OF COUNSEL:

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Houston, Texas 77046
(713) 961-5901

STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT OF VERIFICATION

I, SCOTT J. ATLAS, upon oath state that I have read the foregoing Petitioner Ricardo Aldape Guerra's Reply to Respondent's Response to Petitioner's Motion for Evidentiary Hearing and Brief in Support; I am familiar with its contents; and to the best of my knowledge and belief the matters set forth therein are true and correct.

Scott J. Atlas

Subscribed and sworn to before me this 5th day of April, 1993.

Notary Public

My commission expires:

3-5-97

MARK S. BRAINERD
Notary Public, State of Texas
My Commission Expires
03/05/97

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by certified mail, return receipt requested, on William C. Zapalac, Assistant Attorney General; Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station, Austin, Texas 78711, on the 5th day of April, 1993.

Scott J. Atlas

Scott J. Atlas

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Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 15, 1993

The Honorable Michael Milby,Clerk
United States District Court
Southern District of Texas
Houston Division
P.O. Box 61010
Houston, Texas 77208

RECEIVED
MAR 16 1993
S.J.A.

Re: *Guerra v. Collins,* No. H--93-290

Dear Sir:

Enclosed please find the original and one (1) copy of **Response to Prtitioner's Motion for Evidentiary Hearing, and Brief in Support** to be filed among the papers in the above referenced cause.

By copy of this letter, I am forwarding a copy of this instrument to the Petitioner's attorney.

Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

Thank you for your kind assistance in this matter.

Sincerely,

WILLIAM C. ZAPALAC
Assistant Attorney General
Enforcement Division
(512) 463-2080

WCZ/br

c: Mr. Scott J. 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 TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§ § § §	

RESPONSE TO PETITIONER'S MOTION FOR EVIDENTIARY HEARING, AND BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent ("the Director"), by the Attorney General of Texas, and files this Response to Petitioner's Motion for Evidentiary Hearing, and Brief in Support. The Director would respectfully show the Court as follows:

I.

Petitioner ("Guerra") seeks an evidentiary hearing on nine of the claims raised in his petition for writ of habeas corpus. These include:

1. The state's failure to disclose exculpatory evidence;

2. Use of improper investigative techniques by the police;

3. Prosecutorial misconduct throughout the trial;

4. The state's presentation of flawed analyses of physical evidence;

5. Proof that the murderer fired the gun with his left hand and that Guerra's companion was left-handed, while Guerra himself is right-handed;

6. Ineffective assistance of counsel, due primarily to the state's suppression of exculpatory evidence;

7. The prevalence of biased attitudes among residents of Houston at the time of the trial that infected the jurors during their deliberations;

8. The presence of large numbers of uniformed police officers during the trial, creating the impression that Guerra was a dangerous person;

9. Evidence that indicates that Guerra is innocent of the murder for which he was convicted.

He contends that he is entitled to a hearing because his allegations contain disputed issues of fact and he has not received a hearing on his claims in state court. The Director opposes Guerra's request for an evidentiary hearing.

II.

No hearing is needed because, contrary to Guerra's assertion, the proceedings in state court were adequate to resolve the issues raised in his application for writ of habeas corpus. When Guerra filed his state habeas application, the trial court entered an order recommending that relief be denied. Although the trial court made no express findings of fact and conclusions of law, the Court of Criminal Appeals noted that, as a matter of law, this constituted "a finding that there were no controverted, previously unresolved facts material to the legality of [Guerra's] confinement. . . ." The court then reviewed the entire record of the case, including the state's response and the briefs that were filed in support of the application. It concluded that the trial court's finding was fully supported by the record in the case, and it denied relief on that basis. *Ex parte Guerra,* Application No. 24,021-01.

