BEFORE THE TEXAS BOARD OF PARDONS AND PAROLES

In Re

LEONEL TORRES HERRERA

REQUEST FOR RECOMMENDATION TO THE GOVERNOR FOR NINETY (90) DAY REPRIEVE AND COMMUTATION OF DEATH SENTENCE

Mark Evan Olive
Attorney at Law
2804 Glennis Court
Tallahassee, FL 32304
904-644-7710
Florida Bar #0578533

Robert L. McGlasson
Attorney at Law
Texas Resource Center
1206 San Antonio
Austin, TX 78501
512-320-8300
Texas Bar #13634050

Phyllis L. Crocker
Attorney at Law
Texas Resource Center
1206 San Antonio
Austin, TX 78501
512-320-8300
Texas Bar #05087780

ERNIE HULSEY & ASSOCIATES

11907 Corona Lane
Houston, Texas 77072
Business Phone (713) 981-0294

SUBJECT: Raul Herrera, Jr.

EXAMINATION CRITERIA: The following relevant questions were constructed and administered. The subject's verbal response follow each question in quotations.

1. At the time the D.P.S. Officer was shot, were you in your Uncle Leo's Cougar with your father? "YES"

2. At the time the D.P.S. Officer was shot, was Leonel Herrera in the Cougar with you and your father? "NO"

3. Did you hear the shot that your father fired when the D.P.S. Officer was shot? "YES"

4. When your father got back into the car after the shot was fired, did he say words in Spanish that meant he had shot the D.P.S. Officer? "YES"

5. Was your father driving the Cougar when the second Police Officer stopped the car? "YES"

6. Did you see your father step out of the Cougar with a pistol in his hand? "YES"

7. Did you actually see your father shoot the second officer that stopped you? "YES"

8. Prior to the shooting, did your father leave your Uncle Leonel at your grandmother's house? "YES"

9. At the time the second police officer was shot, was Leonel Herrera in the Cougar with you and your father? "NO"

EXAMINATION RESULTS: After careful analysis of the subject's polygrams, it is this examiner's professional opinion that there was no significant criteria indicative of deception. The subject was considered to be truthful when he answered the above listed relevant questions.

DATED: April 30, 1993

ERNIE HULSEY & ASSOCIATES

11907 Corona Lane
Houston, Texas 77072
Business Phone (713) 981-0294

SUBJECT: Norma Herrera Rodriguez

EXAMINATION CRITERIA: The following relevant questions were constructed and administered. The subject's verbal response follows each question in quotations.

1. On the day the officers were shot, did Raul drop Leonel off at your house in the late afternoon? "YES"

2. Was Leonel messed up and staggering when Raul left him at your house? "YES"

3. Did Leonel pass out on your bed on the evening of the shootings of the officers? "YES"

4. Did Raul drive off in Leonel's car after leaving Leonel at your house? "YES"

5. Was Leonel at your house from before dark until you took him home at approximately 12:30 A.M. on the night the officers were shot? "YES"

6. Did Raul come to your house on the night the officers were shot and say to you, "Tell Leonel to take the blame?" "YES"

7. Did Raul threaten you to keep you from saying that Leonel was at your house when the officers were shot? "YES"

8. Before the first trial was over, did Raul tell you it was because of him and Chavello that Leonel was in jail? "YES"

EXAMINATION RESULTS: Evaluation of the subject's polygrams failed to reveal any criteria indicative of deception. In this examiner's professional opinion the subject was being truthful when she answered the above listed relevant questions.

DATED: MAY 2, 1993

TABLE OF CONTENTS

INTRODUCTION

Leonel Herrera is scheduled to be executed by the State of Texas on May 12, 1993. He requests that the members of this Honorable Board recommend that the Governor of the State of Texas grant a reprieve to remain in effect for at least ninety (90) days, and/or that the Governor grant a commutation of sentence.[1] The bases for Mr. Herrera's request include:

1.) there are serious and ever growing doubts about his guilt;

2.) Texas state courts cannot hear new evidence of innocence presented over thirty (30) days after a conviction, and as a result of a 1993 United States Supreme Court decision in Mr. Herrera's case no federal court can grant a reprieve from execution, notwithstanding such later presented yet compelling evidence of innocence;

3.) this Board and the Governor now share the sole and heavy burden of implementing a policy which provides the best humanly possible chance that Texas will not execute a person simply because compelling evidence of innocence came more than thirty (30) days after his or her trial.

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[1]By letter dated May 4, 1993, counsel presented the Board with a request for such recommendations to the Governor. That letter is reproduced at Appendix 23. As promised in that letter, and as permitted by representatives of the Board, the instant submission supplements the May 4, 1993, request.

On February 18, 1992, Mr. Herrera also filed an application for a reprieve with the Governor. That application has not been acted upon, and it too will be supplemented immediately with the new information presented here.

The State of Texas has no interest in executing the wrong man. Mr. Herrera believes that this Board and the Governor are prepared to study, determine, and require the type of proceedings which ought to be conducted to best avert such an injustice.[2] It would be a cruel irony, especially given the most recent polygraph evidence of Mr. Herrera's innocence, if he, the person whose case could be most responsible for imminent commutation reform in Texas, became simply a vestige of a flawed and jettisoned clemency commutation process.

I. THE STATE HAS PROMISED MR. HERRERA AND THE UNITED STATES SUPREME COURT THAT A MEANINGFUL CONSIDERATION OF MR. HERRERA'S INNOCENCE WILL BE PROVIDED IN THIS FORUM

Last year Leonel Herrera presented evidence in federal court that he was innocent of the offense for which he is scheduled to be executed. That evidence included the eyewitness account of the actual killer's son, and the confessions from the actual killer to his lawyer and to other associates. A federal district court judge, Judge Ricardo H. Hinojosa, entered an order staying the Applicant's execution in order to allow consideration of the evidence.

The State of Texas appealed, and the United States Court of Appeals for the Fifth Circuit vacated the district court judge's order. Mr. Herrera sought review in the United States Supreme

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[2]Prominent members of the bar have recommended that the commutation process in capital cases be revamped. See Appendix 1 (May 5, 1993, letter to Governor Ann Richards and Chairman Kyle from Gabrielle McDonald, Harley Clark, Bill Whitehurst, and Steve Martin).

Court and that Court agreed to determine whether newly presented evidence of innocence could provide a basis for federal habeas corpus relief.

Before the Supreme Court, the State of Texas argued that neither state nor federal law provided a forum for Mr. Herrera's evidence of innocence, and that "executive clemency is the appropriate vehicle to achieve justice where doubt as to guilt cannot result in reversal or new trial under existing legal standards." Respondent's brief, Herrera v. Collins, No. 91-7328, at iii. The Supreme Court embraced the State's contentions that clemency was the appropriate response to evidence of innocence presented after a conviction: while "[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible," Herrera v. Collins, 113 S.Ct. 853, 868 (1993), "[c]lemency ... is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.... Executive clemency has provided the 'fail safe' in our criminal justice system," Herrera, supra, 113 S.Ct. 866, 868, for innocent persons.

In Herrera, the State promised that clemency would provide a safety net. Now Mr. Herrera is before the Board and the Governor, where the State of Texas and the Supreme Court directed him to seek "justice." He seeks what the State promised the United States Supreme Court and Mr. Herrera was available--an "encumbered", "[u]nconstrained", "non-judicial" remedy "'to satisfy the intuition that judicial norms may not always suffice

in fixing a punishment as difficult as death.'" Respondent's brief, Herrera v. Collins, No. 91-7328, at 32. Indeed, the State has promised that the Texas clemency process would allow consideration of any hearsay evidence presented by Mr. Herrera, id., that Mr. Herrera "would benefit from the fact that the decision to grant clemency is not subject to review," and that here was where an innocent person would receive unfettered relief, "for virtually any reason at all." Id.

II. MR. HERRERA'S EVIDENCE OF INNOCENCE, INCLUDING AN EXPERT POLYGRAPHER'S OPINION THAT AN ALIBI WITNESS AND A WITNESS TO THE CRIME ARE BEING TRUTHFUL WHEN THEY SAY MR. HERRERA WAS NOT AT THE SCENE, DESERVES MEANINGFUL CONSIDERATION

The offense for which Mr. Herrera is scheduled to be executed occurred on September 29, 1981. On that date, two law enforcement officers were shot within several minutes of each other. Department of Public Safety Officer David Rucker was shot and killed on FM 100 between Los Fresnos and Port Isabel, Texas. Los Fresnos Police Officer Enrique Carrisalez was shot thereafter when he stopped a car for speeding just outside of Los Fresnos. Office Carrisalez died nine days later.

The post-conviction evidence which the State successfully argued that the courts could not consider in Herrera included:

1. the affidavit and proffered testimony of the actual killer's son, an eyewitness to the crimes;[3]

2. the affidavit and proffered testimony of an attorney,

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[3]See Appendix Items 4 and 5.

and several other persons, who swear that the real culprit, Raul Herrera, Sr., confessed his guilt to them.[4]

Mr. Herrera presents that testimony here, but, more importantly, Mr. Herrera presents other new and compelling evidence. Specifically, Mr. Herrera presents the sworn statement of an alibi witness, and the sworn statements of two additional persons to whom the real murderer confessed.

But most important of all, Mr. Herrera presents evidence that should deeply trouble the State of Texas--the expert opinion of a highly credible polygrapher that the alibi witness, the eyewitness, and the persons to whom the real murderer confessed are all being truthful.

A. The Expert is Unimpeachable

Mr. Herrera chose a respected and credentialed expert to examine the witnesses in this case. The expert's affidavit contains the following information about his background and expertise:

> 1. My name is Ernie Hulsey, and I am a resident of Harris County, Texas, am over the age of eighteen, and am competent to give this affidavit.
>
> 2. I am a licensed polygraph examiner in the State of Texas, and have been licensed since 1973. I am currently the Chairman of the State of Texas Polygraph Examiners Board, which is the state's licensing and policing agency for polygraph examiners. I was appointed to the Board by Governor Bill Clements in 1989.
>
> 3. I have had extensive experience in

[4]See Appendix Items 12, 14, and 15.

law enforcement, both as a trooper with the Texas Department of Public Safety, and as a consultant to and contractor with law enforcement agencies and organizations throughout the State of Texas. I graduated from the Texas Department of Public Safety Academy in 1966, and became a state trooper with the Department. In 1972, while employed with the Department of Public Safety, I graduated from the Texas A & M University Police Polygraph School, and from 1972 through 1975 I was a Department of Public Safety Regional Polygraph Examiner in Houston, Texas.[5]

4. After I left the Department of Public Safety and went into private practice, I have conducted numerous polygraph examinations for and consulted with the Department of Public Safety and many other law enforcement agencies throughout Texas. For example, at the present time I am on contract with the Harris County Sheriff's Department to conduct polygraph examinations for their office. I have also conducted examinations for, among others, the Texas Attorney General's office, many other state law enforcement agencies, and many local sheriff and police departments throughout the state. In that capacity I have conducted many such examinations. In total I have conducted over 35,000 examinations, involving murder, robbery, rape, arson, burglary, and numerous other criminal offenses. I have also been an instructor at both the Texas A & M Police Polygraph School and the University of Houston Polygraph School. I was the director of the University of Houston School from 1986 through 1989.

5. I conducted the polygraph examinations on the following persons on the indicated dates:

Raul Herrera, Jr., April 30, 1993
Jesse Gomez, May 2, 1993
Norma Herrera, May 2, 1993
Antonio Rivera, May 2, 1992

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[5]The two victims in this case were police officers, one a Department of Public Safety officer and one a Los Fresnos Police Officer.

See Appendix 2.[6]

B. The Eyewitness is Telling the Truth--His Father Killed the Officers

Raul Herrera, Jr., has sworn that it was his father, not Leonel Herrera, who killed the police officers in this case. His detailed statements in this regard are set out completely at Appendix items 4 and 5.

The expert polygrapher found Raul, Jr., to be truthful. In his report, the expert explains:

POLYGRAPH EXAMINATION REPORT

SUBJECT:	Raul Herrera, Jr.; AGE: 21; DOB: 11/04/71; Born in McAllen, Texas
CLIENT:	Mr. Robert McGlasson Mr. Mark Olive Attorneys at Law
EXAMINATION METHOD:	The Balanced Flexibility Technique was utilized on each test chart. Three test charts were administered.
STATEMENT OF FACT:	The case information was submitted by attorney, Robert McGlasson. According to the case information submitted, on September 29, 1981, Texas State Trooper, David Rucker and Los Fresnos Police Officer Enrique Carrisalez were shot and killed during two different confrontations with, apparently, the same gunman while on traffic stops. The person accused of the two murders was Leonel Herrera. Herrera was convicted of both murders. Through their investigation, attorneys for Leonel Herrera obtained information implicating Raul Herrera, Sr., Leonel's brother, as the actual murderer. Evidence revealed by the investigation showed that Leonel Herrera was left at his mother's house passed out while Raul Herrera, Sr.,

[6]This expert's resume is submitted with his affidavit at Appendix 2.

Chavello Lopez and Raul Herrera, Jr., who was approximately 9 years and 10 months old at the time, left in Leonel Herrera's Cougar. The information reflected that, before his death in 1984, Raul Herrera, Sr., told several people that it was he and not Leonel who had killed the officers.

The polygraph subject, Raul Herrera, Jr., is now stating he was with his father in the Cougar with Chavello Lopez and his father in fact got out of the car to talk to the D.P.S. Trooper and after firing a shot got back into the car and said, in Spanish, words that meant he had shot the officer.

After driving into Los Fresnos he was stopped by a Police Officer and after opening the door turned and shot the officer. Raul, Jr. stated he saw his father step out of the car with a gun and fire the shot that killed the Los Fresnos Officer.

The subject was being questioned on the polygraph to determine his truthfulness on the statements he made.

EXAMINATION CRITERIA:

The following relevant questions were constructed and administered. The subject's verbal response follow each question in quotations.

1. At the time the D.P.S. Officer was shot, were you in your Uncle Leo's Cougar with your father? "YES"

2. At the time the D.P.S. Officer was shot, was Leonel Herrera in the Cougar with you and your father? "NO"

3. Did you hear the shot that your father fired when the D.P.S. Officer was shot? "YES"

4. When your father got back into the car after the shot was fired, did he say words in Spanish that meant he had shot the D.P.S. Officer? "YES"

5. Was your father driving the Cougar when the second Police Officer stopped the car? "YES"

6. Did you see your father step out of the Cougar with a pistol in his hand? "YES"

7. Did you actually see your father shoot the second officer that stopped you? "YES"

8. Prior to the shooting, did your father leave your Uncle Leonel at your grandmother's house? "YES"

9. At the time the second police officer was shot, was Leonel Herrera in the Cougar with you and your father? "NO"

EXAMINATION After careful analysis of the subject's polygrams, it is this examiner's professional opinion that there was no significant criteria indicative of deception. The subject was considered to be truthful when he answered the above listed relevant questions.

Appendix 3.

C. The Alibi Witness is Telling the Truth--Raul, Sr., was in Leonel's Car, and Leonel Was at her Home

Leonel Herrera did not present an alibi witness to the federal courts. There is one; she is telling the truth.[7]

According to Norma Herrera Rodriguez, she saw both Leonel and Raul, Sr., on the night of the offense. Leonel was asleep in her bed; Raul was in Leonel's car. Her affidavit details what happened, see Appendix 7, and the expert polygrapher asked her all about it:

SUBJECT: Norma Herrera Rodriguez; AGE: 40; DOB: 10/26/53; Born in McAllen, Texas

CLIENT: Robert McGlasson
Mark Olive
Attorneys at Law

EXAMINATION The Balanced Flexibility Technique was utilized on

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[7]This witness has not previously sworn to this alibi for Leonel Herrera because she has been threatened and coerced into silence. Appendix 7.

METHOD: the examination.

STATEMENT OF FACT: This examination was given as part of an investigation in the Leonel Herrera case. Other background information is provided in other reports submitted by this examiner.

