

COPY

Cause No. 3084-A

EX PARTE JESUS ESQUIVEL
RAMIREZ,

Applicant.

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IN THE DISTRICT COURT OF

LAMB COUNTY, TEXAS

154th JUDICIAL DISTRICT

FILED
IN THE OFFICE
OF THE DISTRICT CLERK

**SECOND SUPPLEMENTAL CLAIM TO JESUS ESQUIVEL
RAMIREZ'S APPLICATION FOR A WRIT OF HABEAS CORPUS
SEEKING RELIEF FROM FINAL FELONY CONVICTION**

JAN 07 2005
5:00P
AT 5:00 P M O'CLOCK
CELIA KUYKENDALL
LAMB COUNTY DISTRICT CLERK

Petitioner Jesus Esquivel Ramirez files this Second Supplemental Claim in Support of his Application for a Writ of Habeas Corpus Seeking Relief From a Final Felony Conviction ("Writ of Habeas Corpus") filed on December 16, 2002 in the 154th District Court of Lamb County, Texas, and is incorporated therein.

ADDITIONAL GROUND FOR RELIEF

GROUND NUMBER THIRTY: The State purposefully and improperly elicited improper and prejudicial polygraph testimony from prison informant, Jose Medrano, in violation of Mr. Ramirez's Due Process rights under the Fourteenth Amendment to the United States Constitution.

FACTUAL BASIS FOR CLAIM:

Jose Medrano, a prison informant, was one of three witnesses whose testimony was central to the State's case against Jesus Ramirez.¹ Mr. Medrano testified at Mr. Ramirez's trial that, while he was housed two cells away from Mr. Ramirez in the Lubbock County Jail,

¹ One of the three witnesses was Brenda Ayala who testified that she saw Mr. Ramirez and Alberto Sifuentes around 2:00 a.m. on the morning of August 6 at the Jolly Roger, just moments before Evangelina Cruz was murdered. Evidence reveals that Ms. Ayala was actually at the Jolly Roger just after 12:30 a.m., nearly 90 minutes before the murder. A second witness, Mary Davila Wood, testified that she and Messrs. Ramirez and Sifuentes stopped at the Jolly Roger store after leaving a bar in Lubbock. Evidence shows that Ms. Wood was so intoxicated that she was passed out on the night of the murder, and that her "memory" of stopping at the Jolly Roger was improperly influenced by the State and inconsistent with her earlier statements.

Mr. Ramirez said that he was sorry for everything, that he asked God for forgiveness, and that he was not the one who pulled the trigger, that it was his partner. JR Tr. Vol. 8, pp. 113-115. Medrano's testimony, which amounted to a confession by Mr. Ramirez, was the only such testimony in the Ramirez trial.

As detailed in Mr. Ramirez's habeas petition, evidence shows that the State concealed a multitude of evidence showing that Medrano's testimony could not be believed. The State did not disclose that Medrano had three prior state felony convictions, a history of cooperation with authorities when faced with prosecution, prior mental health problems, and an extraordinarily lenient plea agreement on a pending rape charge in exchange for his testimony in the Ramirez case, and that Medrano, who faced a federal revocation, feared that he would be killed if he was sent back to prison. The State suppressed this evidence which would have demonstrated that Medrano had every reason – and a willingness – to commit perjury to avoid prison time.

During the Ramirez trial, Medrano first testified in a hearing outside the presence of the jury to determine the admissibility of his testimony. On the final question of the State's direct examination of Medrano, he blurted out that he had taken and passed a polygraph test. There were no objections by the State or defense counsel. When Medrano later testified before the jury, he once again, in response to the State's final question during direct examination, blurted out that he had taken and passed a polygraph test. This time defense counsel objected and moved for a mistrial, but the mistrial was denied.

Medrano has recently provided sworn testimony that the State improperly coached him and explicitly instructed him to testify to the jury that he had taken and passed a polygraph examination:

While Mr. Yarbrough and Mr. Say prepared me for my testimony, they told me that during my testimony in front of the jury, I should say that I had passed a polygraph test. They said that the defense attorney would probably jump up and argue that the polygraph results were not admissible but that, by then, it would be too late because the jury would have already heard that I passed the polygraph test. They told me that if they could convict Mr. Ramirez, they would have no problem convicting the other guy.

Medrano Aff., attached as Ex. A, ¶ 6.

Medrano's sworn testimony is supported by the way in which the disclosures occurred – that on two separate occasions, and in an almost identical way, Medrano blurted out that he had taken and passed a polygraph test. The first disclosure came in response to the prosecutor's final question on direct examination at a hearing outside the presence of the jury:

Q: Did you ever ask Mr. Ramirez about shooting the clerk nine times?

A: I didn't ask him, I kind of more stated.

Q: What do you mean by that?

A: I told him that was pretty messed up. It don't take nine bullets to kill somebody.

Q: What was his response to that?