The state's response, on which the Court of Criminal Appeals partially relied, demonstrated that Guerra was not entitled to relief on the allegations for which he claims a right to an evidentiary hearing for a variety of reasons. *See generally Ex parte Guerra,* No. 3598905-A, State's Original Answer at 15-20. For example, with respect to the claim that the state suppressed exculpatory evidence, the state's answer noted that Guerra had not pleaded facts that, if true, would entitle him to relief. The state pointed out, and Guerra has not denied, that his attorneys had access to the entire state's file, including offense reports and lists of witnesses subpoenaed to testify. Consequently, they had the opportunity to cross-examine witnesses about their statements and the truth of their contents, as well as about such things as the identification procedures. *Id.* at 16. Guerra also contended that he would present "additional information" at an evidentiary hearing, a claim he reiterates in his federal petition, including evidence that his companion was left-handed, while he himself is right-handed, and that the state's analysis of the physical evidence was flawed. The state noted that this information was not in the state's possession at the time of trial. As a result, it is irrelevant to a claim of suppression of exculpatory evidence. *Id.* at 18. Further, Guerra was in as good a position to uncover the fact, if it is true, that Carrasco was left-handed, and he certainly knew that he himself is right-handed. Guerra also was free to challenge at trial the state's experts' interpretation of the tests they conducted, and to produce his own experts to counter their testimony. Finally, reliance on such evidence is simply an attempt by Guerra to relitigate the facts of the crime in a collateral proceeding years after his conviction and sentence, a misuse of habeas corpus procedures.

With respect to the state's allegedly intimidating witnesses and altering the substance of their statements, the state noted Guerra provided no names of such witnesses nor any information about what statements were supposedly changed.

Ex parte Guerra, Application No. 359805-A, Respondent's Original Answer at 19. Guerra's assertion that improper procedures were followed in the line-up during which witnesses identified him as the murderer failed to demonstrate that this was material evidence, inasmuch as the in-court identifications would have been admissible because of their independent origin. *Id.* at 19-20.

Guerra also contended that the prosecutors engaged in misconduct during every stage of the trial. The state's response noted that, in most cases, Guerra failed to object to the behavior he now criticizes, or otherwise preserve the error and, therefore, was barred from raising the claim in his habeas corpus application. *See, e.g,. Ex parte Guerra,* Application No. 359805-A, Respondent's Original Answer at 20, 25-27, 29-30, 33, 38, 41, 42, 44, 45, 48, 50. Further, the state addressed each allegation in turn by reference to the record to demonstrate that Guerra's contentions did not amount to prosecutorial misconduct. Where the record is complete and no additional evidence is needed to resolve an applicant's claims, no evidentiary hearing is needed.

Similarly, the state noted in its answer that Guerra had expressly waived his claim that he did not receive a fair trial because of biased attitudes among residents of Harris County. Despite the publicity surrounding the crime, Guerra specifically informed the court that he had no intention of seeking a change of venue and wished to be tried in Harris County. *Id.* at 54. Guerra also failed to preserve his claim that the alleged presence of a large number of uniformed police officers in the courtroom created an impression that he was dangerous and prevented his obtaining a fair trial. *Id.* at 54. Moreover, the contention fails as a matter of law and no further evidence was needed to dispose of it.

The state argued that Guerra was not entitled to a hearing or to relief on the merits of his claim that the prosecutors improperly commented on his status as an illegal alien because, 1) the comments were invited by *voir dire* questions of

Guerra's attorney, and 2) the record reflected no impropriety in the prosecutors' comments and questions. Again, if the Court of Criminal Appeals found it necessary to reach the merits of the claim, it was refuted by the record and no further factual development was necessary to resolve the matter.

Finally, the state pointed out that Guerra failed to allege any "newly discovered" evidence that demonstrated that he was innocent of the crime with for which he was convicted. Rather, he attempted, with the benefit of hindsight, to re-litigate the issues that were resolved against him at trial, arguing new theories and making new challenges to the state's evidence. *Id.* at 11-13. Moreover, even if he did present previously unknown evidence relevant to his guilt, that would not state a claim for habeas corpus relief absent a showing of a constitutional violation. *Herrera v. Collins,* ___ U.S. ___, 113 S.Ct. 853 (1993). Thus, no hearing was necessary on this allegation.

