

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NOAH ESPADA – PETITIONER

vs.

STATE OF TEXAS – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FOURTH COURT OF APPEALS
FOR SAN ANTONIO, TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a *Brady* violation, that results in the reversal of a death sentence because of perjury stemming from the *Brady* violation, implicates the Double Jeopardy Clause and prevents the State from again seeking death?

LIST OF PARTIES

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at *Ex parte Espada*, 565 S.W.3d 326 (Tex. App. - San Antonio 2018, pet. ref'd). The order of the District Court of Bexar County, Texas, 379th Judicial District appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided this case was July 18, 2018. A copy of that decision appears at Appendix A. A timely motion for rehearing was thereafter denied on November 1, 2018, and a copy of the order denying rehearing appears at Appendix C. A timely petition for discretionary review (PDR) was thereafter refused on February 6, 2019, and a copy of the denial of the PDR appears at Appendix D. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

STATEMENT OF THE CASE

The Petitioner was charged with capital murder, convicted by a jury, and sentenced to death on August 17, 2005. (T - 10, 54-55).¹ The Court of Criminal Appeals affirmed the judgment in an unpublished opinion. *Espada v. State*, No. AP-75,219 (Tex. Crim. App., November 5, 2008), *cert. denied*, 557 U.S. 906, 129 S.Ct. 2790, 174 L.Ed.2d 294 (2009). A post-conviction writ of habeas corpus was filed, and the Court of Criminal Appeals in an unpublished opinion granted relief, in part, because of perjury by a state punishment witness, and remanded this cause for a new

¹The clerk’s record will be referred to as “T and page number.” The court reporter’s record of trial and sentencing will be referred to as “R and volume and page number.” The court reporter’s record of the hearing on the writ will be referred to as “R and WHC volume and page number.”

punishment hearing. *Ex parte Espada*, No. WR-78,108-01 (Tex. Crim. App., July 1, 2015). Prior to this new punishment hearing, the Petitioner filed a pretrial writ of habeas corpus seeking relief from double jeopardy and, after a hearing, the trial judge denied relief on July 28, 2017 . (T - 95-120; R - WHC v.1 - 1).

At this pretrial writ hearing, the Petitioner offered into evidence the following: (1) trial testimony of Christopher Nieto; (2) trial testimony of Dr. Richard Coons; (3) closing argument by the prosecutor at punishment in the first trial; (4) testimony by the prosecutor at the 11.071 habeas hearing; (5) findings of fact and conclusions of law by the state habeas judge on the 11.071 writ; and (6) the Court of Criminal Appeals opinion granting relief, in part, on the 11.071 writ. (R - WHC v.1 - 4-5). There as no objection by the State and the exhibits were admitted into evidence. *Id.* at 6. The following are taken from these exhibits.

Defense Exhibit 1 from the pretrial writ hearing shows that the first witness for the prosecution at the sentencing phase of the first trial was Christopher Nieto. (R - WHC v.2 - DE 1) Nieto's testimony was, in part, as follows:

Q. Chris, could you introduce yourself to the jury, please?

A. Hi. I'm Christopher Nieto.

Q. How are you employed now, sir?

A. I'm an electrician journeyman at Southwest Electric.

Q. How were you employed back in April of 2004?

A. I was a Bexar County sheriff's officer, sir.

Q. What were your duties as a Bexar County sheriff's officer?

A. I was working second shift on unit BC. It was five days a week that I worked there.

Q. Obviously the jury is not going to understand that because I don't even understand it. Can you tell us exactly what it is you were doing back in April of 2004?

A. I was to watch over inmates throughout the day from two o'clock in the afternoon to 11 o'clock at night. Make sure all security issues were taken care of. Make sure there was no contraband brought into the facility, and basically, just take care of any needs that they needed there.