The subject was being examined to determine her truthfulness concerning her statements. According to the case information submitted, the subject was home the evening of the shootings of the police officers. Her statement reflected that Raul Herrera, Sr. had brought Leonel to her house on that evening before dark and that she had taken Leonel to his house about 12:30 A.M.

During the pre-test phase of the interview the polygraph subject stated on the day of the shootings she was home getting ready to go to a concert. She stated Raul Herrera, Sr. drove up in Leonel's Cougar and let Leonel out. She stated Leonel was visibly messed up and staggering. She could see he had blood on his shirt and she jumped him about his condition. She stated he told her he didn't want to hear it and went into the house to lay down. She stated she followed him into the house and Raul Herrera, Sr. drove off. She could see someone else in the car, but couldn't see who it was.

The polygraph subject then related that Leonel went into her bedroom and passed out on the bed. Her date cancelled so she stayed home. She remembered the baby sitter came and stayed for a little while.

The polygraph subject then stated that sometime around midnight, or a little after, Raul Herrera, Sr. came to the door with someone else and told her to tell Leonel to take the blame. Raul Herrera, Sr. then left quickly. She said Leonel came to the bedroom door and asked "What did he say," and she told him. Leonel told her to take him home. She stated Leonel talked to his wife on the phone before they left and then she took him home.

The polygraph subject then stated when they arrived at Leonel's house his wife said to him that he was to take the blame and then Leonel ran away.

The polygraph subject then stated Leonel couldn't have killed the officers because he was with her and her mother. She also stated Raul Herrera, Sr. threatened her to keep her quiet about what she knew. Raul Herrera, Sr. told her he would get Leonel out.

EXAMINATION CRITERIA: The following relevant questions were constructed and administered. The subject's verbal response follows each question in quotations.

1. On the day the officers were shot, did Raul drop Leonel off at your house in the late afternoon? "YES"

2. Was Leonel messed up and staggering when Raul left him at your house? "YES"

3. Did Leonel pass out on your bed on the evening of the shootings of the officers? "YES"

4. Did Raul drive off in Leonel's car after leaving Leonel at your house? "YES"

5. Was Leonel at your house from before dark until you took him home at approximately 12:30 A.M. on the night the officers were shot? "YES"

6. Did Raul come to your house on the night the officers were shot and say to you, "Tell Leonel to take the blame?" "YES"

7. Did Raul threaten you to keep you from saying that Leonel was at your house when the officers were shot? "YES"

8. Before the first trial was over, did Raul tell you it was because of him and Chavello that Leonel was in jail? "YES"

EXAMINATION RESULTS: Evaluation of the subject's polygrams failed to reveal any criteria indicative of deception. <u>In this examiner's professional opinion the subject was being truthful when she answered the above listed relevant questions</u>.

Appendix 6.

D. The Persons to Whom Raul Confessed are telling the Truth

1. Antonio Rivera (took polygraph)

In addition to the above information which was not presented to and cannot be considered by the courts, the following new evidence has been uncovered. Before Leonel Herrera was arrested, Raul Herrera, Sr., confessed to Antonio Rivera. Antonio Rivera has truthfully recounted that conversation:

POLYGRAPH EXAMINATION REPORT

SUBJECT:	Antonio Rivera; AGE: 73; DOB: 08/03/19; Born in Quaquilla, Mexico
CLIENT:	Mr. Robert McGlasson Mr. Mark Olive Attorneys at Law
EXAMINATION METHOD:	The Balanced Flexibility Technique was utilized on the examination.
STATEMENT OF FACT:	This examination was given as part of an investigation in the Leonel Herrera case. Other background information is provided in other reports submitted by this examiner. According to the case information submitted, the polygraph subject had stated that Raul Herrera, Sr. came by to see him a day or two before Leonel was arrested. He stated Raul Herrera, Sr. was upset and stated, "Dummy Leonel got the blame for shooting the two officers." The polygraph subject then stated Raul Herrera, Sr. told him he was the one who shot the two officers. The polygraph subject stated he had not heard about the shooting at that time, however he told Raul Herrera, Sr. he should get an attorney because they would be after him.
EXAMINATION CRITERIA:	At that time the examination was constructed and administered. Each relevant question asked is listed below, along with the subject's verbal response.

1. Are you going to answer with the truth on each question? "YES"

2. Before Leonel was arrested for shooting the officers, did Raul come by your house? "YES"

3. At that time, did Raul tell you that he was the one who killed the two officers? "YES"

4. Did Raul tell you, "Dummy Leonel got the blame for shooting the two officers?" "YES"

5. Did you make up any of this information? "NO"

6. Are you lying when you say Raul told you he shot the officers? "NO"

EXAMINATION RESULTS: After careful analysis of the subject's polygrams, it is this examiner's professional opinion that there was no significant criteria indicative of deception. The subject was considered to be truthful when he answered the above listed relevant questions.

Appendix 8. Mr. Rivera provides more detail about this conversation in his recently provided affidavit. Appendix 9.

2. Jessie Gomez (took polygraph)

Raul, Jr., also confessed to Jessie Gomez, before Leonel went to trial. Mr. Gomez has truthfully reported that confession, according to Mr. Hulsey:

POLYGRAPH EXAMINATION REPORT

SUBJECT: Jessie Gomez; AGE: 29; DOB: 01/31/64; Born in Raymondville, Texas

CLIENT: Robert McGlasson
Mark Olive
Attorneys at Law

EXAMINATION METHOD: The Balanced Flexibility Technique was utilized on the examination.

STATEMENT OF FACT: This examination was given as part of an investigation in the Leonel Herrera case. Other background information is provided in other

reports submitted by this examiner.

According to the case information submitted, the polygraph subject had stated that Raul Herrera, Sr., told him, prior to Leonel's trial, that he, Raul Herrera, Sr. had been the one who killed the two officers and not Leonel.

The subject was being examined to determine his truthfulness about the issue.

During the pre-test phase of the interview the subject stated that Raul Herrera, Sr. had come over to his home sometime prior to Leonel's trial. He stated he and Raul Herrera, Sr. went out to the orchard to talk. Raul Herrera, Sr. was upset and told him that Leonel shouldn't be in jail because he didn't kill the two officers. The polygraph subject then stated that Raul Herrera, Sr. told him he was in Leonel's car and after shooting the officers threw the gun in a canal.

EXAMINATION CRITERIA:

At that time the examination was constructed and administered. Each relevant question asked is listed below, along with the subject's verbal response.

1. Are you going to answer each question on this test with the truth? "YES"

2. Did Raul Herrera, Sr. actually tell you that Leonel shouldn't be in jail, because he didn't kill the two officers? "YES"

3. Did Raul Herrera, Sr. actually tell you he, himself had killed the two officers while in Leonel's car? "YES"

4. Did Raul Herrera, Sr. then tell you he had thrown the gun in a canal? "YES"

5. Did Raul Herrera, Sr. tell you this prior to Leonel's trial? "YES"

6. Did you make up any of the information that you put in the affidavit you signed? "NO"

7. Did you tell the complete truth in the affidavit you signed? "YES"

EXAMINATION RESULTS:

After careful analysis of the subject's polygrams, it is this examiner's professional opinion that

there was no significant criteria indicative of deception. The subject was considered to be truthful when he answered the above listed relevant questions.

Appendix 10.

3. Raul, Sr.'s, Attorney

Raul Herrera, Sr., told his attorney that he was the person who killed the police officers. In his affidavit, Mr. Villarreal swears:

> My name is Hector J. Villarreal. I am an attorney licensed to practice in the State of Texas. My address is 400 East Cano, Edinburg, Texas.
>
> In 1984 I represented Raul Herrera, one of Leonel Herrera's brothers, on a charge of attempted murder. When I began representing Raul, he was being held in the Hidalgo County Jail on this charge. I obtained Raul's release on a $25,000 personal recognizance bond from Judge John Domingus.
>
> Shortly after Raul was released from the Hidalgo County Jail, we met in Edinburg to discuss preparing for trial. In the course of that meeting Raul confessed to me that he, not Leonel, had killed Officers Rucker and Carrisalez.
>
> In previous conversations with Raul I had been told that Raul, Leonel, and their father, Jose Herrera, were in the drug trafficking business with the Sheriff of Hidalgo County, Brigido Marmolejo. Raul and Jose were money collectors, and Leonel was a "cutter." As a cutter, Leonel's job was to cut the pure cocaine with filler in preparation for selling it. Leonel always cut the cocaine on South Padre Island. According to Raul, David Rucker, the D.P.S. officer who was killed, was also involved with the drug trafficking business: his job was to act as security for the operation. Every time Leonel went to the Island, Rucker met him and gave him coveralls to wear while he was cutting the cocaine. Part of Rucker's job

was to check the coveralls to insure that Leonel did not take any cocaine.

Raul told me that on September 29, 1981, Leonel was supposed to have gone to South Padre Island to cut cocaine. The plan was that he would drive there with a drug dealer from the East Coast, cut the cocaine and return, as he had done in the past. However, the night before, Leonel had gotten very "coked up." That morning his nose was bleeding badly and he was in no condition to drive to the Island. Raul went in his place. Rucker was not pleased with the switch -- he did not know Raul and was used to working with Leonel. Raul and Rucker had a harsh argument about the switch and the deal did not go down because of it. When Raul and the East Coast dealer were on the way back from the Island, Rucker pulled them over on FM 100. Another argument ensued and Raul shot Rucker. Shortly thereafter, Raul shot Officer Carrisalez when he was stopped for speeding.

Raul told me that he drove Leonel's car to the Island. He had his own set of keys to the car because he and Leonel had keys to each other's cars. Leo always kept his identification (Social Security card) in the car.

Raul did not say anything about this before Leonel was convicted because he thought Leonel would be acquitted. However, Raul told me that when Leonel was convicted and sentenced to death, Raul began blackmailing Sheriff Marmolejo. According to Raul, Sheriff Marmolejo knew that Raul killed the two officers and that D.P.S. Officer Rucker was working in the drug trade because both Raul and Rucker worked for him. While Raul was in jail on the attempted murder charge in 1984 he began threatening to "spill the beans" on the Sheriff if he did not receive money from him. After he was released, he said he wanted more money or he would "come clean" on what had really happened with the police killings.

After Raul was released from jail, he was out for several weeks. Then, on September 8,

1984, the Saturday before the attempted murder trial was to begin, he was shot in the back of the neck and killed by Jose Isabel Lopez. Lopez was charged with murder, pled guilty to manslaughter and received a ten year probated sentence. It is my understanding that Lopez worked for Sheriff Marmolejo in the drug trafficking business and that Raul was killed for threatening to talk about the killing of the two officers.

Appendix 12.

4. Three Others Persons

Raul, Sr., also confessed to at least three other persons, Adan Alaniz,[8] Juan Franco Palacious,[9] and Jose Ybarra, Jr.[10]

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[8]Mr. Alaniz' affidavit is contained at Appendix 13. His affidavit has never been presented to the courts. He states:

1. My name is Adan Alaniz, and I am over the age of eighteen and am competent to give this statement. I am a resident of Edinburg, Hidalgo County, Texas. I own an auto body shop here, which I have owned since 1975.

2. I know Raul Herrera, the brother of Leonel Herrera, who is on death row for the killing of two Cameron County police officers. I first met Raul when were still kids, about 1966, at the local golden gloves boxing club. I was a friend of his and saw him regularly until he was killed. I also knew Leonel, but I never spent much time with him.

3. After the crime involving the two police officers in Los Fresnos, a few months before Raul was killed, I was with him on several occasions when he spoke to me about these killings. One time we were driving around together in my car in Edinburg, and he was talking about how he'd gotten a letter from his brother Leonel. Then, more quietly, he said something about how Leonel had no business being in the pen for this crime. He said that Leonel had nothing to do with the whole thing. Raul said he was the one who

shot the police officers.

4. Another time, only about two months before Raul was killed, I was at Raul's house and he was showing me some letters from his brother Leonel and from another death row inmate named Cuevas. Once again, Raul said that his brother Leonel shouldn't be on death row, because he (Raul) was the killer.

5. When Raul told me he'd done these killings, I didn't ask him any questions or say anything to him, even though it seemed like he wanted to talk about it. I didn't want to know more about it, because I was afraid of Raul and I didn't want to get involved in any way and have Raul coming after me. When he told me these things, he didn't say anything about how it happened or give any specifics, and I didn't ask any questions.

.....

8. During the last years he was alive, Raul was acting differently. It's hard to describe, but he seemed to always have alot weighing on his mind. All he wanted to talk about was his brother Leonel. He would say how Leonel never had a chance, and you could tell he felt bad about his brother.

9. I've never said anything to anybody about what Raul told me about those cop killings. I know I probably should have, but like I said, I just didn't want to get involved, and no one ever came and asked me about this.

[9]This affidavit appears at Appendix 14. This person states:

1. I am Juan Franco Palacios. I reside in Pharr, Texas.

2. I was a friend of Raul Herrera, the brother of Leonel Herrera for many years. Raul Herrera was murdered about six years ago.

3. Several years ago Raul Herrera and I were both locked up in the Hidalgo County Jail at the same time. I believe the year

In sum, the evidence that Leonel Herrera did not kill the officers in this case is unsettling. Indeed, with this evidence, it is unlikely that a prosecutor would even choose to go to trial. Surely this Board must do what it can now to correct an injustice.

---

was 1984. Raul was in jail on some sort of charge from a domestic problem that happened between him and his wife Blanca. I remember that at the time that we were both locked up together, Raul had a broken leg and he was wearing a cast.

4. Raul was extremely depressed when we were in jail together. One night he came to me and he told me that he had many things weighing very heavy on his mind and he needed to free himself of that. He then told me that he is the one who should be having a death sentence and not his brother Leonel. He told me that he, Raul, was the one that killed police officers Rucker and Carrisalez and not his brother Leo.

[10]This witness states:

1. My name is Jose Ybarra Jr. I currently reside on Mesquite Road, in Monte Alto, Texas. I am 43 years old. I attended junior high school with Raoul Herrera and Leonel Herrera in Edinburg, Texas.

2. In the summer of 1983, I ran in to Raul Herrera outside of the Las Vegas Lounge, which is located in Edingburg, Texas. I immediately noticed that he looked very disturbed. As I approached him, he told me that he was the one who had killed the two cops. Because he looked so disturbed and upset, I became nervous and continued past him into the club. That was the last time I saw Raul Herrera.

Appendix 15.

III. DOUBT ABOUT GUILT IS THE QUINTESSENTIAL CLEMENCY CONCERN, AND THE MOST PROCESS POSSIBLE SHOULD BE AFFORDED THE POSSIBLY INNOCENT

The execution of an innocent person is a prosecutor's worst nightmare.[11] The general public is also frightened by that specter--fifty-eight per cent of the population express doubt about executing the wrong person as the most serious concern with capital punishment.[12]

After the Herrera opinion, the United States Senate began serious consideration of a bill to require the federal courts to address late claims of innocence. Appendix 22. Hearings held in the Senate reflected great concern for the potential for injustice wrought by the opinion.

Plainly the people of Texas, like all citizens, would abhor the execution of an innocent person. Accordingly, doubt about guilt should be resolved, or not, in a painstakingly delicate manner. Governors and clemency boards from other death penalty states have successfully struggled with the issue, and come fully to grips with the awesome power and responsibility that arises with doubt about guilt. "The test to be applied is not whether one believes that the accused committed the crime in question, but whether one holds that belief without the presence of any reasonable doubt." Commutation Order Entered By Virginia Governor Douglas Wilder On Behalf of Herbert Russell Bassette.

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[11]See Appendix 21, letter from Jim Mattox.

[12]See Sentencing for Life, Americans Embrace Alternatives to the Death Penalty.