A: Like I said, he was – got scared, you know, his conscience, I believe, was getting to him, maybe that's why he was praying to God, I don't know. But I know that when I did tell him that the guy next to me was telling me to keep asking him. He started just, "No, no, no, it wasn't me, it wasn't me," you know. "I didn't pull the trigger," you know, "it was the other guy."

Q: *You're sure he said that?*

A: *Yeah, I passed the polygraph.*

JR Tr. Vol. 6, p. 131-132 (emphasis added).² The question posed to Medrano was an open-ended, redundant question designed to produce the answer Medrano gave.

² Medrano has also provided sworn testimony that "at the time that Jesus Ramirez made these statements, he seemed to me to be incoherent and in a delusional state of mind . . . Mr. Ramirez seemed to me to be delirious." Ex. A, ¶ 6.

The State then affirmatively elicited the polygraph testimony *in front of the jury*. Like in the earlier testimony before the court, in response to the prosecutor's final question on direct examination, Medrano testified – this time to the jury – that he had taken and passed a polygraph examination:

Q: *Jose, are you just making this up so you can get a better deal on your case?*

A: *No. I passed the polygraph examination.*

Defense counsel objected and asked for a mistrial, which was denied:

[Defense Counsel]: Objection, Judge.

The Court: Okay. The jury will be instructed to disregard the last comment.

[Defense Counsel]: And we ask that it be stricken from the record, Judge. And Judge, we've got to ask for a mistrial.

The Court: That's overruled.

JR Tr. Vol. 8, p. 120 (emphasis added).

In both instances, Medrano testified that he passed a polygraph test in response to the prosecutor's final question on direct examination, and both times the prosecutor elicited this response through an open-ended, redundant question intended only to bolster previous testimony. It is implausible that Medrano could accidentally blurt out this improper and highly prejudicial testimony twice, particularly given that both times he was providing a responsive answer to the prosecutor's last question on direct examination. Even assuming that the first statement about passing the polygraph could have been unplanned, which, according to Medrano it was not, the second one clearly could not have been a surprise. If, after the hearing, the State had instructed Medrano – as it should have – not to testify that he had passed a polygraph test, Medrano would not have made the exact same statement when he testified before the jury. The State cannot in good faith argue that Medrano's testimony was a surprise or beyond its control. Scott Say, who conducted Medrano's direct examination, admitted that Medrano's testimony about passing the

polygraph was the “proper response” to the question that was asked. JR Tr. Vol. 8, p. 123.

Undoubtedly, Say purposefully elicited the improper and highly prejudicial polygraph testimony in an effort to bolster the credibility of this witness whose testimony was otherwise unbelievable.

The State’s purposeful elicitation of the polygraph testimony deprived Mr. Ramirez of his right to a fundamentally fair trial and violated his Due Process rights guaranteed by the Fourteenth Amendment to the United States Constitution. Because polygraph examinations are inherently unreliable and tend to be unduly persuasive, evidence regarding the existence and results of a polygraph examination is not admissible. *Ross v. State*, 133 S.W.3d 618, 625 (Tex. Crim. App. 2004); *Nichols v. State*, 378 S.W.2d 335, 336 (Tex. Crim. App. 1964); *see also*, *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (“affirming military legal system’s per se ban on polygraph evidence: “... jurisdictions may legitimately determine that *the aura of infallibility attending polygraph evidence* can lead jurors to abandon their duty to assess credibility and guilt”) (emphasis added).³ Because Medrano was a crucial witness with severe credibility problems, the State’s intentional elicitation of testimony that he had taken and passed a polygraph test for the purpose of bolstering his credibility was highly improper and unquestionably resulted in a fundamentally unfair trial in violation of Mr. Ramirez’s Due Process rights under the Fourteenth Amendment to the United States Constitution.

³ Moreover, when the results of a polygraph examination are revealed, an instruction that the jury disregard the evidence is insufficient and the failure to grant a mistrial generally constitutes reversible error. *Robinson v. State*, 550 S.W.2d 54, 56 (Tex. Crim. App. 1977) (conviction reversed after the testimony of a convicted felon who allegedly heard confession from defendant was bolstered by disclosure that he had taken and passed polygraph examination); *Nichols*, 378 S.W.2d at 338 (conviction reversed because State intentionally elicited evidence implying that complainant had passed polygraph examination); *Sparks v. State*, 820 S.W. 2d 924, 927 (Tex. App.—Austin 1991, no writ) (conviction reversed because State intentionally elicited evidence that harmed defendant by implying that alternate suspect had passed polygraph examination); *Long v. State*, 10 S.W.3d 389, 399 (Tex. App.—Texarkana 2000, pet. denied) (“When a defendant immediately objects to testimony that reveals the results of a polygraph test of the defendant or other crucial witness, the harm is so great that it cannot be cured by an instruction to disregard. In such circumstances, the defendant is entitled to a mistrial.”).