Q. So basically -- and I don't mean to -- I don't mean this any other way than to tell the jury, you were a jail guard?

A. Yes.

Q. And you worked for the Bexar County Sheriff's Office?

A. Yes.

Q. How long did you --

A. Two years.

Q. And you no longer work there?

A. No, sir.

Q. Can you tell us the circumstance --

A. I had lent my vehicle out to my brother-in-law a couple of days before. He was doing some bad things he wasn't supposed to be doing. He brought my vehicle back and he left a joint in there. I went to work. They had a random search of vehicles. My vehicle came up dirty. After that, they called me out. I had to take a urine test and I had to take a polygraph test. Everything came back negative. The fact of the matter was that they found half a joint in there. And after that, I resigned.

Q. Chris, during the time that you worked over at the jail for the two years, did they give you random urinalysis tests during that whole time?

A. Yes, sir.

Q. Did you ever fail one?

A. No.

Q. And they found half a marijuana joint in your car and that was left there by your brother-in-law?

A. And an affidavit was signed on that.

Q. And so other than doing anything disciplinary or anything like that, you left your job?

A. Right.

Q. And now you are studying to be an electrician?

A. Right.

Q. Now, Chris, tell us exactly where you worked in April of 2004. Where in the jail?

A. Unit BC, which is a lockdown unit for – administrative segregation unit.

Q. Tell the jury what a lockdown unit means?

A. It's basically where they hold all the gang members, high-profile cases and stuff like that that they hold in those units. They're locked down 23 hours a day and they come out for one hour a day.

Q. Chris, during your employment over there, did you have an opportunity to meet an inmate by the name of Noah Espada?

A. Yes, sir.

* * *

Q. Chris, I want to talk to you specifically about a couple of disciplinary reports on inmate Noah Espada.

A. All right.

Q. First, I want to draw your attention to something that happened on April 27th. Would it assist you to have a copy of your reports?

A. No.

Q. On April the 27th, was inmate Noah Espada written up for anything?

A. Yes, sir. He was written up for contraband.

Q. And describe -- do you do, from time to time, a search of inmates' cells?

A. Yes, sir. Every day we're there we have to do cell inspections. And the time we do them is when they come

out on their hour. They exit, we enter their cell, and make sure everything is up-to-date as far as keeping their bunks made, keeping any contraband out, not having any extra pills or trays, or anything that might affect the sanitary part of the job.

Q. When you go in there, do you search the cell?

A. Yes, sir.

Q. Now on April 27th of 2004, did you search inmate Espada's cell?

A. Yes, sir.

Q. When inmate Espada -- at that time, was there somebody in the cell with him?

A. Yes, sir.

Q. Do you remember what --

A. Apolinar Soto.

Q. Tell us what happened when you inspected the cell on the 27th of April of 2004?

A. Okay. Basically we went in. I went in and did a cell inspection. At that time I found -- I raised his bunk. At that time we found an orange pill, peach-colored pill, which was a Xanax, which was not prescribed to him, which was fished to him by another inmate. We found that out by calling medical station. Medical station confirmed that he was not under any kind of medication at the time. And when I asked whose it was, his response was, you found it in my bunk, dumb ass, so I guess it's fucking

mine. And at that time, you know, I wrote up the report as what it was and returned it into the sergeant's office.

* * *

Q. So basically what happens is, you found the contraband in inmate Espada's cell, he claimed ownership for it?

A. Right.

Q. And you wrote up the report?

A. Yes, sir.

Q. And that was on April the 27th of 2004?

A. 2004.

Q. For having non-prescription Xanax in his cell?

A. Yes, sir.

Q. Now I want to talk to you a little bit, Chris, about the next day, which would be April the 28th.

A. Okay.

Q. Did you do another cell inspection on that day?

A. Yes, sir.

Q. And tell us what happened then, Chris?

A. At that time I found another pill in the same spot wrapped in a piece of toilet paper, you know. I didn't even -- I basically asked, whose it was. His celly looked at me like, whose was it before. And after that I wrote up the report and turned it in the same manner that I did before.