Appendix 24. Applying this test, Governor Wilder commuted the sentences of both Herbert Bassette and Joseph Giarratano, Jr. Id. Likewise, the Hon. James Martin, Governor of North Carolina, recently commuted the death sentence of Anson Maynard even though "lengthy, prayerful consideration" left him unsure whether Mr. Maynard was an innocent man:

> I am not convinced that Anson Maynard pulled the trigger to kill Stephen Henry. Nor am I convinced that Anson Maynard is totally innocent. Since it is not clear to me that he was the murderer, I conclude that the most appropriate use of the power of clemency vested in my office is to decide that the State of North Carolina will not carry out the execution....
>
> There is reasonable doubt in my mind. ... For that reason, I have commuted Anson Maynard's death sentence to life in prison without parole. It is cases like this that the power of clemency is given to the governor.

Appendix 24, Commutation Order Entered By James Martin On Behalf of Anson Maynard.

Mr. Herrera is entitled to a similar level of decency and respect for his evidence that he is not guilty. An appropriate process must be in place to deliver such consideration, or Mr. Herrera's execution will be gratuitous cruelty.

APPENDICES

Number	Description
1	Letter to Governor Richards and Chairman Kyle from McDonald, Whitehurst, Clark, and Martin dated May 5, 1993
2	Affidavit of Ernie Hulsey dated May 6, 1993
3	Polygraph Examination Report for Raul Herrera, Jr.
4	Affidavit of Raul Herrera, Jr. dated January 29, 1992
5	Affidavit of Raul Herrera, Jr. dated February 17, 1992
6	Polygraph Examination Report for Norma Rodriguez
7	Affidavit of Norma Rodriguez dated May 6, 1993
8	Polygraph Examination Report for Antonio Rivera
9	Affidavit of Antonio Rivera dated May 2, 1993
10	Polygraph Examination Report for Jessie Gomez
11	Affidavit of Jessie Gomez dated April 23, 1993
12	Affidavit of Hector J. Villarreal dated December 11, 1990
13	Affidavit of Adan Alaniz dated April 25, 1993
14	Affidavit of Juan Franco Palacios dated December 10, 1990
15	Affidavit of Jose Ybarra, Jr. dated January 9, 1991
16	Indictment of Leonel Herrera
17	Verdict Form -- Conviction of Capital Murder dated January 20, 1982
18	Verdict Form -- Sentence (Answers to Special Issues) dated January 21, 1982
19	Judgment of Conviction and Sentence dated January 21, 1982
20	Order Fixing Date of Execution of May 12, 1993

21	Jim Mattox Letter to the Editor, New York Times, April 3, 1992
22	Statement of Sen. Howard M. Metzenbaum on introduction of bill to overturn Supreme Court Herrera Decision dated January 27, 1993, and copy of bill
23	Letter from Mark Olive to Texas Board of Pardons and Parole on behalf of Leonel Herrera dated May 4, 1993
24	Recent grants of clemency from other states based on doubts about guilt

APPENDIX 1

Letter to Governor Richards and Chairman Kyle from McDonald, Whitehurst, Clark, and Martin dated May 5, 1993

May 5, 1993

Governor Ann Richards
State Capitol
Austin, Texas

Jack D. Kyle, Chairman
Texas Board of Pardons and Paroles
2503 Lake Road, Suite 9
Huntsville, Texas

Re: Herrera v. Collins and the Clemency Process for Condemned People Who Maintain their Innocence

Dear Governor Richards and Chairman Kyle:

In the last week, we have followed the case of Gary Graham with great interest and concern. The responsibility to determine whether a possibly innocent person has been sentenced to death presents a grave moral challenge as well as a vexing set of procedural issues. We are writing to express our hope that you will find a way to treat Herrera claims with the kind of creativity, honesty, and dignity that you have sought to introduce into the pardon and parole process since you have borne the responsibility for it in our state.

In January, the U.S. Supreme Court's decision in Herrera v. Collins, 113 S.Ct. 853 (1993), thrust an awesome and new responsibility onto the states. Asked to decide whether the Constitution prevents the execution of a condemned person who, in light of evidence discovered after trial, appears to be innocent, the Court held that the Constitution does not prevent the execution of such a person. In reaching this conclusion, however, the Court said that such a person "is not . . . left without a forum to raise his actual innocence claim[,]" for in Texas, as in any other state, the person "may file a request for executive clemency." Id. at 866. The Court went on to describe the role of clemency in protecting innocent people against execution:

> "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted....
>
> Executive clemency has provided the 'fail-safe' in our criminal justice system...."

Id. at 866, 868.

The practical consequence of this ruling was to allocate to the clemency process of the states the entire responsibility of determining who should live or die under these circumstances. In

so doing, the Court shifted this ultimate responsibility without giving even a hint as to how the responsibility should be carried out.

Our concern is that the clemency process as it now exists in Texas, as in most other states, is sorely inadequate to the task that the Supreme Court has thrust upon it. Prior to Herrera, the Board has always been able to rely on the trial record and the jury's verdict to establish the facts of the case. The guilt of the applicant was not a matter that the Board had to be concerned about or address. Herrera has changed this in the most fundamental way. Now, when faced with a new and credible claim of innocence, the Board must assume duties not unlike those of a judge and jury in determining whether the newly-discovered evidence provides a basis for clemency in order to prevent an irreversible miscarriage of justice. The failure to do so would leave questions unresolved that would continue to haunt this state's justice system, eroding public confidence in the system and preventing closure on bitterly contested and deeply felt issues.

The question that immediately arises is, what kind of hearing is necessary to assure reliable resolution of credible questions of innocence? The kind of hearing that the Board holds in other cases is not likely to be the kind of hearing that the Board can feel confident about in deciding questions of innocence. In other cases, the credibility and value of evidence is predetermined by the jury's verdict or by a judge's findings. There is no predetermination, or even prior consideration, of the evidence in a case that presents a new and credible claim of innocence.

Because the U.S. Supreme Court has thrust the state and the Board into an arena for which it has never developed procedures, we urge you to take the lead in developing procedures for hearing credible claims of innocence. With your leadership, the risk that our state will be subject to legal challenge for failing to develop such procedures will be minimized. More importantly, we can be confident that we are meeting the moral challenge given us by the U.S. Supreme Court as well as the demands of elemental justice.

If we can be of assistance in developing these procedures, we would be glad to do so.

Sincerely,

Gabrielle McDonald

Harley Clark

Bill Whitehurst

Steve Martin

APPENDIX 2

Affidavit of Ernie Hulsey
dated May 6, 1993

State of Texas

County of Harris

Affidavit of Ernie Hulsey

1. My name is Ernie Hulsey, and I am a resident of Harris County, Texas, am over the age of eighteen, and am competent to give this affidavit.

2. I am a licensed polygraph examiner in the State of Texas, and have been licensed since 1973. I am currently the Chairman of the State of Texas Polygraph Examiners Board, which is the state's licensing and policing agency for polygraph examiners. I was appointed to the Board by Governor Bill Clements in 1989.

3. I have had extensive experience in law enforcement, both as a trooper with the Texas Department of Public Safety, and as a consultant to and contractor with law enforcement agencies and organizations throughout the State of Texas. I graduated from the Texas Department of Public Safety Academy in 1966, and became a state trooper with the Department. In 1972, while employed with the Department of Public Safety, I graduated from the Texas A & M University Police Polygraph School, and from 1972 through 1975 I was a Department of Public Safety Regional Polygraph Examiner in Houston, Texas.

4. After I left the Department of Public Safety and went into private practice, I have conducted numerous polygraph examinations for and consulted with the Department of Public Safety and many other law enforcement agencies throughout Texas. For example, at the present time I am on contract with the Harris County Sheriff's Department to conduct polygraph examinations for their office. I have also conducted examinations for, among others, the Texas Attorney General's office, many other state law enforcement agencies, and many local sheriff and police departments throughout the state. In that capacity I have conducted many such examinations. In total I have conducted over 35,000 examinations, involving murder, robbery, rape, arson, burglary, and numerous other criminal offenses. I have also been an instructor at both the Texas A & M Police Polygraph School and the University of Houston Polygraph School. I was the director of the University of Houston School from 1986 through 1989.

5. I conducted the polygraph examinations on the following persons on the indicated dates:

Raul Herrera, Jr., April 30, 1993
Jesse Gomez, May 2, 1993
Norma Herrera, May 2, 1993
Antonio Rivera, May 2, 1992

I prepared reports on each of these examinations for Attorneys Robert McGlasson and Mark Olive.

6. Attached to this affidavit is a copy of my Resume.

Under penalty of perjury I hereby swear that the foregoing is true and correct to the best of my information and belief.

Ernie Hulsey

Sworn to and subscribed before me

this 6th day of May, 1993.

Annette M. Lamoreaux

ERNIE HULSEY
Resume/Personal History

PROFESSIONAL CREDENTIALS

* Licensed Polygraph Examiner In Texas since 1972
  State License #312
* Graduate of Texas Department of Public Safety Academy in 1966
* Graduate of Texas A&M University Police Polygraph School in 1972
* Texas Department of Public Safety-Regional Polygraph Examiner in Houston 1972-1975
* Twenty years experience in Professional Polygraph Testing
* Over 35,000 examinations conducted involving Forgery, Burglary, Robbery, Rape, Murder, Arson, Extortion, Espionage, Sabotage, all types of sex related criminal offenses and numerous other types of criminal offenses
* Proficient in the utilization of the Backster Zone of Comparison, Keeler, Reid, Arther, R & I, Balanced Flexibility Technique and other recognized Techniques
* Instructor Texas A&M University Police Polygraph School from 1977 to 1984
* University of Houston Polygraph School - Director, 1986 to 1989
* Conducted Polygraph Examinations for numerous Defense Attorneys, Prosecutors, Attorney General's Office, Texas Rangers, Texas Department of Public Safety, City, County, State and Federal Law Enforcement Agencies as well as all types of Business and Industry
* Private Polygraph Practice since 1978 as ERNIE HULSEY & ASSOCIATES
* Secretary of Texas State Board of Polygraph Examiners, 1989; Vice Chairman, 1990; Chairman, 1992; Chairman 1993

PROFESSIONAL AFFILIATIONS

* Texas Association of Polygraph Examiners - Board of Directors Member 1980
* American Polygraph Association - Membership Committee 1979 to 1989
* American Association of Police Polygraphists

APPENDIX 3

Polygraph Examination Report for Raul Herrera, Jr.

ERNIE HULSEY & ASSOCIATES

11907 Corona Lane
Houston, Texas 77072
Business Phone (713) 981-0294

April 30, 1993

Robert McGlasson, Mark Olive
Attorneys at Law
1206 San Antonio St.
Austin, Texas 78701

POLYGRAPH EXAMINATION REPORT

SUBJECT: Raul Herrera, Jr.; AGE: 21; DOB: 11/04/71; Born in McAllen, Texas

CLIENT: Mr. Robert McGlasson
Mr. Mark Olive
Attorneys at Law

EXAMINATION METHOD: The Balanced Flexibility Technique was utilized on each test chart. Three test charts were administered.

STATEMENT OF FACT: The case information was submitted by attorney, Robert McGlasson.

According to the case information submitted, on September 29, 1981, Texas State Trooper David Rucker and Los Fresnos Police Officer Enrique Carrizales were shot and killed during two different confrontations with, apparently, the same gunman while on traffic stops. The person accused of the two murders was Leonel Herrera. Herrera was convicted of both murders.

Through their investigation, attorneys for Leonel Herrera obtained information implicating Raul Herrera, Sr., Leonel's brother, as the actual murderer. Evidence revealed by the investigation showed that Leonel Herrera was left at his mother's house passed out while Raul Herrera, Sr., Chavello Lopez and Raul Herrera, Jr., who was approximately 9 years and 10 months old at the time, left in Leonel Herrera's Cougar. The information reflected that, before his death in 1984, Raul Herrera, Sr. told several people that it was he and not Leonel who had killed the officers.

The polygraph subject, Raul Herrera, Jr., is now stating he was with his father in the Cougar with Chavello Lopez and his father in fact got out of the car to talk to the D.P.S. Trooper and after firing a shot got back into the car and said, in Spanish, words that meant he had shot the officer.

After driving into Los Fresnos he was stopped by a Police Officer and after opening the door turned and shot the officer. Raul, Jr. stated he saw his father step out of the car with a gun and fire the shot that killed the Los Fresnos Officer.

The subject was being questioned on the polygraph to determine his truthfulness on the statements he made.

EXAMINATION CRITERIA:

The following relevant questions were constructed and administered. The subject's verbal response follow each question in quotations.

1. At the time the D.P.S. Officer was shot, were you in your Uncle Leo's Cougar with your father? "YES"

2. At the time the D.P.S. Officer was shot, was Leonel Herrera in the Cougar with you and your father? "NO"

3. Did you hear the shot that your father fired when the D.P.S. Officer was shot? "YES"

4. When your father got back into the car after the shot was fired, did he say words in Spanish that meant he had shot the D.P.S. Officer? "YES"

5. Was your father driving the Cougar when the second Police Officer stopped the car? "YES"

6. Did you see your father step out of the Cougar with a pistol in his hand? "YES"

7. Did you actually see your father shoot the second officer that stopped you? "YES"

8. Prior to the shooting, did your father leave your Uncle Leonel at your grandmother's house? "YES"

9. At the time the second police officer was shot, was Leonel Herrera in the Cougar with you and your father? " NO"

EXAMINATION RESULTS: After careful analysis of the subject's polygrams, it is this examiner's professional opinion that there was no significant criteria indicative of deception. The subject was considered to be truthful when he answered the above listed relevant questions.

For any other information, please contact this examiner.

ERNIE HULSEY
President

EH/jh

STATE OF TEXAS
POLYGRAPH EXAMINERS BOARD
STATE LICENSE #312

APPENDIX 4

Affidavit of Raul Herrera, Jr.
dated January 29, 1992

STATE OF TEXAS §

COUNTY OF WALKER §

AFFIDAVIT OF RAUL HERRERA, JR.

Personally appeared before the undersigned officer duly authorized by law to administer oaths, Raul Herrera, Jr., who being duly sworn states on oath:

1. I am Raul Herrera, Jr. I am the nephew of Leonel Herrera, and the son of Leonel's brother Raul Herrera. On September 29, 1981 I witnessed the murders of two police officers who were killed in the Rio Grand Valley. At that time I was nine years old. The first one, whose name I later found out was David Rucker, was shot near Port Isabel, Texas, and the second one, whose name I later found out was Enrique Carrazales, was shot while we were on our way home to Edinburg. He was shot near Los Fresnos. My father, Raul Herrera, shot both of the men. A man named Chavello Lopez was also in the car when my father shot the men. At that time, my father and Chavello were best friends and business partners. They were together almost all the time. My Uncle Leonel was not present with us when my father killed the officers. Only myself, Chavello and my father were in the car when the shootings happened.

2. On the afternoon of the day the shootings happened, I was at my grandfather's house in Mission, Texas. My father was also there, and so was Chavello Lopez, my Uncle Leonel and some other men whose names I did not know, but who I had seen doing business with my father. A sheriff stopped by my grandfather's house that afternoon. We had a barbeque and my father and Uncle

Leonel snorted cocaine a lot of the afternoon. I know the men talked a lot about business and they seemed very upset about something, but I did not know at that time what it was they were upset about.

3. I knew at that time that my grandfather and my father and my Uncle Leonel were in a drug business together with some other people in the valley and I knew that they worked dealing drugs for the sheriff of Hidalgo County. I knew this because my father never hid his business from me. Since the earliest I can remember, he snorted cocaine in front of me. He took me on cocaine deliveries with him, and I was with him often when he was paid for the deliveries. I often went with him to pick up cars in Starr County with drugs in them which we delivered to different places, usually Houston. I always knew where different shipments were kept. My father was training me in his business.

4. When it came to the business, my father was the boss over my Uncle Leonel. Inside our family, it was my father and grandfather that made most of the decisions, made the big deliveries and did the collecting. They made most of the money also. My grandfather had a big ranch house in Mission and another one in Houston to show from the business. My father had some different businesses and also a good house. My Uncle Leonel was more like a junkie. He didn't have anything to show for the business. By 1981, he was very bad on the cocaine, and he spent most of the time wasted from it. Many, many times, especially right before he got locked up for these shootings, I used to see

him passed out from the cocaine with blood all over his face from his nose. He stayed in the business to get the drugs. His job was to cut the drugs for my father. In return they usually gave him mostly cocaine instead of money.