In short, Guerra did not plead facts with respect to these allegations in state court that would have entitled him to an evidentiary hearing. As a result, and as the Court of Criminal Appeals found, his application raised no controverted, previously unresolved facts material to his confinement. Because no material facts had been placed in issue, there was no need for the trial court to conduct an evidentiary hearing.

III.

Further, Guerra is not entitled to an evidentiary hearing in this Court. To the extent that he relies on the same arguments that he advanced in state court, his claims are either barred by his failure to preserve errors or they fail as a matter of law or on the merits of the record as it exists. In seeking an evidentiary hearing, Guerra is attempting to do nothing more than obtain a complete retrial of his case in federal court. The record does not need to be supplemented or expanded to dispose of his allegations, and the Court need not grant an evidentiary hearing

simply because Guerra has asked for one. *See Lavernia v. Lynaugh,* 845 F.2d 493, 501 (5th Cir. 1988).

To the extent that Guerra has attempted to correct the deficiencies of his pleadings in state court to support his argument for a hearing in this Court, his efforts are unavailing. In *Keeney v. Tamayo-Reyes,* ___ U.S. ___, 112 S.Ct. 1715 (1992), the Supreme Court held that, where a habeas corpus petitioner has an opportunity to develop his claims for relief in a state evidentiary hearing, he is not entitled to a federal hearing to bring forward additional proof of those claims, absent a showing of cause for failing to present the evidence in state court and resulting prejudice. *Id.* at ___, 112 S.Ct. at 1717-21. Even though Guerra did not receive a hearing in state court, the same principle applies in this case. The reason no hearing was held in state court was that Guerra failed to raise controverted facts material to his confinement, either because he did not preserve the claimed errors at trial or because his pleadings were insufficient. A petitioner cannot be allowed to use the state courts as a mere "warm up" for federal habeas, discovering the weaknesses in his case in the state proceedings and then correcting them when he files a federal petition. To allow such a practice would render the state court proceedings a meaningless dress rehearsal before the grand performance in federal court. This, of course, is at odds with the principles of comity underlying our dual judicial system, and could "give litigants incentives to withhold claims [in state court] for manipulative purposes." *Id.* at ___, 112 S.Ct. at 1718.*

WHEREFORE, PREMISES CONSIDER, the Director opposes the request for an evidentiary hearing in this cause.

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*The Director's arguments might appear more persuasive to the Court once a complete answer to the allegations has been filed and the claims have been addressed directly. In this regard, the Court might perfer to postpone a decision on whether an evidentiary hearing is necessary until after the Director's answer is filed on April 16.

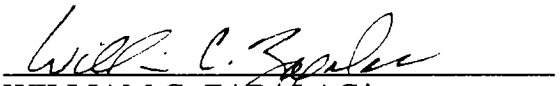
Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division



WILLIAM C. ZAPALAC*
Assistant Attorney General
Southern District # 8615

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Fax No. (512) 463-2084

ATTORNEYS FOR RESPONDENT

*Counsel of record

CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Response to Petitioner's Motion for Evidentiary Hearing, and Brief in Support has been served by placing same in overnight mail on this the 5th day of March, 1993, addressed to: Mr. Scott J. Atlas, VINSON & ELKINS, 2500 First City Tower, 1001 Fannin, Houston, Texas 77002-6760.

WILLIAM C. ZAPALAC
Assistant Attorney General

37

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

RICARDO ALDAPE GUERRA,

Petitioner.

v.

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

Respondent.

H 93 290

Civil Action No. _____

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS

ON THIS DAY, came on to be heard the Motion for Leave to Proceed in Forma Pauperis filed by Petitioner Ricardo Aldape Guerra. Good cause appearing therefor, it is ordered that Petitioner Ricardo Aldape Guerra is granted leave to proceed in forma pauperis in the above-captioned action.

IT IS SO ORDERED.

SIGNED this 22nd day of February, 1993.