Q. After you found the Xanax on the 27th, how long was inmate Espada out of his cell between the 27th and the 28th?

A. Had to be a 24-hour period.

Q. And did he leave his cell during that time?

A. No.

Q. So somehow another Xanax pill found its way --

A. Other inmates come out on their hour, and other inmates go and congregate around cells and throw things under the cell doors. And that's how they get passed around.

Q. So is inmate Espada then, on the 28th, written up for having contraband, a Xanax pill again?

A. Yes, sir.

Q. Now Chris, I want to talk to you about something else that happened on April the 28th of 04.

A. Okay.

Q. You described earlier that inmates in this unit are allowed out a certain period during the day. Is that correct?

A. Yes, sir.

Q. And I think you've indicated to the jury that in every 24-hour period they are allowed to exit their cell for one hour to do the things that they have to do?

A. Yes, sir.

Q. Do they go out alone, Chris?

A. No. They come out as -- the most they'll be able to come out is in groups of four.

Q. Is that for security purposes?

A. Yes, sir.

Q. And on the 28th of April, were you -- did you view inmate Espada exit his cell during that time when he was supposed to come out?

A. Yes, sir.

Q. And do you remember if other inmates exited their cells, three others at that time?

A. I remember one specific inmate, Boyce Ahmed.

Q. Is that his first or last name?

A. First.

Q. And last name?

A. Ahmed.

Q. Another inmate?

A. Yes, sir.

Q. And where was his cell in relation to inmate Espada's cell?

A. Boyce Ahmed was in 21 or 22.

Q. And what about Espada?

A. Espada was in cell 23.

Q. So they were in close --

A. Yes, sir.

Q. -- proximity? Now tell the jury what it is you saw when you saw inmate Espada and inmate Boyce exit their cells?

A. Okay. When Espada exited his cell, instead of going directly to his left, which would be the way to go down the stairs to get down to the unit -- to get down to where the TV and everything is at, he immediately turned to his right and basically attacked Boyce Ahmed with a closed fist; started throwing punches at his upper body and torso. The way I wrote the report was he was the aggressor, basically. He came out throwing punches and basically Boyce Ahmed -- basically had self-defense. He had to protect himself. At that time I hit the SERT button, which is Special Emergency Response Team, comes up to separate the fight. At that time I told Boyce Ahmed to lay down, and Espada to lay down. Espada would not lay down. I had to basically intervene and put Noah Espada on the ground and hold him there until the SERT team got there. Meantime, Boyce Ahmed did stay laying on the ground.

Q. And did you write a report reflecting that inmate Espada had attacked another inmate?

A. Yes, sir.

Q. And that report was turned over to other authorities and there was an eventual disciplinary hearing held?

A. Yes, sir.

Q. Now it was clear to you when you saw this that inmate Espada was the aggressor?

A. Yes, sir.

Q. Let me ask you this. Explain to the jury about the intercom system there at the jail.

A. There's an intercom system that basically helps the inmates whenever they need something; basically, they need assistance with somebody trying to commit suicide, or they need Tylenol, or someone is having a seizure. Any kind of assistance they need, they hit the intercom and they're able to call down to the corporal's office. And we're able to listen to what they need. I do not recall the specific date, but one day Apolinar Soto called down to the intercom --

Q. Let me interrupt for you a second. The day we're talking about where the intercom was used by Soto, who is inmate Espada's cellmate?

A. Yes, sir.

Q. Was that before this altercation?

A. It was before.

Q. And am I correct in assuming that when a guy is in his cell, or two guys are in the cell, they can press a button in their cell and speak to you or a corporal about something that they might need?

A. Yes, sir.

Q. And sometime before the altercation that you saw, did inmate Soto, who was Espada's cellmate, press the intercom and indicate to you that he needed something?

A. Yes, sir.

Q. And what was that?

A. He basically needed Tylenol. He said he had a headache. He needed some Tylenol. And we forgot to turn off the intercom button. Tylenol was given to him. And throughout the day -- not throughout the day -- a few minutes throughout (sic) that, we heard them conversating. And throughout the conversation, we did here Noah Espada say when he left one of the apartments, whose ever apartment it was, that he heard a lady gasping for air as he walked out of the building.