5. After the barbeque at my grandfather's house on the day the shootings happened, me, my father, my Uncle Leonel and Chavello Lopez left in my Uncle Leonel's car which was a gray Cougar. My Uncle Leonel was not driving because he was too wasted on the cocaine. We stopped at several houses and then we drove to the house where by grandmother and my aunt Norma were staying on Eighteenth Street in Edinburg. My Aunt Norma and my grandmother were at home. We dropped my Uncle Leonel off at the Eighteenth Street house, and me, my father and Chavello Lopez drove to some more people's houses whose names I do not know. Then we drove to near Port Isabel where my father killed the first officer. My father actually did the driving. Chavello sat in the front seat next to my father, and I rode in the back seat of the car. The officer that was killed met us at a rest stop off the highway. My father pulled the car over first. He told me to stay down in the car. Then he got out of the car and spoke to the officer and then he shot him. My father got back in the car and we drove away.

6. We were driving back toward Edinburg when we were pulled over by another police officer. My father pulled over the car and opened the driver's side door. He stepped half way out of the car and shot several times. At that time I hid on the

floor between the front and back seats of the car. Then we drove away. We stopped at one or two people's houses on the way back, and then we went to Leonel's common law wife, Lali's house back in Edinburg. We parked the car next to the house and picked up another car there. I do not remember what the other car looked like. My father used a lot of different cars in his business and we were always changing cars. My father talked to my aunt Lali about something at her house and then we left in the different car. We drove back to my Aunt Norma's house on Eighteenth Street. I am not sure what time it was but I know it was very late at night or early in the morning. My Uncle Leonel was still there. I remember my father yelled at my Aunt Norma, and then we left. My Uncle Jesus, who we called Chuy, was also at my Aunt Norma's house when we got there after the shootings. My grandmother Maria was there and so was a friend of the family who goes by the name Ossi. Ossi and I went outside and talked in the alley behind the house. I have not seen my Uncle Leonel since we left him at my Aunt Norma's house on that night.

7. During the years after my father killed those officers, our entire family fell apart. My father stayed in the drug business until 1984, when my father was murdered. He had started drinking a lot and being sloppy with the business. Also around that time, he was arrested for attempted murder for shooting my mother. The night before he was murdered, he cried in front of me. He told me that he had done a lot of wrong things, and he asked me to forgive him for what he did to my Uncle Leonel. I

was twelve years old. I had never seen my father crying before. I remember he made me sign something saying I would do right with my life. The next day me, my father, my brother and Chavello were supposed to go to the beach together. On our way there we stopped at Chavello's house. As we were walking from the street toward the front door of Chavello's house, my father and Chavello started arguing about my Uncle Leonel. Chavello said that my father talked too much. Chavello kept going toward the house and me and my father turned around and were walking back toward our car. Chavello went inside and came right back out and shot my father in the head. Chavello screamed at my brother and me to get out, and we ran to the neighbors.

8. I told a police officer about my father having been the one that shot the police officers and not my Uncle Leonel, but he told me never to say anything about it again. Until now, no attorney for my Uncle Leonel has ever asked me anything about his case. I am telling the truth about what I know to have happened because I know that Leonel Herrera did not kill the police officers.

Further affiant saith not.

Raul Garza Herrera
RAUL GARZA HERRERA

Sworn to and subscribed to me
this 29th day of January, 1992.

Notary Public

My commission expires: 1/29/94

APPENDIX 5

Affidavit of Raul Herrera, Jr.
dated February 17, 1992

State of Texas

County of Walker

Affidavit of Raul Herrera, Jr

1. I am Raul Herrera, Jr. I am the same Raul Herrera, Jr. who signed the affidavit dated January 29, 1992 stating that my father, and not my Uncle Leo, killed Officers Rucker and Carrisalez.

2. Ever since I was a small child I have known that my father and my grandfather were involved in illegal drug trafficking activities with the Sheriff of Hidalgo County, Brigado Marmalejo. I accompanied my father many, many times when he was involved in these activities. Many times I went with my father on trips to Cameron County to different people's houses or to businesses where by father met with different Department of Public Safety (DPS) officers. These DPS officers wore DPS uniforms and drove DPS cars. My father oversaw the loading of illegal drugs from the houses or businesses in Cameron County into the DPS officers' cars. Then the DPS officers drove the cars, full of drugs, back to Hidalgo County. I drove back with my father and we met the DPS cars usually at my grandfather's ranch on 7 Mile Line Road in Mission, TX or at Sheriff Marmalejo's ranch outside of Edinburg, TX. The drugs were loaded into 18 wheeler trucks that carried produce.

3. One of the uniformed DPS officers who regularly made these trips with my dad was the man I later learned was named Officer Rucker. Other DPS officers were aware of these activities even if they were not directly part of it.

4. I remember taking these trips with my father during the year before my father killed the police officers and before my Uncle Leonel's trial. We kept making these trips after my Uncle Leonel's trial, all the way up until my father was killed. DPS officers always acted as security for the drug transfers.

5. I remember very clearly the period when my Uncle Leonel was tried for the murder of the two police officers. My father was very upset during this time. While the trial was going on, different DPS officers, and other police officers, came to my father's house on 6 Mile Line Road in Mission, TX to meet with my father. They had meetings like this almost every night that the trial went on. Sheriff Marmalejo came to one of these meetings. Usually there were 6 or 7 people altogether, including my father. Each night I saw DPS officers in uniform and other police officers in plain clothes at the house talking to my father. They always talked about Uncle Leonel's trial. They were angry and they wanted to make sure my father and my Uncle Leonel were not going to tell the truth about what really happened to the police officers who were killed. Police officers threatened our family. They were frightened that their drug business would be exposed.

6. After my Uncle Leonel was arrested and beaten up, I saw a picture in the newspaper of him being brought from the hospital back to the jail. I recognized one of the police officers as one of the men who I had seen snorting cocaine with my father at my grandfather's ranch, my father's house and the Las Vegas Bar in Edinburg, Tx.

Further affiant sayeth not.

_____
Raul Herrera, Jr

Subscribed and sworn to before me this 17th day of February 1992.

My commission expires 1/29/94

_____
Notary Public

State of Texas
County of Walker

Affidavit of Raul Herrera, Jr.

1. I am Raul Herrera, Jr. I am the same Raul Herrera, Jr. who signed the affidavit dated January 29, 1992 stating that my father, and not my Uncle Leo, killed Officers Rucker and Carrisalez.

2. Ever since I was a small child I have known that my father and my grandfather were involved in illegal drug trafficking activities with the sheriff of Hidalgo County, Briqado Marmalejo. I accompanied my father many many times when he was involved in these activities. Many times I went with my father on trips to Cameron County to different people's houses or to businesses where my father met with different Department of Public Safety (DPS) officers. These DPS officers wore DPS uniforms and drove DPS cars. My father oversaw the loading of illegal drugs from the houses or businesses in Cameron County into the DPS officers' cars. Then the DPS officers drove the cars, full of drugs, back to Hidalgo County. I drove back with my father and we met the DPS cars usually at my

grandfather's ranch on 7 Mile Line Road in Mission, TX or at Sheriff Marmalejo's ranch outside of Edinburg, TX. The drugs were loaded into 18 wheeler trucks that carried produce.

3. One of the uniformed DPS officers who regularly made these trips with my dad was the man I later learned was named Officer Rucker. Other DPS officers were aware of these activities even if they were not directly part of it.

4. I remember taking these trips with my father during the year before my father killed the police officers and before my Uncle Leonel's trial. We kept making these trips after my Uncle Leonel's trial, all the way up until my father was killed. DPS officers always acted as security for the drug transfers.

5. I remember very clearly the period when my Uncle Leonel was tried for the murder of the two police officers. My father was very upset during this time. While the trial was going on, different DPS officers, and other police officers, came to my father's house on 6 Mile Line Road in Mission, TX to meet with my father. They had meetings like this almost every night that the trial went on. Sheriff Marmalejo

came to one of these meetings. Usually there were 6 or 7 people altogether, including my father. Each night I saw DPS officers in uniform and other police officers in plain clothes at the house talking to my father. They always talked about Uncle Leonel's trial. They were angry and they wanted to make sure my father and my Uncle Leonel were not going to tell the truth about what really happened to the police officers were killed. Police officers threatened our family. They were frightened that their drug business would be exposed.

6. After my Uncle Leonel was arrested and beaten up, I saw a picture in the newspaper of him being brought from the hospital back to the jail. I recognized one of the police officers as one of the men who I had seen snorting cocaine with my father at my grandfather's ranch, my father's house and the Las Vegas Bar in Edinburg, TX.

Further affiant sayeth not.

Raul Herrera Jr.
Raul Herrera, Jr.

Subscribed and sworn to before me this 17th day of February 1992.

Phyllis Cloe my commission expires 1/29/94.

APPENDIX 6

Polygraph Examination Report for Norma Rodriguez

ERNIE HULSEY & ASSOCIATES

11907 Corona Lane
Houston, Texas 77072
Business Phone (713) 981-0294

May 2, 1993

Robert McGlasson
Mark Olive
Attorneys at Law
1206 San Antonio Street
Austin, Texas 78701

POLYGRAPH EXAMINATION REPORT

SUBJECT:	Norma Herrera Rodriquez; AGE: 40; DOB: 10/26/53; Born in McAllen, Texas
CLIENT:	Robert McGlasson Mark Olive Attorneys at Law
EXAMINATION METHOD:	The Balanced Flexibility Technique was utilized on the examination.
STATEMENT OF FACT:	This examination was given as part of an investigation in the Leonel Herrera case. Other background information is provided in other reports submitted by this examiner. The subject was being examined to determine her truthfulness concerning her statements. According to the case information submitted, the subject was home the evening of the shootings of the police officers. Her statement reflected that Raul Herrera, Sr. had brought Leonel to her house on that evening before dark and that she had taken Leonel to his house about 12:30 A.M.

During the pre-test phase of the interview the polygraph subject stated on the day of the shootings she was home getting ready to go to a concert. She stated Raul Herrera, Sr. drove up in Leonel's Cougar and let Leonel out. She stated Leonel was visibly messed up and staggering. She could see he had blood on his shirt and she jumped him about his condition. She stated he told her he didn't want to hear it and went into the house to lay down. She stated she followed him into the house and Raul Herrera, Sr. drove off. She could see someone else in the car, but couldn't see who it was.

The polygraph subject then related that Leonel went into her bedroom and passed out on the bed. Her date cancelled so she stayed home. She remembered the baby sitter came and stayed for a little while.

The polygraph subject then stated that sometime around midnight, or a little after, Raul Herrera, Sr. came to the door with someone else and told her to tell Leonel to take the blame. Raul Herrera, Sr. then left quickly. She said Leonel came to the bedroom door and asked "What did he say," and she told him. Leonel told her to take him home. She stated Leonel talked to his wife on the phone before they left and then she took him home.

The polygraph subject then stated when they arrived at Leonel's house his wife said to him that he was to take the blame and then Leonel ran away.

The polygraph subject then stated Leonel couldn't have killed the officers because he was with her and her mother. She also stated Raul Herrera, Sr. threatened her to keep her quiet about what she knew. Raul Herrera, Sr. told her he would get Leonel out.

EXAMINATION CRITERIA: The following relevant questions were constructed and administered. The subject's verbal response follows each question in quotations.

1. On the day the officers were shot, did Raul drop Leonel off at your house in the late afternoon? "YES"

2. Was Leonel messed up and staggering when Raul left him at your house? "YES"

3. Did Leonel pass out on your bed on the evening of the shootings of the officers? "YES"

4. Did Raul drive off in Leonel's car after leaving Leonel at your house? "YES"

5. Was Leonel at your house from before dark until you took him home at approximately 12:30 A.M. on the night the officers were shot? "YES"

6. Did Raul come to your house on the night the officers were shot and say to you, "Tell Leonel to take the blame?" "YES"

7. Did Raul threaten you to keep you from saying that Leonel was at your house when the officers were shot? "YES"

8. Before the first trial was over, did Raul tell you it was because of him and Chavello that Leonel was in jail? "YES"

EXAMINATION RESULTS: Evaluation of the subject's polygrams failed to reveal any criteria indicative of deception. In this examiner's professional opinion the subject was being truthful when she answered the above listed relevant questions.

For any other information, please contact this examiner.

ERNIE HULSEY
President

EH/jh

STATE OF TEXAS
POLYGRAPH EXAMINERS BOARD
STATE LICENSE #312

APPENDIX 7

Affidavit of Norma Rodriguez
dated May 6, 1993

State of Texas

County of Harris

Affidavit of Norma Herrera Rodriguez

1. My name is Norma Rodriguez. Leonel Herrera is my brother. I am over the age of eighteen and am competent to give this statement.

2. On September 29, 1981, the night the two police officers were killed in the Los Fresnos, Texas area, my brother Leonel spent most of the night with my mother and me at my house on Eighteenth Street in Edinburg, Texas. A few days after that the police arrested Leonel for the killings. I know it was not my brother Leonel that did the killings, though, because he was with me and my mother when they occurred.

3. I remember the day and evening of the shootings very clearly, because the things that happened that day changed my life and my family's forever. During the late afternoon of the 29th, some time before it was dark, my other brother Raul Herrera stopped by my house to drop off Leonel. They were in Leonel's gray cougar, and Raul was driving. I could tell Leonel was very messed up on cocaine. His nose was bleeding and he couldn't talk right or walk straight. After Leonel got out of the car, Raul drove away.

4. When I got Leo into the house, I cleaned the blood off his nose and shirt, and then put him into the bed in my bedroom. He passed out immediately on the bed, and stayed there until well into the night.

5. Later that evening, some time after midnight, my brother Raul returned to the house. He was very upset, and he spoke with me through the screen door. He said to me, "Dile a Leonel que tome la muleta," which means, "Tell Leonel to take the blame." That was all he said, and I will never forget the threatening way he said it. Raul left on foot. By this time Leonel was awake, and I drove him to his own house at that time.

6. I have not come forward with this information before now because I have been afraid. I have a daughter, who was very young in 1981, and I have been afraid for hers and my safety. Raul threatened me and scared me from ever telling anyone that Leonel was at my house that night and that Raul had come by and said he was to take the blame.

7. Raul was not the only person I feared if I had come forward with what I knew about all of this. Over the years I have been threatened by men who call and tell me to watch my step. After Leonel was arrested I was often followed in my car by people I did not know. I have been stopped by police officers on several occasions for no reason. On the night Leo was arrested, I saw him unconscious at the police station, having been very badly beaten. I saw blood on the uniforms of some of

the police officers at the station. All of this has kept me frightened for my safety and the safety of my family. I am still afraid of what might happen now that I have told the truth about what I know. But I just cannot live with myself anymore knowing that Leonel may die for a crime I know he did not commit.

Under penalty of perjury I hereby swear that the foregoing is true and correct to the best of my information and belief.

Norma Herrera Rodriquez

Sworn to and subscribed before me
this 6th day of May, 1993.

Notary Public

ROBERT L. MCGLASSON
MY COMMISSION EXPIRES
March 1, 1994

APPENDIX 8

Polygraph Examination Report for Antonio Rivera

ERNIE HULSEY & ASSOCIATES

11907 Corona Lane
Houston, Texas 77072
Business Phone (713) 981-0294

May 2, 1993

Robert McGlasson
Mark Olive
Attorneys at Law
1206 San Antonio Street
Austin, Texas 78701

POLYGRAPH EXAMINATION REPORT

SUBJECT:	Antonio Rivera; AGE: 73; DOB: 08/03/19; Born in Quaquilla, Mexico
CLIENT:	Robert McGlasson Mark Olive Attorneys at Law
EXAMINATION METHOD:	The Balanced Flexibility Technique was utilized on the examination.
STATEMENT OF FACT:	This examination was given as part of an investigation in the Leonel Herrera case. Other background information is provided in other reports submitted by this examiner. According to the case information submitted, the polygraph subject had stated that Raul Herrera, Sr. came by to see him a day or two before Leonel was arrested. He stated Raul Herrera, Sr. was upset and stated, "Dummy Leonel got the blame for shooting the two officers." The polygraph subject then stated Raul Herrera, Sr. told him he was the one who shot the two officers. The polygraph subject stated he had not heard about the shooting at that time, however he told Raul Herrera, Sr. he should get an attorney because they would be after him.
EXAMINATION CRITERIA:	At that time the examination was constructed and administered. Each relevant question asked is listed below, along with the subject's verbal response.

