

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

BERNARDO ABAN TERCERO,

Petitioner,

No. 4:06-cv-3384

VS.

RICK THALER, Director,
Texas Department of Criminal Justice,
Institutional Division

DEATH PENALTY CASE

Respondent

PETITIONER'S REPLY AND REQUEST FOR
EVIDENTIARY HEARING AND DISCOVERY

COMES NOW the Petitioner, by and through undersigned counsel and pursuant to Rule 5(e) , 6, and 8 of the Rules Governing Section 2254 Cases in the United States District Courts (*hereinafter* Rules) files his Reply to the Respondent's Supplemental Answer (D.C. Docket No. 53) and further requests that this Court set this matter for an evidentiary hearing and grant the Petitioner leave to take the depositions of those individuals of the Fraud Prevention Unit of the United States Embassy in Nicaragua who conducted the investigation of the Petitioner's birth records, the results of which are the linchpin of the Respondent's claim that the Petitioner was over 18 years of age at the time

TERCERO V. THALER
No. 4:06-CV-3384
PETITIONER'S REPLY AND REQUEST FOR
EVIDENTIARY HEARING AND DISCOVERY

he committed the offense that resulted in his receiving the death penalty.

INTRODUCTION

On October 16, 2000 the Petitioner was convicted of the offense of capital murder in 232nd District Court of Harris County, Texas for the murder of Robert Berger during the course of a robbery of Park Avenue Cleaners, in Houston, Texas.

On October 20, 2000 the jury answered “Yes” to Special Issue No. 1 and “No” to Special Issue No. 2 and the Court imposed a sentence of death on the Petitioner.

On November 20, 2000 counsel for the Petitioner filed a Motion for New Trial based upon prosecutorial misconduct and after hearing the trial court denied the motion on December 18, 2000.

The Petitioner timely appealed his conviction to the Court of Criminal Appeals and on September 18, 2002 in an unpublished opinion the Court of Criminal Appeals denied the Petitioner’s appeal. *State v. Tercero*, No.73621 (2002).

On May 12, 2002, pursuant to Article 11.071 of the Texas Code of Criminal Procedure, Dick Wheelan, counsel for the Petitioner filed a petition for post conviction relief in the trial court and on July 11, 2002 the State filed its response.

On November 29, 2004 the Petitioner filed a *pro se* “Applicant’s Motion to Amend Petition for State Habeas Corpus,” which raised claims not included in the petition for habeas corpus filed by Mr. Wheelan, and on June 2nd 2005 the Petitioner filed a Motion

for the Appointment of New 11.071 State Habeas Counsel, which was denied on June 7, 2005.

After requesting that the parties submit proposed findings of fact and conclusions of law, the trial court denied the petition and on November 16, 2005 in an unpublished opinion the Court of Criminal Appeals affirmed the denial of the petition for habeas corpus. The Court also dismissed the Petitioner's motion to amend his petition as a successor petition which did not meet one of the exceptions provided for in Section 5 of Article 11.071. *Ex Parte Bernardo Aban Tercero*, No. WR-62,593-01 and WR-62,593-02 (2005).

On November 10, 2006 counsel for the Petitioner filed an Amended Petition for Writ of Habeas Corpus in this Court. D.C. Docket No. 6. The Petition contained a number of claims, one of which was that the Petitioner was under the age of 18 years when he committed the offense for which he received the death penalty and was therefore ineligible for execution pursuant to the decision of the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005). Attached to the Petition was a birth certificate which indicated that the Petitioner's was in fact under the age of 18 years at the time he committed the subject offense. D.C. Docket No. 6, Exhibit A.

Pursuant to an Order of this Court, on June 22, 2007 the Respondent filed its Answer to the Petition. D.C. Docket No. 19. In response to the Petitioner's *Simmons*

claim, the Respondent set forth the results of an investigation by the “Fraud Prevention Unit” of the U.S. Embassy in Nicaragua and claimed *inter alia* that although the Petitioner’s documents “do appear to be legitimate,” *Id.* at 29, the investigation indicated that there was a “rectification” of the Petitioner’s birth records which allegedly changed his birth date to show that he was younger than he actually was. *See id* at 29-31 and accompanying exhibits. *See also* Discussion *infra*.