Q. Did it appear to you that inmate Espada was bragging to inmate Soto?

* * *

Q. (By Mr. O'Connell) Did it appear to you that he was bragging about one of the -- the killing of one of his victims?

A. Yes, sir.

Q. And that was because you had left the intercom on after Soto called asking for Tylenol?

A. Yes, sir.

Q. Had you had enough interaction with Espada at that time to recognize his voice?

A. Yes, sir. I worked in that unit five days a week.

Q. Was it clear to you that inmate Espada was speaking about leaving a victim gasping for air and not inmate Soto?

A. Right. He was talking about a victim.

Q. And it was Espada?

A. Yes, sir.

Q. And he was speaking to inmate Soto?

A. Yes, sir.

MR. O'CONNELL: Pass the witness.

* * *

THE COURT: Can you all step out in the hallway for a minute, please?

(Jury not Present)

VOIR DIRE EXAMINATION OF THE WITNESS
QUESTIONS BY MR. SCOTT:

Q. Sir, my name is Jeff Scott. We've never met before. Is that correct?

A. Yes.

Q. Were you investigated -- before you resigned from the Sheriff's Department, were you ever investigated or interviewed by the FBI?

A. No, sir. I was investigated and it was all dropped. I have a packet at home which came in -- I don't recall when it came in, but I believe it had already been thrown out.

(R - v.38 - 87-94).

Defense Exhibit 2 from the pretrial writ hearing shows that the prosecution called Dr. Coons to testify at the sentencing phase of the trial regarding the future

dangerousness of Noah. (R - WHC v.2 - DE 2). The following occurred during his testimony:

Then, for the hypothetical, please, Doctor, while this person is in the custody of the authorities in the Bexar County Detention Center, he attacks another inmate with his fists. Assume for the hypothetical that a guard at the detention center actually hears what the guard terms as this inmate bragging about the death of one of his victims by saying he left her gasping for breath.

Assume that there is some kind of physical altercation while this person is in custody with a jail guard. Then assume that contraband such as, drugs, Xanax, a key ring fashioned into possibly a weapon, a newspaper rolled up fashioned into possibly a weapon, are found in his cell while he is in the custody of the authorities.

* * *

Q. (By Mr. O'Connell) Excuse me, Doctor. I'll withdraw the last question. The question I want to ask you, given the hypothetical that I just explained to you, take all those facts as fact, the things that I just described to you. Do you have an opinion in my hypothetical about whether that hypothetical person would be a future danger?

* * *

A. I do. Are you including only the hypothetical or the other things that I reviewed?

Q. Everything that you've reviewed, including the hypothetical.

A. Yes, I do.

Q. And could you please relate that to the jury?

A. I believe there is a probability that that person would commit criminal acts of violence in the future which would constitute a continuing threat to society.

Q. Doctor, tell us how you came to that conclusion.

A. Well, looking at the -- what I described earlier as my scheme of looking at things, at the issue of future dangerousness. Understanding that the best predictor of the future is the past. If you look at the history of violence of this individual, there's threats, and there's a — a — well, I'll get to the instant offense in a minute.

There's fighting in the jail with another inmate. And it's a bad sign that someone would be violent during -- awaiting trial for capital murder knowing there's an issue of future dangerousness in the offing. Having what would be considered . . . contraband . . .

(R - v.35 - 143-145).

Defense Exhibit 3 from the pretrial habeas hearing shows that the prosecution focused in closing argument on this evidence of fighting and possession of drugs in the jail as follows:

Let's talk about the facts as applied to the punishment part of this case. Okay? Officer Chris - Chris came in. And at first -- he told you, look, this guy had been in jail less than 40 days when he attacked another inmate. Okay?