1. Are you going to answer with the truth on each question? "YES"

2. Before Leonel was arrested for shooting the officers, did Raul come by your house? "YES"

3. At that time, did Raul tell you that he was the one who killed the two officers? "YES"

4. Did Raul tell you, "Dummy Leonel got the blame for shooting the two officers?" "YES"

5. Did you make up any of this information? "NO"

6. Are you lying when you say Raul told you he shot the officers? "NO"

EXAMINATION RESULTS: After careful analysis of the subject's polygrams, it is this examiner's professional opinion that there was no significant criteria indicative of deception. The subject was considered to be truthful when he answered the above listed relevant questions.

For any other information, please contact this examiner.

ERNIE HULSEY
President

EH/jh

STATE OF TEXAS
POLYGRAPH EXAMINERS BOARD
STATE LICENSE #312

APPENDIX 9

Affidavit of Antonio Rivera
dated May 2, 1993

County of Hidalgo

State of Texas

Affidavit of Antonio Rivera

1. My name is Antonio Rivera, and I am over the age of eighteen and am competent to give this statement. I am a resident of McAllen, Hidalgo County, Texas.

2. I am the step grandfather of Leonel Herrera, who is on death row here in Texas. My wife (who is deceased), Manuela Garza Rivera, was the mother of Leonel and Raul Herrera's father, Jose Herrera.

3. Back in 1981 at the time the two police officers were killed over in Los Fresnos, I was living in Mission, Texas. I still own the Mission Texas property, but I now live in McAllen.

4. Shortly after the two officers were killed, in the middle of the morning Raul Herrera came by my house to borrow a pair of pliers. He was nervous and agitated. We were standing outside the house talking. Raul said that he had killed two police officers, and that Leonel (whom he called "pendejo", which means stupid or dummy) was being blamed for the crimes. This was the first I had heard about any police officers being killed. I was very surprised when Raul told me this. I told him he should get an attorney and present himself to the officials, because they were going to look for him wherever he went and find him anyway. He just walked off angrily. I never spoke to Raul about

this again.

5. Within a day or two after Raul's visit, Leonel was arrested for the killings.

6. I have never said anything about my conversation with Raul to anyone until now. No one has ever come and asked me about this, and it was a serious matter and I was afraid to get involved.

Under penalty of perjury I hereby swear that the foregoing is true and correct to the best of my information and belief.

Antonio Rivera

I accurately translated this statement for Mr. Rivera from English into Spanish, as I am fluent in both Spanish and English.

Reuben Rodriguez

Sworn to and subscribed before me

this 2nd day of May, 1993.

Notary Public

ROBERT L. MCGLASSON
MY COMMISSION EXPIRES
March 1, 1994

APPENDIX 10

Polygraph Examination Report for Jessie Gomez

ERNIE HULSEY & ASSOCIATES

11907 Corona Lane
Houston, Texas 77072
Business Phone (713) 981-0294

May 2, 1993

Robert McGlasson
Mark Olive
Attorneys at Law
1206 San Antonio Street
Austin, Texas 78701

POLYGRAPH EXAMINATION REPORT

SUBJECT:	Jessie Gomez; AGE: 29; DOB: 01/31/64; Born in Raymondville, Texas
CLIENT:	Robert McGlasson Mark Olive Attorneys at Law
EXAMINATION METHOD:	The Balanced Flexibility Technique was utilized on the examination.
STATEMENT OF FACT:	This examination was given as part of an investigation in the Leonel Herrera case. Other background information is provided in other reports submitted by this examiner.

According to the case information submitted, the polygraph subject had stated that Raul Herrera, Sr., told him, prior to Leonel's trial, that he, Raul Herrera, Sr. had been the one who killed the two officers and not Leonel.

The subject was being examined to determine his truthfulness about the issue.

During the pre-test phase of the interview the subject stated that Raul Herrera, Sr. had come over to his home sometime prior to Leonel's trial. He stated he and Raul Herrera, Sr. went out to the orchard to talk. Raul Herrera, Sr. was upset and told him that Leonel shouldn't be in jail because he didn't kill the two officers. The polygraph subject then stated that Raul Herrera, Sr. told him he was in Leonel's car and after shooting the officers threw the gun in a canal.

EXAMINATION CRITERIA: At that time the examination was constructed and administered. Each relevant question asked is listed below, along with the subject's verbal response.

1. Are you going to answer each question on this test with the truth? "YES"

2. Did Raul Herrera, Sr. actually tell you that Leonel shouldn't be in jail, because he didn't kill the two officers? "YES"

3. Did Raul Herrera, Sr. actually tell you he, himself had killed the two officers while in Leonel's car? "YES"

4. Did Raul Herrera, Sr. then tell you he had thrown the gun in a canal? "YES"

5. Did Raul Herrera, Sr. tell you this prior to Leonel's trial? "YES"

6. Did you make up any of the information that you put in the affidavit you signed? "NO"

7. Did you tell the complete truth in the affidavit you signed? "YES"

EXAMINATION RESULTS: After careful analysis of the subject's polygrams, it is this examiner's professional opinion that there was no significant criteria indicative of deception. The subject was considered to be truthful when he answered the above listed relevant questions.

For any other information, please contact this examiner.

ERNIE HULSEY
President

EH/jh

STATE OF TEXAS
POLYGRAPH EXAMINERS BOARD
STATE LICENSE #312

APPENDIX 11

Affidavit of Jessie Gomez
dated April 23, 1993

County of Willacy

State of Texas

Affidavit of Jessie Gomez

1. My name is Jessie Gomez, and I am over the age of eighteen and am competent to give this statement. I am a resident of Raymondville, Willacy County, Texas. I work at Knapp Chevrolet in Harlingen, Texas. I am an auto mechanic.

2. I knew Raul Herrera ever since I can remember. He was my cousin. My mother is the sister of Raul and Leonel Herrera's mother. [Actually, I was adopted when I was an infant]. Raul was alot older than I was, and he took me under his wing as a father figure, because my dad was always working.

3. I spent alot of time with Raul from the time I was about twelve or thirteen until shortly after the two police officers were killed near Los Fresnos. Raul would take me cruising with other friends, and I would spend alot of time at his house or playing pool at my Uncle Max's house. Uncle Max was Raul's father.

4. Raul was known to get violent frequently. I knew from personal experience that Raul could go off real quick sometimes without any warning. I respected him as my cousin, but I was also afraid of him.

5. Some time after the crime, I know it was before Leonel's trial for the cop killings, Raul drove to my house one evening

where me and my family lived in Raymondville. He first was talking with my dad. I remember he was telling my dad he needed money, and my dad wasn't giving him any, and Raul was getting upset. I started to worry that Raul was going to explode on my dad, so I said let's go out in the orchard and drink some beer. Raul and I went out in the orchards together, and we were drinking beer and talking. While we were sitting there on the car in the orchards, at one point Raul started crying, saying that his brother Leonel shouldn't be in the jail. I asked what he meant, and Raul said because his brother didn't kill those cops, he didn't have anything to do with it. I asked Raul how he knew this, and he said because he [Raul] killed them and Leonel wasn't even there.

6. I was really shocked when Raul told me this. At the time I must have been only about seventeen or eighteen. I told Raul that he needed to tell somebody else about this. He told me he couldn't, because he was afraid that someone would harm him and his family, and he didn't want to go to prison again.

7. I was afraid to ever saying anything about this, so I didn't. Knowing what I did about Raul's personality, I was scared he might really hurt my family or me if I gave this information to anyone. So I never said anything about it.

8. After that evening in the orchard, I stopped seeing Raul and the Herrera family as much. I remember when Leonel got the death penalty, and when Uncle Max died, and when Raul was killed, but I just stayed away from all of that and kept to myself in

Raymondville. I was very afraid ever to say something about any of this to anyone, and since that time no one has ever asked me about it.

Under penalty of perjury I hereby swear that the foregoing is true and correct to the best of my information and belief.

Jessie Gomez

Jessie Gomez

Sworn to and subscribed before me

this 23 day of April, 1993.

Notary Public

RUBEN RODRIGUEZ
Notary Public, State of Texas
My Comm. Expires March 4, 1997

APPENDIX 12

Affidavit of Hector J. Villarreal
dated December 11, 1990

AFFIDAVIT

STATE OF TEXAS *

COUNTY OF HIDALGO *

My name is Hector J. Villarreal. I am an attorney licensed to practice in the State of Texas. My address is 400 East Cano, Edinburg, Texas.

In 1984 I represented Raul Herrera, one of Leonel Herrera's brothers, on a charge of attempted murder. When I began representing Raul, he was being held in the Hidalgo County Jail on this charge. I obtained Raul's release on a $25,000.00 personal recognizance bond from Judge John Dominguez.

Shortly after Raul was released from the Hidalgo County Jail, we met in Edinburg to discuss preparing for trial. In the course of that meeting Raul confessed to me that he, not Leonel, had killed officers Rucker and Carrisalez.

In previous conversations with Raul I had been told that Raul, Leonel, and their father, Jose Herrera, were in the drug trafficking business with the Sheriff of Hidalgo County, Brigido Marmolejo. Raul and Jose were money collectors, and Leonel was a "cutter". As a cutter, Leonel's job was to cut the pure cocaine with filler in preparation for selling it. Leonel always cut the cocaine on South Padre Island. According to Raul, David Rucker the D.P.S. officer who was killed, was also involved with the drug trafficking business: his job was to act as security for the operation. Every time Leonel went to the Island, Rucker met him

and gave him coveralls to wear while he was cutting the cocaine. Part of Rucker's job was to check the coveralls to insure that Leonel did not take any cocaine.

Raul told me that on September 29, 1981, Leonel was supposed to have gone to South Padre Island to cut cocaine. The plan was that he would drive there with a drug dealer from the East Coast, cut the cocaine and return, as he had done in the past. However, the night before, Leonel had gotten very "coked up". That morning his nose was bleeding badly and he was in no condition to drive to the Island. Raul went in his place. Rucker was not pleased with the switch -- he did not know Raul and was used to working with Leonel. Raul and Rucker had a harsh argument about the switch and the deal did not go down because of it. When Raul and the East Coast dealer were on the way back from the Island, Rucker pulled them over on FM100. Another argument ensued and Raul shot Rucker. Shortly thereafter, Raul shot Officer Carrisalez when he was stopped for speeding.

Raul told me that he drove Leonel's car to the Island. He had his own set of keys to the car because he and Leonel had keys to each other's cars. Leo always kept his identification (Social Security card) in the car.

Raul did not say anything about this before Leonel was convicted because he thought Leonel would be acquitted. However, Raul told me that when Leonel was convicted and sentenced to death, Raul began blackmailing Sheriff Marmolejo. According to Raul, Sheriff Marmolejo knew that Raul killed the two officers and that D.P.S. Officer Rucker was working in the drug trade because both

Raul and Rucker worked for him. While Raul was in jail on the attempted murder charge in 1984 he began threatening to "spill the beans" on the Sheriff if he did not receive money from him. After he was released, he said he wanted more money or he would "come clean" on what had really happened with the police killings.

After Raul was released from jail, he was out for several weeks. Then, on September 8, 1984, the Saturday before the attempted murder trial was to begin, he was shot in the back of the neck and killed by Jose Isabel Lopez. Lopez was charged with murder, pled guilty to manslaughter and received a ten year probated sentenced. It is my understanding that Lopez worked for Sheriff Marmolejo in the drug trafficking business and that Raul was killed for threatening to talk about the killing of the two officers.

All of the above information is based on statements made to me by my former client, Raul Herrera.

Under pain and penalty of perjury, the foregoing is true and correct to the best of my knowledge and belief.

Hector J. Villarreal
Affiant

SUBSCRIBED AND SWORN to before me this 11th day of December, 1990.

NATALIA C. PENA
NOTARY PUBLIC
State of Texas
Comm. Exp. 04-10-93

Natalia C. Pena
Notary Public, in and for the
State of Texas

My Commission Expires: 4-10-93

APPENDIX 13

Affidavit of Adan Alaniz
dated April 25, 1993

County of Hidalgo

State of Texas

Affidavit of Adan Alaniz

1. My name is Adan Alaniz, and I am over the age of eighteen and am competent to give this statement. I am a resident of Edinburg, Hidalgo County, Texas. I own an auto body shop here, which I have owned since 1975.

2. I know Raul Herrera, the brother of Leonel Herrera, who is on death row for the killing of two Cameron County police officers. I first met Raul when were still kids, about 1966, at the local golden gloves boxing club. I was a friend of his and saw him regularly until he was killed. I also knew Leonel, but I never spent much time with him.

3. After the crime involving the two police officers in Los Fresnos, a few months before Raul was killed, I was with him on several occasions when he spoke to me about these killings. One time we were driving around together in my car in Edinburg, and he was talking about how he'd gotten a letter from his brother Leonel. Then, more quietly, he said something about how Leonel had no business being in the pen for this crime. He said that Leonel had nothing to do with the whole thing. Raul said he was the one who shot the police officers.

4. Another time, only about two months before Raul was killed, I was at Raul's house and he was showing me some letters

from his brother Leonel and from another death row inmate named Cuevas. Once again, Raul said that his brother Leonel shouldn't be on death row, because he [Raul] was the killer.

5. When Raul told me he'd done these killings, I didn't ask him any questions or say anything to him, even though it seemed like he wanted to talk about it. I didn't want to know more about it, because I was afraid of Raul and I didn't want to get involved in any way and have Raul coming after me. When he told me these things, he didn't say anything about how it happened or give any specifics, and I didn't ask any questions.

6. Ever since I knew Raul he was always pretty temperamental. He could get really violent all of a sudden, and you never knew when it might happen. Raul had a reputation for being real violent sometimes, and people were mostly scared of him.

7. I remember once when we were still younger when Raul and several of us went down to Mexico to boys town. We were taking a taxi back to the bridge and the driver was messing with us somehow. Raul told him to stop the car, and then he pulled the driver out and started beating him up real bad. He was kicking him in the head, and I grabbed Raul and pulled him away and said let's get out of here.

8. During the last years he was alive, Raul was acting differently. It's hard to describe, but he seemed to always have alot weighing on his mind. All he wanted to talk about was his brother Leonel. He would say how Leonel never had a chance, and

you could tell he felt bad about his brother.

9. I've never said anything to anybody about what Raul told me about those cop killings. I know I probably should have, but like I said, I just didn't want to get involved, and no one ever came and asked me about this.

Under penalty of perjury I hereby swear that the foregoing is true and correct to the best of my information and belief.

Adan Alaniz

Adan Alaniz

Sworn to and subscribed before me

this 25 day of APRIL, 1993.

Notary Public

RUBEN RODRIGUEZ
Notary Public, State of Texas
My Comm. Expires March 4, 1997

APPENDIX 14

Affidavit of Juan Franco Palacios
dated December 10, 1990

STATE OF TEXAS)

COUNTY OF HIDALGO)

AFFIDAVIT

Personally appeared before the undersigned officer duly authorized by law to administer oaths, Juan Franco Palacios, deposes and says on oath:

1.

I am Juan Franco Palacios. I reside in Pharr, Texas.

2.

I was a friend of Raul Herrera, the brother of Leonel Herrera for many years. Raul Herrera was murdered about six years ago.

3.