UNITED STATES DISTRICT JUDGE

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Gee
Stern FYI
F. Pilgrim Sandra

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

RICARDO ALDAPE GUERRA,

Petitioner.

v.

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

Respondent.

H 93 290

Civil Action No. _____

ORDER GRANTING APPOINTMENT OF COUNSEL

ON THIS DAY, came on to be heard the Motion for Appointment of Counsel filed by Scott J. Atlas of the law firm of Vinson & Elkins, seeking appointment to represent Petitioner, Ricardo Aldape Guerra. Good cause appearing therefor it is ordered that Scott J. Atlas of the law firm of Vinson & Elkins is hereby appointed to represent Petitioner, Ricardo Aldape Guerra, in the above-captioned action.

IT IS SO ORDERED.

SIGNED this 22nd day of February, 1993.

UNITED STATES DISTRICT JUDGE

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Office of the Attorney General
State of Texas

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DAN MORALES
ATTORNEY GENERAL

February 24, 1993

The Honorable Michael Milby, Clerk
United States District Court
Southern District of Texas
Houston Division
P.O. Box 61010
Houston, Texas 77208

Re: *Ricardo Aldape Guerra v. James A. Collins*, No. H-93-290

Dear Sir:

Enclosed for filing with the papers in the above-referenced case are copies of the state trial and appellate record of Mr. Guerra's capital murder trial. Included are:

> The transcript, the twenty-seven volumes of the statement of facts (vols. II-XXVIII), and one exhibit volume in trial court cause number 359805;
>
> The briefs, Court of Criminal Appeals opinions, and miscellaneous motions, papers and orders in appeal number 69081.

The record of Mr. Guerra's state habeas corpus application will be sent under separate cover.

Please stamp the date of receipt of these documents on the enclosed copy of this letter and return it to me in the enclosed postage-paid, self-addressed envelope.

By copy of this letter, I am notifying Petitioner's counsel of this matter.

Thank you for your assistance in this matter.

Sincerely,

WILLIAM C. ZAPALAC
Assistant Attorney General
Enforcement Division
(512) 463-2080

Encl.
WCZ/br

c: Mr. Scott J. Atlas
2500 First City Tower
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Lt: Gee
Stan
Sandra M
FAX

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Belota

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

0-f-pleas

Scott

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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 TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§ § § § §	

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent ("the Director"), by the Attorney General of Texas, and files this Opposition to Petitioner's Motion for Leave to Proceed *In Forma Pauperis*. The Director would respectfully show the Court as follows.

I.

On or about February 1, 1993, Respondent ("Guerra") filed his petition for writ of habeas corpus. Contemporaneously, he filed a motion to leave to proceed *in forma pauperis*. In the motion and accompanying affidavit, he states that he is indigent and does not possess sufficient means to pay for the costs of the litigation. The supporting affidavit, however, reveals that Guerra currently has $192.59 in his Inmate Trust Fund account. This is verified by the Certificate of Tina Caldwell, an authorized officer of the Texas Department of Criminal Justice, Institutional Division, and by a letter to Guerra's attorney, signed by Guerra, a legal assistant, and Ms. Caldwell.

II.

The decision whether to grant *in forma pauperis* status to a habeas petitioner under 28 U.S.C. §1915(d) is committed to the discretion of the district court. *Green v. Estelle*, 649 F.2d 298, 302 (5th Cir. 1981). The court may order a petitioner to make either full or partial payment of the required fees, depending on the petitioner's available financial resources. *Williams v. Estelle*, 681 F.2d 946, 947 (5th Cir. 1982). To determine whether payment should be required, the court must examine the person's financial condition to ascertain whether ordering payment would result in the imposition of an undue hardship. *Prows v. Kastner*, 842 F.2d 138, 140 (5th Cir. 1988).

III.

The filing fee in a habeas corpus case is $5.00. There are no fees for serving the petition; if the court concludes that an answer is warranted, a show cause order is issued and the clerk's office serves the respondent. It would appear that Guerra now has sufficient funds in his Inmate Trust account to pay the filing fee without suffering undue financial hardship. Whether he should bear subsequent expenses of the litigation, in whole or in part, can be determined as the expenses arise.