Now if you want to take about future danger, the probability that are somebody will commit another criminal

act of violence that will constitute a continuing threat to society, let -- let me ask you just a hypothetical here. What if he was caught when he left Sandra's apartment? What if some friend of Sandra's was coming over, they saw the guy leaving and caught him. Well then they would have asked -- that would have been a capital -- would he be a future danger? Well you know what? He answered that had already. He killed Luke two nights later.

So now he's killed two people and he's in jail for it. He knows he's in jail for it. He knows he's facing the death penalty. He knows he's got to keep his nose clean. And 40 days after he's in jail, he attacks another inmate.

Now, I don't really care if they send him 30 days without privileges, or disciplinary action, or anything else. The fact of the matter is, the evidence, the facts in this case, is that that guard saw him attack another inmate. They walked out of their cells and he went at him with fists. That, ladies and gentlemen, is an act of violence. He's already answered your questioned beyond a reasonable doubt; not only by what he did to Luke and Sandra, but what he's done when he's been locked up.

Think about what else he's done when he's been locked up. Okay? You know, there's this haze of drugs and Ecstasy. I remember one witness saying something about Ecstasy specifically. And that witness was Sarah, the girlfriend. And do you know what she said? If you remember back that far? She was asked, did you guys take Ecstasy? Yeah, we took it on a few occasions. How did it make him feel? Happy. It made him feel happy. And they talked through the night when they took Ecstasy. Didn't make him kill. It made him happy. That's what her testimony is. That's the facts, ladies and gentlemen. Okay?

Think about this: He was found with drugs in his cell 40 days or 30 days after he was incarcerated. Well don't you think that somebody that because of drugs, killed two people, would never touch them again as long as they -- they lived? He's smuggling them into his cell on consecutive days. And then he's telling the guards, well if it's in my bunk, I guess it's mine, dumb ass. That's what he's about.

You don't see the real Noah Espada. They see it over at the jail. You don't see it here in this courtroom.

Luke and Sandra saw it. And in order to make your decision, to make a just decision, you have to see it when you're back in that room. You have to see what this guy is really all about.

* * *

And that first question is whether or not he will commit criminal acts. He already has. He already has. And when you decide that question, you're asked, well how can we possibly answer this question when we know he's killed two people; we know the manner in which he's killed two people; we know he's gotten in fights at the jail; we know he has weapons; he has drugs; he's disrespectful. How could you possibly answer no, knowing where he's going? You have to answer it yes . . .

(R - WHC v.2 - DE 3).

Nieto testified at the 11.071 habeas hearing in this case. In overturning the death sentence, the Texas Court of Criminal Appeals stated as follows:

At trial, to demonstrate that Petitioner would constitute a future danger even in prison, the State presented the testimony of several jail guards concerning Petitioner's conduct. This included the testimony of Christopher Nieto, a former deputy who stated that he had written three disciplinary reports against Petitioner after finding Xanax

pills in Petitioner's bunk and after witnessing Petitioner assault another detainee without provocation. Nieto also testified that he overheard Petitioner bragging about the offense of conviction to his cell mate.

The trial court conducted a live habeas hearing during which Nieto, other guards, and detainees testified. At the habeas hearing, it was established that Nieto testified falsely at trial concerning his employment history with the Bexar County Sheriff's Office. For example, it was revealed that less than a month before Nieto reported Petitioner's disciplinary offenses, Nieto left his assigned work area in order to confront and threaten Petitioner. This improper conduct resulted in his suspension. When questioned at the habeas hearing about the Order of Suspension describing this conduct, Nieto denied that he had confronted Petitioner and stated that the officer who reported the incident made it up because of a personal grudge. He stated that the captain who handled the suspension proceedings advised him not to challenge the officer's report, even if it contained false allegations, and just accept the suspension. Both the reporting officer and the captain testified at the habeas hearing and contradicted Nieto's account of the circumstances of his suspension. Another guard who had worked with the reporting officer and Nieto testified that he would believe the reporting officer's account of Nieto's misconduct.