Several years ago Raul Herrera and I were both locked up in the Hidalgo County Jail at the same time. I believe the year was 1984. Raul was in jail on some sort of charge from a domestic problem that happened between him and his wife Blanca. I remember that at the time that we were both locked up together, Raul had a broken leg and he was wearing a cast.

4.

Raul was extremely depressed when we were in the jail together. One night he came to me and he told me that he had many things weighing very heavy on his mind and he needed to free himself of that. He then told me that he is the one who should be having a death sentence and not his brother Leonel. He told

me that he, Raul, was the one that killed police officers Rucker and Carrisalez and not his brother Leo.

5.

I swear under pain and penalty of perjury that the above statement is true and correct.

Further affiant saith not.

Jaun Franco
JAUN FRANCO PALACIOS

Sworn to and subscribed before me this 10th day of December, 1990.

Sylvia A. Guevara
NOTARY PUBLIC

NOTARY PUBLIC STATE OF TEXAS
SYLVIA A. GUEVARA
Notary Public
STATE OF TEXAS
My Comm. Exp. SEPT 20, 1993

APPENDIX 15

Affidavit of Jose Ybarra, Jr.
dated January 9, 1991

State of Texas

County of Cameron

Affidavit of Jose Ybarra Junior

1. My name is Jose Ybarra Jr. I currently reside on Mesquite Road, in Monte Alto, Texas. I am 43 years old. I attended junior high school with Raoul Herrera and Leonel Herrera in Edinburg, Texas.

2. In the summer of 1983, I ran in to Raoul Herrera outside of the Las Vegas Lounge, which is located in Edinburg, Texas. I immediately noticed that he looked very disturbed. As I approached him, he told me that he was the one who had killed the two cops. Because he looked so disturbed and upset, I became nervous and continued past him into the club. That was the last time I saw Raoul Herrera.

3. I have read the foregoing affidavit, and swear under penalties of perjury that it is true and correct.

Jose Ybarra Jr.

Sworn to and subscribed before me
this 9 day of January, 1991.

NOTARY PUBLIC

APPENDIX 16

Indictment of Leonel Herrera

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS, for the County of Cameron, State aforesaid, duly organized as such at the July Term, A. D. 19 81, of the 107th Judicial District Court in and for said County, upon their oaths in said Court, present that LEONEL TORRES HERRERA

on or about the 29th day of September A. D One Thousand Nine Hundred and Eighty-one and anterior to the presentment of this indictment, in the County of Cameron and State of Texas, did then and there unlawfully, intentionally and knowingly cause the death of ENRIQUE CARRISALEZ, by shooting him with a firearm, the said ENRIQUE CARRISALEZ being then and there a peace officer, to-wit, an officer of the Los Fresnos, Texas Police Department, acting in the lawful discharge of an official duty, and the Defendant, LEONEL TORRES HERRERA, then and there knowing that ENRIQUE CARRISALEZ was a peace officer,

against the peace and dignity of the State.

Foreman of the Grand Jury.

2

APPENDIX 17

Verdict Form -- Conviction of Capital Murder dated January 20, 1982

CAUSE NO. 81-CR-672-C

THE STATE OF TEXAS	)	IN THE DISTRICT COURT OF
VS	:	CAMERON COUNTY, TEXAS
LEONEL TORRES HERRERA	)	197TH JUDICIAL DISTRICT

FORMS OF VERDICT

We, the Jury, find the Defendant, Leonel Torres Herrera, NOT GUILTY.

_____
Foreman

* * * * * * * *

We, the Jury, find the Defendant, Leonel Torres Herrera, GUILTY OF CAPITAL MURDER AS CHARGED IN THE INDICTMENT.

C. L. Bullock
Foreman

1/20/82
3:52 PM

FILED
TIME 3:52 P.M.
JAN 20 1982
AURORA DE LA GARZA, Clerk
District Court, Cameron County, Texas
By Raul Alaniz, Deputy

APPENDIX 18

Verdict Form -- Sentence (Answers to Special Issues) dated January 21, 1982

CAUSE NO. 81-CR-672-C

THE STATE OF TEXAS	)	IN THE DISTRICT COURT OF
VS	:	CAMERON COUNTY, TEXAS
LEONEL TORRES HERRERA	)	197TH JUDICIAL DISTRICT

ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, Leonel Torres Herrera, that caused the death of Enrique Carrizales, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Answer "Yes" or "No".

We, the Jury, answer: Yes

ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Leonel Torres Herrera, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer "Yes" or "No".

We, the Jury, answer: Yes

FILED
TIME 8:25 a.m.
JAN 21 1982
AURORA DE LA GARZA, Clerk
District Court, Cameron County, Texas
By Raul Martinez Deputy

CERTIFICATE OF ANSWER

We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in the case.

O. L. Barnett
Foreman
1-21-82

APPENDIX 19

Judgment of Conviction and Sentence dated January 21, 1982

CAUSE NO. 81-CR-672-C

THE STATE OF TEXAS	)	IN THE DISTRICT COURT OF
VS	:	CAMERON COUNTY, TEXAS
LEONEL TORRES HERRERA	)	197TH JUDICIAL DISTRICT

JUDGMENT OF CONVICTION

BE IT REMEMBERED that on the 4th day of January, 1982, this cause was called to trial and the State appeared by her Assistant Criminal District Attorney, and the Defendant, Leonel Torres Herrera, appeared in person, his counsel by employment, the Hon. James S. Bates also being present, and the Defendant, having been duly arraigned, pleaded Not Guilty and both parties announced ready for trial; thereupon individual voir dire examinations of jury panel began and continued through January 12, 1982, until a jury of good and lawful persons, to wit: Ashton L. Barefoot and eleven others, was duly selected, empaneled and sworn according to the law and charged by the Court on separation; whereupon said cause was recessed until January 13, 1982.

THEREAFTER, on January 13, 1982, the indictment was read to the jury and the Defendant entered his plea of Not Guilty thereto whereupon the State made the opening statements and proceeded to offer evidence through January 18, 1982 and rested.

WHEREUPON, the cause was recessed until January 19, 1982.

THEREAFTER, on January 19, 1982, Defendant introduced evidence whereupon State offered rebuttal evidence. All parties closed and the jury was sent home until January 20, 1982, whereupon the charge was prepared and submitted to all counsel and the case recessed until January 20, 1982.

THEREAFTER, on January 20, 1982, the Court charged the jury as to the law applicable to said cause and argument of counsel for the State and the Defendant was duly heard and concluded, and the jury retired in charge of the proper officer to consider

VOL 4Y PAGE 116

their verdict, and after ward was brought into open court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

> "We, the Jury, find the Defendant, Leonel Torres Herrera, GUILTY OF CAPITAL MURDER AS CHARGED IN THE INDICTMENT.
>
> s/Ashton L. Barefoot
> Foreman"

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, Leonel Torres Herrera, is guilty of the offense of Capital Murder as found by the jury, and that said offense was committed on September 29, 1981.

WHEREUPON the cause was recessed until January 21, 1982.

THEREAFTER, on January 21, 1982, the hearing on punishment began and both the State and the Defendant offered evidence and rested. WHEREUPON the Court charged the jury with additional instructions as to the law applicable to punishment in said cause and the jury retired to consider its verdict as to Defendant's punishment, and thereafter returned into open court in charge of the proper officer to return the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

"ISSUE NO. 1

> Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, Leonel Torres Herrera, that caused the death of Enrique Carrizales, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Answer "Yes" or "No".
>
> We, the Jury, answer: Yes

ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Leonel Torres Herrera, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer "Yes" or "No".

We, the Jury, answer: Yes

CERTIFICATE OF ANSWER

"We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in the case.

s/Ashton L. Barefoot
Foreman"

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendant, Leonel Torres Herrera, is guilty of the offense of Capital Murder, as found by the Jury, and that he be punished, by reason of the answer made by the Jury to the Special Issues submitted, by death.

SIGNED FOR ENTRY: January 21, 1982.

Judge Presiding

TIME FILED

JAN 21 1982

AURORA DE LA GARZA, Clerk
District Court, Cameron County, Texas
By _____ Deputy

VOL 49 PAGE 118

APPENDIX 20

Order Fixing Date of Execution of May 12, 1993

CAUSE NO. 81-CR-672-C

THE STATE OF TEXAS	IN THE DISTRICT COURT OF
VS	CAMERON COUNTY, TEXAS
LEONEL TORRES HERRERA	197TH JUDICIAL DISTRICT

ORDER FIXING DATE FOR EXECUTION

The Order Fixing Date for Execution signed for entry herein on March 23, 1993, is hereby vacated. In its stead the following order is hereby entered this 8th day of April, 1993:

In this cause the Defendant, Leonel Torres Herrera was sentenced on July 2, 1985, to death and the date of his execution fixed for August 16, 1985. Thereafter, the execution was stayed by the United States District Court for the Southern District of Texas, Brownsville Division, pending a ruling by that Court on an Application for Writ of Habeas Corpus filed by the Defendant.

Thereafter, the stay of execution was vacated by order of the same United States District Court for the Southern District of Texas, Brownsville Division, such order being affirmed by the United States Court of Appeals, Fifth Circuit, and a Petition for Writ Of Certiorari denied by the Supreme Court of the United States.

Thereafter, on October 30, 1990, the date of the execution of Defendant was fixed by this Court for December 17, 1990.

Thereafter, on December 12, 1990, a subsequent Post Conviction Application for Writ of Habeas Corpus was filed by the Defendant; and this Court on December 13, 1990, modified its Order of October 30, 1990, fixing a new date of execution for January 23, 1991.

Thereafter, on January 17, 1991, a stay of execution was granted Defendant pending further order of the Texas Court of Criminal Appeals.

Thereafter on May 29, 1991, in a per curiam opinion the Texas Court of Criminal Appeals, all relief sought by Defendant was denied.

Thereafter, on September 18, 1991, the Court of Criminal Appeals denied Defendant's Motion for Rehearing; and

Thereafter, on January 3, 1992, the Mandate of the Court of Criminal Appeals was issued by the Clerk of such Court commanding that the Order of such Court be recognized, obeyed, and executed.

Thereafter, on January 13, 1992, in obedience to said Mandate, the date of the execution of the Defendant was fixed by this Court for February 19, 1992.

Thereafter, the execution date of February 19, 1992, was vacated by the Texas Court of Criminal Appeals by its per curiam order of February 19, 1992.

Thereafter, on March 9, 1992, the date of the execution of the Defendant was fixed by this Court for April 15, 1992.

Thereafter, on April 13, 1992, the execution date of April 15, 1992, was vacated by the Texas Court of Criminal Appeals pending the action of the United States Supreme Court upon Certiorari to the United States Court of Appeals for the Fifth Circuit.

Thereafter, the United States Supreme Court by its opinion delivered January 25, 1993, affirmed the Judgment of the United States Court of Appeals for the Fifth Circuit and the Judgment of this Court, Herrera v Collins No. 91-7328.

Thereafter, on March 22, 1993, the Texas Court of Criminal Appeals vacated its April 13, 1992, stay of execution; and, the State by its motion filed herein March 22, 1993, moved the Court to set an execution date herein.

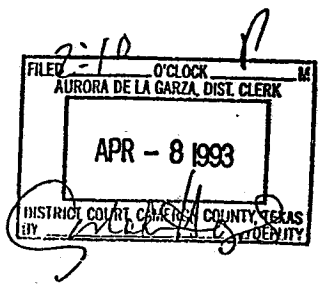
The motion of the State is granted.

Therefore, IT IS THE ORDER OF THE COURT that the Defendant, Leonel Torres Herrera, who has been adjudged guilty of Capital Murder, and whose punishment upon the answers of the jury to Special Issues has been assessed at death, shall at anytime before sunrise on May 12, 1993, in accordance with the execution procedures determined and supervised by the Director of the Texas Department of Criminal Justice, Institutional Division, be caused to die by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death.

The Clerk of this Court shall issue a Warrant of Execution in accordance with Art. 43.15 of the Texas Code of Criminal Procedure directed to the Director of the Texas Department of Criminal Justice, Institutional Division. Such warrant of execu tion shall be accompanied by a certified copy of this Order and shall be the authority of the Director of the Texas Department of Criminal Justice, Institutional Division, to carry out the sentence of this Court.

Signed for entry this 8th day of April, 1993.

Judge Presiding



APPENDIX 21

Jim Mattox Letter to the Editor,
New York Times, April 3, 1992

On Not Executing an Innocent Prisoner

To the Editor:

"Can They Execute the Innocent? Probably" (Op-Ed, March 11) by Jordan Steiker discusses the Supreme Court's decision to hear the case of Leonel Herrera, who is on death row in Texas. The Court has agreed to consider whether or not the Constitution prohibits the execution of an innocent person. Professor Steiker suggests, surprisingly, that the Court may answer the question "no."

It was my responsibility as Attorney General for Texas from 1983 to 1991 to enforce our judgments of death. During my tenure, more than 25 people were executed by Texas. Professor Steiker's tentative prognosis troubles me deeply.

My worst nightmare would have been the execution of an innocent person. As one who had to agonize over this prospect, I believe the proper interpretation would be that our Bill of Rights is intended to prevent such an obvious travesty of justice.

I favor executions for people who deserve such punishment, but I do not think people should be put to death before they have an opportunity to present nonfrivolous claims. It was my policy as Attorney General not to oppose a stay of execution when such claims were being considered by the courts. A claim of innocence, especially in a capital case such as Mr. Herrera's, is perhaps the most legitimate reason to grant relief.

Executing someone with a plausible claim of innocence is abhorrent to any standard of decency marked by a civilized society. No person, including Mr. Herrera, should be executed while any such claims remain unresolved. To the degree Professor Steiker's fears are formed by the Court's legitimate impatience with seemingly interminable capital appeals, that impatience must be tempered when a claim of actual innocence is presented. For the Supreme Court to write otherwise would be a sad day for those who favor, as well as those who oppose, capital punishment in this country. JIM MATTOX

Austin, Tex., March 19, 1992

APPENDIX 22

**Statement of Sen. Howard M. Metzenbaum
on introduction of bill to overturn Supreme Court Herrera Decision
dated January 27, 1993, and copy of bill**

U.S. Senator Howard M.
METZENBAUM
of Ohio

Committees:
Judiciary
Labor and Human Resources
Select Committee on Intelligence
Environment and Public Works

Chairmanships:
Subcommittee on Antitrust
Subcommittee on Labor

Statement by Sen. Howard M. Metzenbaum
On bill to overturn Supreme Court Herrera Decision
1/27/93

AFTER 200 YEARS AS THE WORLD'S GREATEST CONSTITUTIONAL DEMOCRACY, I BELIEVE AMERICANS AGREE ON ONE SIMPLE PRINCIPLE - THE CONSTITUTION FORBIDS THE EXECUTION OF INNOCENT PEOPLE. APPARENTLY, A MAJORITY OF THE SUPREME COURT DO NOT SHARE THAT VIEW. ON MONDAY, THE COURT DECIDED THAT OUR CONSTITUTION DOES NOT PROHIBIT THE EXECUTION OF A PERSON WHO HAS BEEN CONVICTED AND SENTENCED TO DEATH, BUT WHO MAY BE ABLE TO PROVE HIS OR HER INNOCENCE WITH NEWLY DISCOVERED EVIDENCE.

WHETHER YOU SUPPORT OR OPPOSE THE DEATH PENALTY, SURELY WE ALL AGREE THAT OUR LAWS MUST REQUIRE THAT EVIDENCE OF GUILT BE SOLID AND RELIABLE BEFORE THE STATE CARRIES OUT AN EXECUTION. WHEN NEWLY DISCOVERED EVIDENCE COMES FORWARD THAT INDICATES A DEATH ROW INMATE IS PROBABLY INNOCENT, OUR FEDERAL COURTS SHOULD AND MUST INTERVENE TO STOP THE EXECUTION.