WHEREFORE, PREMISES CONSIDERED, the Director opposes Guerra's motion for leave to proceed *in forma pauperis* to the extent that Guerra should be ordered to pay the filing fee for this habeas corpus case and that a decision on his responsibility for later expenses be deferred until those expenses arise.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC*
Assistant Attorney General
Southern District #8615

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Fax No. (512) 463-2084

ATTORNEYS FOR RESPONDENT

*Counsel of record

CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Opposition to Petitioner's Motion to Proceed *In Forma Pauperis* has been served by facsimile transmission to (713) 758-~~2024~~ 2346, and by placing same in the United States Mail, postage prepaid, on this the 18th day of February, 1993, addressed to: Mr. Scott J. Atlas, 2500 First City Tower, 1001 Fannin, Houston, Texas 77002-6760.

WILLIAM C. ZAPALAC
Assistant Attorney General

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Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 18, 1993

The Honorable Michael Milby,Clerk
United States District Court
Southern District of Texas
Houston Division
P.O. Box 61010
Houston, Texas 77208

Re: *Guerra v. Collins,* No. H-93-290

Dear Sir:

Enclosed please find the original and one (1) copy of **Respondent's Opposition to Petitioner's Motion to Proceed *In Forma Pauperis*** to be filed among the papers in the above referenced cause.

By copy of this letter, I am forwarding a copy of this instrument to the Petitioner's attorney.

Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

Thank you for your kind assistance in this matter.

Sincerely,

WILLIAM C. ZAPALAC
Assistant Attorney General
Enforcement Division
(512) 463-2080

WCZ/br
c: Mr. Scott J. Atlas
2500 First City Tower
1001 Fannin
Houston, Texas 77002-6760

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 TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent ("the Director"), by the Attorney General of Texas, and files this Opposition to Petitioner's Motion for Leave to Proceed *In Forma Pauperis*. The Director would respectfully show the Court as follows.

I.

On or about February 1, 1993, Respondent ("Guerra") filed his petition for writ of habeas corpus. Contemporaneously, he filed a motion to leave to proceed *in forma pauperis*. In the motion and accompanying affidavit, he states that he is indigent and does not possess sufficient means to pay for the costs of the litigation. The supporting affidavit, however, reveals that Guerra currently has $192.59 in his Inmate Trust Fund account. This is verified by the Certificate of Tina Caldwell, an authorized officer of the Texas Department of Criminal Justice, Institutional Division, and by a letter to Guerra's attorney, signed by Guerra, a legal assistant, and Ms. Caldwell.

II.

The decision whether to grant *in forma pauperis* status to a habeas petitioner under 28 U.S.C. §1915(d) is committed to the discretion of the district court. *Green v. Estelle,* 649 F.2d 298, 302 (5th Cir. 1981). The court may order a petitioner to make either full or partial payment of the required fees, depending on the petitioner's available financial resources. *Williams v. Estelle,* 681 F.2d 946, 947 (5th Cir. 1982). To determine whether payment should be required, the court must examine the person's financial condition to ascertain whether ordering payment would result in the imposition of an undue hardship. *Prows v. Kastner,* 842 F.2d 138, 140 (5th Cir. 1988).

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WHEREFORE, PREMISES CONSIDERED, the Director opposes Guerra's motion for leave to proceed *in forma pauperis* to the extent that Guerra should be ordered to pay the filing fee for this habeas corpus case and that a decision on his responsibility for later expenses be deferred until those expenses arise.

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*Counsel of record

CERTIFICATE OF SERVICE

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WILLIAM C. ZAPALAC
Assistant Attorney General

+ Pl dgs

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 TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	

Petitioner's motion granted
~~denied~~
3/22/93

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TO THE HONORABLE JUDGE OF SAID COURT:

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Assistant Attorney General