It was also revealed at the habeas hearing that Nieto was under investigation for providing controlled substances to detainees when he resigned from the Sheriff's Office. A vehicle inspection conducted pursuant to this investigation led to the discovery in Nieto's car of a bag containing marijuana, a bong, and plastic packaging consistent with drug trafficking. Nieto resigned from the Sheriff's Office rather than submit to a polygraph examination concerning his explanation for the contraband found in his car. This evidence refuted Nieto's trial testimony that he resigned from the Sheriff's Office after a random vehicle inspection

uncovered “half a joint” that his brother-in-law had left in his car, and that Nieto had passed a polygraph examination confirming his explanation for the presence of the “half joint” in his car.

In addition, a probation officer who had supervised Nieto testified at the habeas hearing. Nieto’s probation records showed that in 2006, Nieto was charged with theft of property valued between \$1500 and \$20,000. These records included a dependency counselor’s report, dating from 2008, identifying the following traits: “cannabis dependent, cocaine abuse, negative learned behaviors, manipulateness, denial of treatment needs, underemployment, [and] lack of impulse control.” Concerning the theft offense, the habeas record indicates that Nieto was initially placed on deferred adjudication, was later adjudicated guilty and placed on probation, and finally was sentenced to a term of imprisonment.

These and other revelations cast doubt upon the credibility of Nieto’s trial testimony concerning Petitioner. The prosecutor testified that he would not have presented Nieto’s testimony at trial if he had known about Nieto’s dishonest and criminal conduct.

In addition, detainee testimony — including the testimony of the detainee Petitioner reportedly assaulted — controverted Nieto’s trial testimony that Petitioner had committed an unprovoked assault. The detainees’ testimony further undermined the credibility of Nieto’s trial testimony concerning Petitioner’s conduct while in jail. Nieto testified at the habeas hearing that he did not remember the detainees who testified or any of Petitioner’s disciplinary offenses, including the assault. When habeas counsel asked Nieto why the detainees would make up allegations against him, Nieto responded, “I mean, come on, man, they’re on the other side of the law.”

At trial, the State presented evidence of Petitioner's future dangerousness from sources other than Nieto. This evidence included additional disciplinary offenses. We conclude, however, that Nieto's reports and testimony were not merely cumulative of other evidence because the State expressly relied on the acts of misconduct reported by Nieto during its examination of the future dangerousness experts and again during closing argument. Further, during the State's examination of guards and detainees and again in closing argument, the State endorsed the honesty of the guards (including Nieto) and characterized the detainees' testimony as not credible.

Following the evidentiary hearing, the trial court found that the State did not withhold exculpatory evidence or knowingly present false testimony, and that trial counsel was not ineffective for failing to discover the information concerning Nieto before trial. However, the trial court also found that Nieto presented false testimony. The trial court stated that this false testimony was "more likely than not the tipping point" on the issue of future dangerousness. The trial court concluded that Petitioner established by a preponderance of the evidence that Nieto's false testimony was material to the jury's finding of future dangerousness and recommended granting a new punishment hearing.

Ex parte Espada, No. WR-78,108-01, 2015 Tex. Crim. App. Unpub. LEXIS 463 (Tex. Crim. App., July 1, 2015).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question of federal law that should be settled by this Court. Prior to the first trial, the prosecution should have known about the *Brady* evidence of Nieto's above described employment problems with the Bexar County Sheriff's office and investigation by the District Attorney's

Office. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Additionally, the prosecution should have known about the *Brady* evidence of the other inmates in the Petitioner's pod (whom the prosecution had bench warranted back to county for the Petitioner's trial) knowing that Nieto set up the Petitioner for the assault claim and planted drugs in the Petitioner's cell for the possession claim made at trial.

In addressing this *Brady* issue, the court below held that, "Because the case was completed to verdict, whether Christopher Nieto's personnel file constituted *Brady* material, and whether the State was obligated to provide such material to Espada's defense counsel, does not affect jeopardy in this case. Because the information came to light after Espada's conviction, the information never raised the issue of a mistrial." *Ex parte Espada, supra*. The Petitioner requested that the court below consider whether or not this *Brady* violation implicated the Fifth Amendment Double Jeopardy Clause and thus prevented the State from again seeking death in this case. The court below held that the Fifth Amendment Double Jeopardy Clause was not implicated because the prosecutor did not goad a mistrial. *Ex parte Espada, supra*. The specific question, however, was whether or not the severity of the *Brady* violation in this case implicated the Fifth Amendment Double Jeopardy Clause.