I AM APPALLED THAT THE SUPREME COURT'S DECISION UNDERMINES THIS PRINCIPLE. THE COURT HELD THAT A STATE PRISONER WHO CLAIMS HE HAS NEW EVIDENCE OF HIS INNOCENCE IS NOT ENTITLED TO HAVE THAT CLAIM REVIEWED IN A FEDERAL PROCEEDING. THE COURT STATES THAT SUCH A CLAIM SHOULD BE RAISED WITH A GOVERNOR IN A PETITION FOR EXECUTIVE CLEMENCY. IN OTHER WORDS, THE DOORS TO THE COURTHOUSE ARE CLOSED. PERSONS FACING EXECUTION WHO HAVE NEW EVIDENCE OF THEIR INNOCENCE ARE FORCED TO RELY ON THE MERCY OF A SINGLE MAN OR WOMAN TO SPARE THEIR LIVES, JUST LIKE THE DEFEATED GLADIATORS IN ANCIENT ROME.

THE GOVERNMENT'S EXECUTION OF AN INNOCENT PERSON IS THE ULTIMATE ARBITRARY DEPRIVATION FROM WHICH ONE NEVER RECOVERS. JUSTICE BLACKMUN MADE THE SIMPLE BUT OBVIOUS STATEMENT IN HIS STRONG DISSENT THAT "THE EXECUTION OF A PERSON WHO CAN SHOW THAT HE IS INNOCENT COMES PERILOUSLY CLOSE TO SIMPLE MURDER."

THIS GREAT NATION SHOULD REJECT CHIEF JUSTICE REHNQUIST'S CONCLUSION THAT WE SHOULD RELY ON THE GRACE OF ELECTED OFFICIALS TO GRANT CLEMENCY TO INNOCENT PERSONS ON DEATH ROW. CONGRESS MUST ACT QUICKLY TO ASSURE THAT A PRISONER SENTENCED TO DEATH IS ENTITLED TO RAISE A CLAIM OF ACTUAL INNOCENCE, BASED ON NEWLY

DISCOVERED EVIDENCE, IN A FEDERAL PETITION. ALTHOUGH I UNDERSTAND THE DESIRE FOR FINALITY OF CRIMINAL JUDGMENTS,

EXECUTIONS WITHOUT ADEQUATE SAFEGUARDS ARE UNACCEPTABLE IN A CIVILIZED SOCIETY. CONGRESS MUST ACT NOW TO PREVENT THE EXECUTION OF SOMEONE WHO CAN PROVE HIS INNOCENCE.

TODAY, I PLAN TO INTRODUCE LEGISLATION WHICH ALLOWS A PRISONER SENTENCED TO DEATH TO RAISE IN FEDERAL PROCEEDINGS THE CLAIM OF ACTUAL INNOCENCE BASED ON NEWLY DISCOVERED EVIDENCE. CONGRESS HAS ALWAYS HAD THE POWER TO DETERMINE WHICH TYPES OF CASES ARE APPROPRIATE FOR FEDERAL COURT REVIEW. THIS BILL MAKES IT CLEAR THAT FEDERAL JUDICIAL REVIEW WILL BE AVAILABLE TO A DEATH ROW INMATE WHO HAS NEW EVIDENCE OF HIS OR HER INNOCENCE THAT IS BOTH SOLID AND RELIABLE. THE BILL RELIES UPON A STANDARD OF REVIEW SUGGESTED BY JUSTICES BLACKMUN, STEVENS AND SOUTER IN THEIR DISSENT.

IT IS IRONIC, AND INDEED ALMOST TRAGIC, THAT THE SUPREME COURT WOULD ANNOUNCE THIS CALLOUS AND UNFAIR DECISION JUST ONE DAY AFTER THE DEATH OF THURGOOD MARSHALL. JUSTICE MARSHALL WAS THE MOST TENACIOUS, PERSISTENT, AND EFFECTIVE CHAMPION OF EQUAL JUSTICE AND FUNDAMENTAL FAIRNESS EVER TO SIT ON THE SUPREME COURT. HE WOULD NOT FOR A MOMENT TOLERATE THE OUTCOME OF THE HERRERA CASE.

A DECISION WHICH SUGGESTS THE SUPREME COURT'S WILLINGNESS TO CONDONE THE EXECUTION OF INNOCENT PEOPLE, ONLY UNDERSCORES HOW MUCH WE WILL MISS THURGOOD MARSHALL. THE DECISION ALSO IS A REMINDER THAT WE ALL MUST WORK TO ENSURE THAT THIS SUPREME COURT DOES NOT SUCCEED IN ITS EFFORT TO DISMANTLE HIS LEGACY.

APPENDIX 23
Letter from Mark Olive to Texas Board of Pardons and Parole on behalf of Leonel Herrera dated May 4, 1993

MARK EVAN OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL 32304

May 4, 1993

Texas Board of Pardons and Parole
P.O. Box 13401
Capitol Station
Austin, TX 78711

Dear Board Members:

Leonel Herrera, a Texas death-sentenced inmate, is scheduled to be executed by the State of Texas on May 12, 1993. Through this letter, Mr. Herrera petitions this Board for a recommendation that the Governor grant a reprieve and/or a commutation of sentence for Mr. Herrera.[1]

In accordance with Section 143.42 of the Texas Code, Mr. Herrera shows the following:

1.) The name of the Applicant is Leonel Torres Herrera. He is a forty-three year old Mexican American from Edinburg, Texas. He is indigent and currently incarcerated on death row at the Ellis One Unit of the Texas Department of Criminal Justice, Institutional Division in Huntsville, Texas;

2.) The Applicant's agents for the purpose of the instant request are the following attorneys: Mark E. Olive, Robert M. McGlasson, and Phyllis L. Crocker;

3.) Certified copies of the indictment, judgment, verdict,

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[1]Mr. Herrera is innocent of the offense for which he was convicted. That is the issue he brings to this Board. See Numbered Paragraph 8, infra. An eyewitness to the shooting, and an alibi witness, have taken and passed lie detector tests which show the Applicant's innocence. The eyewitness was truthful when he said that he saw his father commit the offenses, and Leonel Herrera was not present. The alibi witness was truthful when she said that Leonel Herrera was at her home asleep at the time of the offenses. This evidence was not presented to the Courts or the Governor previously. The lie detector tests were administered within the last five (5) days.

and sentence in this case, as well as official documentation of the scheduled execution date, will be supplied;[2]

4.) The offense for which the Applicant is scheduled to be executed occurred on September 29, 1981. On that date, two law enforcement officers were shot within several minutes of each other. Department of Public Safety Officer David Rucker was shot and killed on FM 100 between Los Fresnos and Port Isabel, Texas. Los Fresnos Police Officer Enrique Carrisalez was shot thereafter when he stopped a car for speeding just outside of Los Fresnos. Office Carrisalez died nine days later.

5.) Applicant's trial began on January 13, 1982. On January 20, 1982 the jury found him guilty of capital murder. The punishment phase occurred on January 21, 1982. An appeal was filed in the Texas Court of Criminal Appeals, and that Court affirmed Mr. Herrera's conviction and sentence on October 31, 1984. Herrera v. State, 682 S.W.2d 313 (Tex. Crim. App. 1984). The United States Supreme Court denied a Petition for Writ of Certiorari on May 28, 1985. Herrera v. Texas, 472 U.S. 282 (1985). Applicant filed a petition for writ of habeas corpus in the Texas Court of Criminal Appeals on July 26, 1985. That Court denied relief on August 2, 1985. Mr. Herrera filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas on August 7, 1985. That Court denied relief on October 23, 1989. That order was affirmed by the United States Court of Appeals for the Fifth Circuit on June 25, 1990. Herrera v. Collins, 904 F.2d 944 (5th Cir. 1990). The United States Supreme Court denied Applicant's petition for writ of certiorari on October 15, 1990. On December 12, 1990, Petitioner filed a petition for writ of habeas corpus in the Texas Court of Criminal Appeals. That Court ordered full briefing and heard oral argument, but denied relief in a majority opinion filed May 29, 1991.

On February 16, 1992, Applicant filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas. He showed that he had important and compelling evidence of his innocence, and argued that because of his innocence it would violate the United States Constitution to execute him. The federal district court judge was concerned about the contents of affidavits showing the possibility of the Applicant's innocence, and granted a stay of execution so as to entertain the issue of innocence. The State appealed that decision, and the United States

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[2]Documentation of the judgment and the date of execution will be supplied immediately. In addition, undersigned counsel is gathering information, including the polygraph reports mentioned in footnote 1, supra, to submit to the Board. It is hoped that the reports and affidavits will be submitted within two days. It is certain that further supplementation of this application will follow.

Court of Appeals reversed the district court judge. Collins v. Herrera, 754 F.2d 1029 (5th Cir. 1992). The Fifth Circuit held that, based upon Supreme Court precedent, innocence did not provide a basis for federal habeas corpus relief.

The United States Supreme Court granted the Applicant's petition for writ of certiorari and addressed the issue of whether the federal constitution prohibited the execution of an innocent person. The Court held that it did not, Herrera v. Collins, 113 S.Ct. 853 (1993), and that the remedy for Applicant was clemency.

6. In prior proceedings, issues regarding the manner in which the Applicant was convicted were presented to the courts. Included in those claims for relief was a.) that the manner in which the Applicant was identified as the culprit was unreliable;[3] b.) that it was improper to allow police officers to be jurors in the Applicant's case, inasmuch as he was charged with a crime against a police officer; and c.) that it was improper to conduct the Applicant's trial in a courtroom in which uniformed, armed, police officers were in attendance in great number. The Applicant challenged his sentence of death because he was sentenced pursuant to an unconstitutional sentencing scheme.

7.) The important issue before this Board is whether and how to consider an Applicant's evidence of innocence. Mr. Herrera has no other avenue for relief. The Supreme Court found that in all but the rarest hypothetical cases, there is no constitutional violation in executing someone who has been convicted of capital murder and sentenced to death but whose guilt has been thrown into question by evidence first disclosed after trial. The Court recognized that judicial proceedings will not in every instance do justice. "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." Herrera, supra, 113 S.Ct. at 868. And in such instances, the courts may not have the flexibility to remedy an injustice even though it is recognized.

On these occasions, clemency proceedings must provide the safety net. "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.... Executive clemency has provided the 'fail safe' in our criminal justice system...." Herrera, supra, 113 S.Ct. 866, 868.

8.) Clemency is needed as a fail safe in Applicant's case. Applicant can show that he could not have committed and that he did not commit the offense. He can show who did commit the offense.

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[3]Courts have agreed that the identifications were unreliable, but not so unreliable as to violate the constitution.

This is the only body which can, by law, hear this claim.

9.) No court has listened to the Applicant's evidence of his innocence, and the Supreme Court has written, in Herrera, that it is this Board's responsibility to listen. Applicant has significant proof of his innocence which the courts would not consider; he also has dramatic new evidence that was never presented to the courts. The evidence includes the following:

a. Four witnesses all attest that Leonel Herrera did not commit the murder of the two law enforcement officers in Cameron County. They have taken and passed polygraph tests designed to test the truthfulness of their accounts.

1. Raul Herrera, Jr., whose testimony the courts have refused to hear, has sworn that he witnessed the shooting deaths of Texas State Trooper David Rucker and Los Fresnos police officer Enrique Carrisalez. Raul, Jr., stated, during his polygraph, that his father Raul Herrera, not Leonel Herrera, committed the murders for which Leonel was tried. He stated that he witnessed the shootings with his own eyes and ears. He and his father were in Leonel's automobile at the time that Raul, Sr., committed the crimes. These statements by Raul, Jr., were found to be truthful by the expert polygrapher.

2. and 3. Antonio Rivera and Jessie Gomez have both sworn and told the polygraph examiner that Raul Herrera confessed to each of them on separate occasions, immediately after the offense and before the trial. Raul, Sr., said that he, not Leonel, killed Rucker and Carrisalez. The polygraph expert considered their answers to be truthful.

4. Finally, Norma Rodriguez, Leonel Herrera's sister, has sworn that Leonel was at her house at the time of the shootings. Her brother Raul, Sr., threatened her to keep quiet and told her to let Leonel take the blame. Polygraph examiner Ernie Hulsey has stated in a written report that his test results confirm the truthfulness of Norma's account, as well as the truthfulness of the other three

witnesses.[4]

b. Hector J. Villarreal, an Edinburg attorney and former state district judge, has also provided an affidavit in which he states that he represented Raul Herrera on an (unrelated) charge of attempted murder. During the course of confidential attorney-client communication, Raul Herrera confessed to him that he committed the murders.

In conclusion, and in accordance with Texas law, the Applicant is not presenting technical questions of law which are properly presented via the judicial process. Instead, he seeks a meaningful review of his compelling new evidence of innocence. In order to present such evidence in an orderly and meaningful manner, Applicant requests that this Board recommend a reprieve and or clemency.

As noted, the Applicant wishes to supplement this application over the next several days. He will submit the affidavits, the polygraph reports, and other matters to the Board as soon as possible.

Sincerely,

Mark E. Olive
(904) 644-7710

[4]These witnesses had not been submitted to polygraph examinations at the time of the United States Supreme Court opinion. The lie detector test information is dramatic new evidence of innocence.

APPENDIX 24
Recent grants of clemency from other states based on doubts about guilt

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES G. MARTIN
GOVERNOR

January 13, 1992

Malcolm Ray Hunter, Jr., Esquire
Henderson Hill, Esquire
Office of the Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602

RE: Anson Avery Maynard

Dear Messrs. Hunter and Hill:

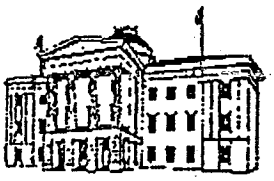
Enclosed please find a copy of the Commutation Order executed by the Governor on January 10, 1992 concerning the above-referenced inmate.

Very truly yours,

Mark Martin
Legal Counsel to the Governor

MM/sl
Enclosure

State of North Carolina



JAMES G. MARTIN
GOVERNOR

COMMUTATION ORDER

RE: ANSON AVERY MAYNARD
#30342-43

WHEREAS, the defendant, Anson Avery Maynard, was convicted of murder in the first degree by unanimous verdict of the jury, duly returned at the 30 November 1981, Criminal Session of the Superior Court of Cumberland County, North Carolina, in case number 81-CRS-35849, and the jury having recommended the punishment of death; and

WHEREAS, judgments were entered by the superior court on December 11, 1981 and thereafter, that Anson Avery Maynard be sentenced to death and that the Sheriff of Cumberland County, North Carolina, deliver him to the Warden of the State's Penitentiary at Raleigh, North Carolina, where the Warden would cause him to be put to death as by law provided; and

WHEREAS, it has been made to appear to me that this case is one fit for the exercise of Executive Clemency;

NOW, THEREFORE, I, James G. Martin, Governor of the State of North Carolina, by virtue of the power and authority vested in me

by the Constitution of the State of North Carolina, do by these presents COMMUTE Anson Avery Maynard's sentence of death to a sentence of imprisonment for life, without benefit of parole but subject to such other clemency as may be granted by the Governor.

An original of this order shall be delivered forthwith to the Warden of Central Prison, Raleigh, North Carolina, the Secretary of the Department of Correction and Anson Avery Maynard. A certified copy of this order shall be delivered to the Clerk of Superior Court of Cumberland County for filing. Copies of this order shall be delivered to the Attorney General, the District Attorney for the 12th Prosecutorial District and Counsel for Anson Avery Maynard.

Anson Avery Maynard is committed to the custody of the Department of Correction for the remainder of his life, subject to the provisions herein.

Done in the Capital City of Raleigh, this 10th day of January, 1992.

James G. Martin
Governor

James G. Martin
Governor

State of North Carolina
Office of the Governor

Release: Date:

Contact: Distribution:

GOVERNOR COMMUTES ANSON MAYNARD'S DEATH SENTENCE
TO LIFE WITHOUT PAROLE

RALEIGH -- The following is Governor Jim Martin's statement concerning the commutation of Anson Avery Maynard's death sentence to life in prison without parole.