Respectfully submitted,



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**ATTORNEYS FOR APPLICANT
JESUS ESQUIVEL RAMIREZ**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon counsel of record by Federal Express on this 5th day of January 2005.



STATE OF TEXAS
COUNTY OF DALLAS

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AFFIDAVIT OF JOSE ERLINDO MEDRANO, JR.

1. My name is Jose Erlindo Medrano., Jr. I am more than twenty-one (21) years of age, of sound mind, and am wholly competent to sign this Affidavit. I have personal knowledge of the facts stated in this Affidavit, and they are true and correct.

2. I testified in the capital murder trial of Jesus Ramirez. During the trial, I testified about statements that I heard Mr. Ramirez make in September or October of 1996 while we were being held in the Lubbock County Jail.

3. At the time that Jesus Ramirez made these statements, he seemed to me to be incoherent and in a delusional state of mind. For hours and hours, Mr. Ramirez would scream, cry, repeatedly call out to God, bang his head against the wall, and speak in a language that I could not understand. This was not a one-time incident. Mr. Ramirez seemed to me to be delirious.

4. When I was later questioned by police investigators and Lamb County prosecutor, Mark Yarbrough, about the statements Mr. Ramirez had made, I told them about Mr. Ramirez's incoherent state of mind and described how he had been acting, but no one seemed to be interested in this information.

5. Prior to testifying in Mr. Ramirez's trial, Mr. Yarbrough and Mr. Say prepared me for the way they wanted me to testify. During these practice sessions, they told me that while I was testifying in front of the jury, they would stay away from any questions about Mr. Ramirez's incoherent state of mind and his strange behavior. They told me that I should only answer the

questions they asked and not volunteer information about Mr. Ramirez's incoherent state of mind.

6. While Mr. Yarbrough and Mr. Say prepared me for my testimony, they told me that during my testimony in front of the jury, I should say that I had passed a polygraph test. They said that the defense attorney would probably jump up and argue that the polygraph results were not admissible but that, by then, it would be too late because the jury would have already heard that I passed the polygraph test. They told me that if they could convict Mr. Ramirez, they would have no problem convicting the other guy.

7. During the time that Scott Say was my defense lawyer, he tried to negotiate a plea deal where I would get five years on the rape charge in Lamb County in return for my testifying in Mr. Ramirez's trial. He was also trying to get my pending federal revocation charge to run concurrently with my pending state charge. I repeatedly made it clear that I would not plead guilty to anything more than five years. I made it clear that I did not want to serve any more time for my federal revocation. I also made it clear to prosecutors that I was concerned for my safety if I was sent to federal prison or a TDCJ facility because I thought I could be attacked or killed. I understood that there had been a contract out on my life, and I knew my life was at risk.

8. Mr. Yarbrough wanted me to testify against Mr. Ramirez and he proposed a plea agreement, where in exchange for my testimony, I would serve ten years on the rape charge. That was Mr. Yarbrough's best offer until immediately before the trial. I consistently refused any ten year plea. It was not until right before I testified in Mr. Ramirez's trial, that I was for the first time offered a five year plea deal in exchange for my testimony. Just before I agreed to accept the five year plea, the prosecutor from Lubbock threatened that I would get fifty years if I did not sign the plea agreement and testify.

9. Before I testified in Mr. Ramirez's trial, I signed a handwritten plea agreement. Attached to this affidavit is a true and correct copy of the plea agreement that I signed shortly before I testified in Mr. Ramirez's trial.

10. Both Scott Say and Mark Yarbrough knew about my prior drug conviction for possession with intent to distribute 230 kilograms of marijuana in Corpus Christi because I told them about it. I told Scott Say and Mark Yarbrough that I had previously cooperated with federal authorities in my drug case in Corpus Christi and that as a result of my cooperation, I received a lower prison sentence. Scott Say also knew that I had provided federal authorities information about a heroin deal in California. Scott Say also knew that I had three prior felony convictions from Hidalgo County.

11. Prior to testifying in Mr. Ramirez's trial, I also told Mr. Say and Mr. Yarbrough that I was on federal supervised release and that my release was in the process of being revoked. I told them about the revocation proceeding because I was very worried about it being revoked and being sent to federal prison. Mr. Say and Mr. Yarbrough agreed to try to get my pending federal revocation charge to run concurrently with my pending rape charge in Lamb County.

12. Tracy Frazier was in jail in Littlefield while I was there. While we were in the jail, Frazier told me that he was going to get a sweet deal from the Lamb County prosecutors on his pending charge involving a high speed chase in return for his testimony in Alberto Sifuentes's trial.

FURTHER, Affiant sayeth not.


Jose Erlindo Medrano, Jr.

This instrument was acknowledged before me on this 11th day of November
2004, by Jose Erlindo Medrano.

Brenda K. Green

Notary Public in and for the State of Texas