The Pennsylvania Supreme Court has encountered severe *Brady* violations which were held to implicate the Double Jeopardy Clause. "[P]rosecutorial

misconduct during Petitioner's first trial was not only impermissible, but had constitutional implications under the double jeopardy clause which prohibit retrial." *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992). The *Smith* court stated that "previously, we have held that 'double jeopardy will attach only to those mistrials which have been intentionally caused by prosecutorial misconduct.' *Commonwealth v. Simons*, 522 A.2d 537, 540 (Pa. 1987), adopting the federal constitutional standard set forth in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982)." *Id.* The *Smith* court stated that "the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Id.*

Egregiousness on the part of the prosecution is not a requirement for the bar against retrial. In *Commonwealth v. Martorano*, 741 A.2d 1221 (Pa. 1999), the Superior Court reversed convictions for first-degree murder due to "pervasive prosecutorial misconduct, including blatantly disregarding the trial court's evidentiary rulings, disparaging the integrity of the trial court in front of the jury, and repeatedly alluding to evidence that the prosecutor knew did not exist." *Id.* at 1222. The *Martorano* court stated that, "While [the prosecution's] misconduct does not involve

concealment of evidence as in *Smith*, it nonetheless evinces the prosecutor's intent to deprive Appellees of a fair trial; to ignore the bounds of legitimate advocacy; in short, to win a conviction by any means necessary. This is precisely the kind of prosecutorial overreaching to which double jeopardy protection applies." *Id.*

In the case at bar, there was a clear violation of *Brady* and its progeny. No prosecutor would have believed Nieto's testimony regarding his leaving the Bexar County Sheriff's Office. It is clear that this case approaches, if not a concealment of evidence level of action by a prosecutor, at least the ignoring of the bounds of legitimate advocacy; in short, to win a death sentence by any means necessary. This is precisely the kind of prosecutorial overreaching to which Fifth Amendment double jeopardy protection applies. The State should be precluded from again seeking a death sentence in this case.

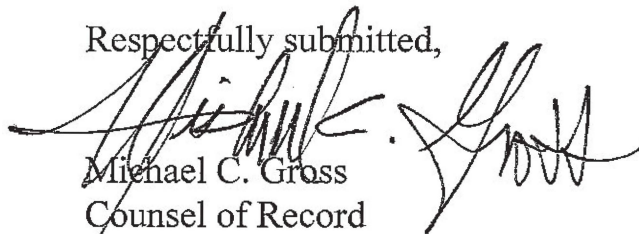
Based upon the Pennsylvania case law cited above, this *Brady* violation implicated the Fifth Amendment Double Jeopardy Clause and thus prevents the State from again seeking death in this case. The court below held that the Double Jeopardy Clause was not implicated because the prosecutor did not goad a mistrial. Pennsylvania, however, has recognized that neither goading a mistrial nor egregiousness on the part of the prosecution is a requirement for the double jeopardy bar against retrial. Given the reasoning in this case law, the question that logically follows is does a *Brady* violation, that results in the reversal of a death sentence

because of perjury stemming from the *Brady* violation, implicate the Double Jeopardy Clause and prevent the State from again seeking death? The reasoning of the Pennsylvania cases clearly leads to the conclusion that the *Brady* violation in the case at bar implicated the Double Jeopardy Clause. The contrary holding by the court below that a *Brady* violation – that results in the reversal of a death sentence because of perjury stemming from the *Brady* violation – does not implicate the Fifth Amendment Double Jeopardy Clause and prevent the State from again seeking death is an important question of federal law that should be settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael C. Gross", is written over the typed name and title.

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