"After lengthy, prayerful consideration, I have decided to commute the death sentence of Anson Avery Maynard to life imprisonment without parole. Anson Maynard was convicted of murdering Stephen Henry on June 13, 1981, in Fayetteville, North Carolina. After all appeals were exhausted, the date of January 17, 1992, was set by the courts for the State to carry out the death sentence, and a written appeal for clemency was received by me as Governor of North Carolina on November 22, 1991.

"I have heard attorneys and witnesses on both sides, as well as family members of both Stephen Henry and Anson Maynard. I have sifted through a complex mixture of ambiguous evidence, some of which was not available for presentation to the jury which convicted Anson Maynard, and some of which may not have even been admissible in a court of law.

"No physical evidence ties Anson Maynard to the scene of the crime or to the commission of the crime. The only direct witness to testify that Maynard pulled the trigger was Gary Bullard, an admitted participant in the murder who was given immunity from prosecution in return for his evidence and testimony against Maynard. Given the information available at the time, the jury accepted Bullard's version over Maynard's.

"After extensive review of all of the claims and counterclaims, I am not convinced that Anson Maynard pulled the trigger to kill Stephen Henry. Nor am I convinced that Anson Maynard is totally innocent.

- more -

Governor's Communications Office
State Capitol, Raleigh, NC 27603-8001
(919) 733-5612 - Toll Free 1-800-662-7005
FAX (919) 733-5166

"Since it is not clear to me that he was the murderer, I conclude that the most appropriate use of the power of clemency vested in my office is to decide that the State of North Carolina will not carry out the execution of Anson Maynard. Because it is not clear on the basis of all I have read and heard that Anson Maynard was not the murderer, I conclude that he should remain in prison for the rest of his life.

"The record is clear that the courts have done their duty under the powers and procedures of the courts. Law enforcement has done its duty to use the evidence available to support a conviction. The post-conviction defense counsel has worked hard to find every shred of evidence to support the petition for clemency. The Attorney General's office has worked hard to uncover any information or response supporting the original verdict and sentence. I have done the best I can to reach an understanding of what truth can be found in all this.

"I want it clearly understood that my actions do not indicate any tolerance on my part, or of the State of North Carolina, of murder in this state, especially the murder of a person who has indicated a willingness to assist the state through testimony against another person. The willingness of citizens to offer testimony is essential to the prosecution of the guilty and it is a function of government to protect witnesses from harm. Where the evidence is clear, we should not hesitate in carrying forth swift, sure justice, including execution.

"I appreciate the efforts of the jury to arrive at the truth. There was much conflicting evidence presented to them in 1981 and we all respect the decision they reached at that time based upon what they saw and heard. It is only with the benefit of additional time, and with information that they may not have had available, that my decision modifies their sentence.

"There is reasonable doubt in my mind as to whether the degree of involvement of Anson Avery Maynard in the murder of Stephen Henry is sufficiently clear to justify the death penalty. For that reason, I have commuted Anson Maynard's death sentence to life in prison without parole. It is for cases like this that the power of clemency is given to the governor.

TO ALL WHOM THESE PRESENTS SHALL COME -- GREETING:

Herbert Russell Bassett was brought to trial in the Circuit Court for the County of Henrico, Commonwealth of Virginia, in August of 1980 for the capital murder and robbery of Albert Lee Burwell, Jr. On August 22, 1980, Herbert Russell Bassett was convicted, inter alia, of one count of capital murder in the commission of a robbery and for this crime the jury fixed his punishment at death. On November 20, 1980, Judge Robert M. Wallace accepted the jury's judgment and entered an order sentencing Herbert Russell Bassett to death. Herbert Russell Bassett has now petitioned me to commute his sentence of death.

In accordance with the powers granted to me as Governor of Virginia under Article V, Section 12 of the Constitution of Virginia, I, Lawrence Douglas Wilder, do hereby reach the following conclusions and grant the following commutation of sentence:

It is axiomatic that the ultimate sentence of death must be applied solely to those who have been demonstrated beyond a reasonable doubt to have committed the crime for which they are charged. The test to be applied is not whether one believes that the accused committed the crime in question, but whether one holds that belief without the presence of any reasonable doubt. After a thorough review of the evidence, including evidence presented to me by counsel for Herbert Russell Bassett which was not before the jury when they rendered their verdict, while well reasoned and conscientious minds may differ, I cannot in good conscience erase the presence of a reasonable doubt and fail to employ the powers vested in me as Governor to intervene.

NOW THEREFORE, in light of the foregoing I do hereby grant Herbert Russell Bassett a commutation of the sentence of death to life imprisonment without parole.

In taking this action, it is not my intention to convey an impression that an argument cannot be made that there is significant evidence to support the verdict that was imposed upon Herbert Russell Bassett. Accordingly, no one can fault those who have reached a conclusion different than mine. This includes those who have prosecuted this case with vigor, and I commend them for

their conscientious, steadfast and dedicated loyalty to their obligation to uphold the law of this Commonwealth.

Given under my hand and the Lesser Seal of the Commonwealth at Richmond, this 23rd day of January in the year of our Lord one thousand nine hundred and ninety-one and in the 216th year of the Commonwealth of Virginia.

Governor of Virginia

By the Governor:

Secretary of the Commonwealth

[This is a copy of the Order of Commutation entered by Governor Lawrence Douglas Wilder on behalf of Herbert Russell Bassette]

TO ALL WHOM THESE PRESENTS SHALL COME -- GREETING:

Herbert Russell Bassette, also known as, Herbert Russell Bassett, was brought to trial in the Circuit Court for the County of Henrico, Commonwealth of Virginia, in August of 1980 for the capital murder and robbery of Albert Lee Burwell, Jr. On August 22, 1980, Herbert Russell Bassette was convicted, inter alia, of one count of capital murder in the commission of a robbery and for this crime the jury fixed his punishment at death. On November 19, 1980, Judge Robert M. Wallace accepted the jury's judgment and entered an order sentencing Herbert Russell Bassette to death. Herbert Russell Bassette has now petitioned me to commute his sentence of death.

In accordance with the powers granted to me as Governor of Virginia under Article V, Section 12 of the Constitution of Virginia, I, Lawrence Douglas Wilder, do hereby reach the following conclusions and grant the following commutation of sentence:

It is axiomatic that the ultimate sentence of death must be applied solely to those who have been demonstrated beyond a reasonable doubt to have committed the crime for which they are charged. The test to be applied is not whether one believes that the accused committed the crime in question, but whether one holds that belief without the presence of any reasonable doubt. After a thorough review of the evidence, including evidence presented to me by counsel for Herbert Russell Bassette which was not before the jury when they rendered their verdict, while well reasoned and conscientious minds may differ, I cannot in good conscience erase the presence of a reasonable doubt and fail to employ the powers vested in me as Governor to intervene.

NOW THEREFORE, in light of the foregoing I do hereby grant Herbert Russell Bassette a commutation of the sentence of death to life imprisonment without parole.

In taking this action, it is not my intention to convey an impression that an argument cannot be made that there is significant evidence to support the verdict that was imposed upon Herbert Russell Bassette. Accordingly, no one can fault those who have reached a conclusion different than mine. This includes those

who have prosecuted this case with vigor, and I commend them for their conscientious, steadfast and dedicated loyalty to their obligation to uphold the law of this Commonwealth.

Given under my hand and the Lesser Seal of the Commonwealth at Richmond, this 23rd day of January in the year of our Lord one thousand nine hundred and ninety-two and in the 216th year of the Commonwealth of Virginia.

Governor of Virginia

By the Governor:

Secretary of the Commonwealth

COMMONWEALTH of VIRGINIA

Executive Department

TO ALL WHOM THESE PRESENTS SHALL COME -- GREETING:

In accordance with the powers granted to me as Governor of Virginia under Article V, Section 12 of the Constitution of Virginia, I, Lawrence Douglas Wilder, do hereby reach the following conclusions and render the following conditional pardon:

Joseph M. Giarratano, Jr., was brought to trial in the Circuit Court of the City of Norfolk for burglary while armed with a deadly weapon, rape, first degree murder in the commission of or subsequent to rape and first degree murder. There is evidence to reflect that sometime prior to trial, Joseph M. Giarratano, Jr., was offered a plea bargain in which in exchange for a plea of guilty to some or all of the aforementioned offenses, the Commonwealth's Attorney would recommend two life sentences and a third sentence of 50 years. Joseph M. Giarratano, Jr., chose to present a plea of not guilty based upon an insanity defense, and further confirmed in an agreement with his attorney that the facts of the case were much the same as his statement to the Norfolk Police Department.

On May 22, 1979, Joseph M. Giarratano, Jr., was found guilty of the rape of Michelle Kline, of capital murder for the death of Michelle Kline and of first degree murder for the death of her mother, Barbara Kline, in a bench trial before The Honorable Thomas R. McNamara, Judge of the Circuit Court of the City of Norfolk.

After the review of a presentence report, Joseph M. Giarratano, Jr., was sentenced by the court on August 17, 1979, to death for the capital murder conviction, life imprisonment for the first degree murder conviction and 30 years for the rape conviction.

Since the date of the verdict and sentencing by the court, Joseph M. Giarratano, Jr., has been involved in numerous appeals,

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both within the courts of the Commonwealth and the United States. No court before which an appeal has been presented has granted the relief Joseph M. Giarratano, Jr., sought.

On January 22, 1991, upon the Commonwealth's motion, The Honorable Thomas R. McNamara, Judge of the Circuit Court of the City of Norfolk, ordered that Joseph M. Giarratano, Jr., be executed on February 22, 1991, and that the sentence be carried out "at such time of the day as the Director of the Department of Corrections shall fix."

Joseph M. Giarratano, Jr., through counsel, has petitioned my Office with the request that I invoke the clemency powers granted to me under Article V, Section 12 of the Constitution of Virginia and that he be granted clemency to the extent that I commute his death sentence conditioned on the right of the Commonwealth to retry him.

I have thoroughly reviewed the evidence in the case, the briefs of counsel for the Attorney General and defense counsel. It is also a matter of common knowledge that I have been subjected to significant pleas from across the United States and other parts of the world to grant the request of Joseph M. Giarratano, Jr. While they have been sincere in their expressions of concern on behalf of Joseph M. Giarratano, Jr., the overwhelming majority acknowledge that they do not enjoy a grasp of the specific facts in the case. I on the other hand do, as I must. Accordingly, while I appreciate these expressions of opinion, I must be ever mindful that the powers granted to the Governor by the Constitution cannot be implemented based upon popular appeal, nor can such decision be implemented in a manner that sacrificially abridges the law. To the contrary, it must emanate from a thorough review of each case, be based upon the evidence presented and rest its authority upon established principles of law. Moreover, a governor must remain cognizant of the precept that the powers granted must be carefully husbanded in order to assure that they not meet with abuse.

The framers of the Constitution of Virginia and the citizens who approved its passage into law have been deliberate in establishing the breadth of the Governor's clemency powers. The relief that Joseph M. Giarratano, Jr., seeks from the Governor is unprecedented. There has been no evidence forthcoming from counsel for Joseph M. Giarratano, Jr., nor am I aware of any instance in which any Governor in the United States or any United States President has ever extended his clemency powers in a manner that has either granted or allowed a new trial for any person convicted

of a crime.

In reaching my decision on the issue of clemency, I must consider the necessity to recognize the sanctity normally extended to each branch of government and the inherent obligation to maintain the dignity accorded to the separation of powers. The extraordinary powers granted to me by the Constitution of Virginia do not in my opinion allow me to reach into the jurisdiction of the Judicial Branch of Virginia government and mandate a new trial. The propriety of a new trial has been reviewed and determined adversely to Joseph M. Giarratano, Jr., by the courts of this Commonwealth and the United States and, while the clemency powers granted to me are broad, they must be utilized in the manner established by precedent existing in the United States and in the Commonwealth since time immemorial, with full appreciation for the demands to exercise unfettered judgment.

NOW THEREFORE, in light of the foregoing I have determined that, while well reasoned and conscientious minds may differ, the ultimate decision must be mine; accordingly, based upon the dictates of the circumstances of this case and the evidence presented by the Attorney General and defense counsel, I do hereby grant Joseph M. Giarratano, Jr., the following CONDITIONAL PARDON:

(1) I acknowledge that statutory language exists to the effect that those persons sentenced to death are not eligible for parole. Notwithstanding this factor, I do not view such language as a constraint to the powers granted to me by the Constitution under Article V, Section 12. I have concluded that the powers granted to me supercede any direct or implied attempt to restrict such powers through a statutory enactment. Accordingly, I hereby commute the sentence of death for the capital murder conviction to life imprisonment and grant Joseph M. Giarratano, Jr., parole eligibility with the opportunity for parole to be determined by the Virginia Parole Board in the same manner as if, originally, he had been sentenced to life imprisonment under present law; provided, however, that in no instance shall he be eligible for parole until he has served a total of 25 years including present time served; and

(2) The findings and sentence of the court as to rape and first degree murder are to remain unchanged; and

(3) The capital punishment commutation is conditioned upon Joseph M. Giarratano, Jr., maintaining good conduct and cooperating with Virginia Department of Corrections officials; accordingly, if at any time during his imprisonment he shall be guilty of a felony,

including the attempt to escape, this commutation shall be rendered null and void and revised to the extent that he shall thereafter serve a life sentence without parole, unless such misconduct on his part leads to a sentence from a court that dictates a more stringent sentence; and

(4) I do hereby further implement my clemency powers to the extent that nothing contained herein is to be deemed to preclude the Attorney General, in her sole discretion and at her option, from taking whatever steps are necessary to attempt to secure Joseph M. Giarratano, Jr., a new trial and to initiate and prosecute that trial with her staff or through the use of others, for those reasons having been made known to the Attorney General in a petition to her by Joseph M. Giarratano, Jr., requesting a retrial. The petition from Joseph M. Giarratano, Jr., however, must provide for the waiver of any right he may have to double jeopardy, for his continued incarceration until the Judicial Branch has rendered its final verdict and entered an order to the contrary and any further conditions which the Attorney General or the Judicial Branch may deem appropriate. I extend my clemency powers to the Attorney General to invoke the option set forth above with the full acknowledgement that she is not bound to agree to a new trial nor may the Judicial Branch be bound to accede to the request for a retrial. Moreover, I accept the fact that, in the event the Attorney General should choose to attempt to secure a retrial and the Judicial Branch should agree to such a retrial, that such retrial results could conclude with an outcome that is either more or less stringent than this clemency order, including the potential of an outcome in which the sentence of death could be ordered. Accordingly, in the event of such a retrial, the verdict that results and the sentence that is imposed in the event of a finding of guilty shall supercede this grant of executive clemency.

(5) In the event that any part of this clemency grant is deemed by a court of competent jurisdiction to be ineffective, void or contrary to law or my intent, Joseph M. Giarratano, Jr., is not to be released from prison, but instead, his sentence will be commuted to life imprisonment without parole, unless I am serving as Governor of Virginia at the time of such judicial decision and I choose to implement a different pardon result.

(6) Before this conditional clemency grant will become effective, Joseph M. Giarratano, Jr., must accept its terms on or before 5:00 P.M. on February 20, 1991, by signing this document at the place designated for his signature. If he rejects this grant, either in whole or in part, the entire grant is revoked and, thereby, will be null and void and the sentence of the Circuit

Court of the City of Norfolk will be carried out.

Given under my hand and the Lesser Seal of the Commonwealth at Richmond, this 19th day of February in the year of our Lord one thousand nine hundred and ninety-one and the 215th year of the Commonwealth of Virginia.

Governor of Virginia

By the Governor:

Secretary of the Commonwealth

ACCEPTANCE OF THE CONDITIONAL PARDON

I, Joseph M. Giarratano, Jr., hereby accept the above CONDITIONAL PARDON with the conditions therein set forth.

Signature: _____ Date: 20 February, 1991

Joseph M. Giarratano, Jr.
Page Six of Six

State of Virginia
City of Richmond, to-wit:

Subscribed and sworn to before me this 20th day of February 1991, by Joseph M. Giarratano, Jr.

Deborah Greene
Notary Public

My commission expires the 11 day of March, 1991.