Based upon the allegations set forth in the Respondent’s Answer, counsel for the Petitioner requested and was allocated funds to do their own investigation in Nicaragua. D.C. Docket No. 25, 26. In November of 2007 Counsel’s investigator, Norma Villanueva, a licensed clinical social worker, traveled to Nicaragua and conducted an exhaustive investigation. Ms. Villanueva personally conducted face to face interviews of numerous Nicaraguan officials with a view toward clarification of the issue of the so-called “rectification,”; she made a close personal examination of the original microfiche records which showed the birth of two siblings, both named Bernardo Aban Tercero; Ms. Villanueva also traveled by jeep and driver to the remote mountain area of Nicaragua where Petitioner was born and raised. There, she conducted a number of face to face interviews of Mr. Tercero’s family and the family’s acquaintances with a view toward establishing and confirming the facts surrounding the birth of Petitioner and his older brother.

Based upon the results of Ms. Villanueva's very thorough investigation, on January 8, 2008, the counsel for the Petitioner filed a reply to the Answer, accompanied by a detailed affidavit from Ms. Villanueva setting forth the results of her investigation in Nicaragua and numerous affidavits from Mr. Tercero's family and acquaintances. D.C. Docket No. 31. These documents will be further discussed below.

On March 31, 2008 this Court issued an Order staying the instant case and directing counsel for the Petitioner to return to state court to exhaust the Petitioner's *Simmons* claim.

On May 5, 2008 counsel for the Petitioner filed a Successor Application for Writ of Habeas Corpus in the 232nd District Court, Harris County, Texas. *Ex Parte Bernardo Aban Tercero*, No. 762351-B. The Application was forwarded to the Court of Criminal Appeals, and on October 29, 2008 the Court of Criminal Appeals issued an Order granting successor status to the Petitioner's Application and remanding it to the District Court for development of the record. *Ex Parte Bernardo Aban Tercero*, No. WR-62,593-03 (Oct. 29, 2008) .

On April 27, 2009 the State filed its Answer, and notwithstanding the fact that both the Application and the State's Answer raised numerous issues of material fact that could only be resolved through the presentation and cross-examination of witnesses at an

evidentiary hearing, on August 8, 2009 the District Court issued an Order directing the parties to prepare proposed findings of fact and conclusions of law.

On November 4, 2009 the parties submitted their proposed findings of fact and conclusion of law. The State's proposed findings consisted almost solely of police reports and transcript excerpts, some of which contained inconsistent dates of the Petitioner's birth. Other than a cursory mention of a Nicaraguan birth certificate, none of the proposed findings addressed either the veracity of the affidavits presented by the Petitioner pertaining to his older brother, nor did they address the veracity and/or credibility of the sworn affidavits submitted by the Petitioner which supported the birth and death of an older brother, or the findings by Ms. Villanueva of two separate records of the birth, on the same day of the month, in the years 1976 and 1979, of two male children by Petitioner's mother, both named Bernardo Aban Tercero in the official and unaltered microfiche records of the Nicaraguan government.

On November 13, 2009 the District Court signed the State's proposed findings and issued an Order denying the Petitioner's Application for Writ of Habeas Corpus, and on March 3, 2010 the Court of Criminal Appeals issued an Order adopting the District Court's findings and conclusions and denying relief. *Ex Parte Tercero, supra*, (March 3, 2010).

DISCUSSION

Virtually all of the Respondent's argument challenging the veracity of the Petitioner's birth certificate is based upon an alleged investigation by the "Fraud Prevention Unit" of the U.S. Embassy in Nicaragua. Although the Respondent dismisses the affidavit of Ms. Villanueva and the Petitioner's family and their acquaintances as "hearsay," it fails to address the painstaking investigation she performed which includes her listing of the names of the government officials she contacted, the records she examined, and most importantly, her findings pertaining to the "rectification" that the Respondent so heavily relies upon in its challenge. As Ms. Villanueva noted in her affidavit:

8. The first step was to inquire about the records available at the central registry in Managua. For this purpose, I interviewed Dr. Maria del Rosario Acosta Guillén, who is the Director General of the Central Registry for Civil Status (Directora General del Registro Central del Estado Civil de Las Personas). This interview consisted of three distinct parts.
 - a. Part One: She was asked to attest to her signature on the document which had been previously provided to the Court. She did affirm this was her signature. She was asked if she personally did the work required to complete the document. She affirmed she personally did the work. She stated only the individual who oversees and confirms the work may sign the document.
 - b. Part Two: She was asked to research and provide evidence as to the veracity and authenticity of an original birth record for the defendant in 1979. For this request, she assigned this task to one of her colleagues so that the process would be transparent. She assigned Dr. Rodolfo Nicolas Villalta Castellon to do the new search while I watched the process. The process went as follows:

- I. An immediate search is done to look for the microfiche of the original book from the municipalities. The microfiche is kept in two styles, metal and film. Both styles of microfiche are viewed as the clarity of picture differs between the two mediums.
 - ii. The microfiche is inspected for compliance with legal requirements such as dates, signatures, and that it was a picture from the original record book and not an altered, corrected, nor amended source.
 - iii. Dr. Rodolfo Nicolas Villalta Castellon then provided an official Birth Certificate. This document attests to the fact that the information is accurate, from the original source, and verified as true.
- c. Part Three: She was asked to provide proof on the procedures, policies, and laws which govern and dictate the activity of verifying and attesting to birth record information. Also, she was asked for a clear explanation of the term “rectification”. For this, she demonstrated to this investigator the Manual utilized by all Registrars whether at the local, state, or federal level. This Manual includes the Compendium of Procedures, Laws, and Jurisprudence (Compendium)
- I. Explanation of contents of Birth Certificate: Dr. Maria del Rosario Acosta Guillén stated that the upper portion of the Birth Certificate documents the facts that are on the original birth registration taken from the microfiche. This is the only source of information utilized to assert the actual date of birth, place of birth, and parent’s names. She stated that the Date of Registry (Fecha de Inscripción) also comes from the original record of birth. In the observation section (Observaciones) they are required to document any official documentation made regarding this birth, the date, and the source of information. The documentation of a rectification made on October 20, 2006 was documented in the

observation section for informational purposes only.
It does not in any way change or alter the facts from
the original microfiche birth record.

- ii. Term “Rectification” (Rectificación): Dr. Maria del Rosario Acosta Guillén explained the process of rectification allowed in Nicaraguan law. The Compendium which all registrars must follow states the following: all rectifications must be done in front of a Local, Civil or District Judge, or a Notary Public with more than 10 years of registration as a Notary with the Supreme Court if Justice of Nicaragua. She noted that in no instance is anyone in her office allowed to do a rectification. Dr. Acosta Guillén stated the rectification done in October 20, 2006 on the defendant’s birth record made no actual change to the original document as seen on microfiche. It only affirmed what was on the microfiche. Therefore, she felt it was an unnecessary document.
- iii. Dr. Maria del Rosario Acosta Guillén stated the original birth record had been registered according to the law and the information contained within in it has never been altered/corrected by an official document or rectification. She further explained that the Compendium states that under Article 510 of the Civil Code a new born child must be registered prior to the completion of twelve months after the birth. (B.J 17262-09/11/54 and B,J 362-24/01/69) She further explained that in those cases of unmarried parents, the parent registering the child must present their Birth Certificate and the federal identification. In this case, the child is given only the last name of the parent registering the child. It is noted that the original birth record that the defendant’s birth was registered in January of 1980. This registration was five months after the birth, and well within the law.
- iv. The rectification on Bernardo Tercero’s birth certificate did not alter the information on the birth certificate. The rectification was annotated on Mr. Tercero’s birth certificate because it was linked to Mr. Tercero’s information. The fact this link was found speaks to the accuracy of the Nicaraguan birth information system. The link was the following: Mr. Tercero’s older brother had the same name, and the birth date was also the same with exception of the year. The rectification made the correction and annotation that the older brother was a separate individual and not Mr. Bernardo Tercero the defendant in this case. It was a rectification for

TERCERO V. THALER

No. 4:06-CV-3384

PETITIONER’S REPLY AND REQUEST FOR
EVIDENTIARY HEARING AND DISCOVERY

Page 9

clarification of identity. In no way did it alter the information on Mr. Tercero's birth certificate and record.

9. A second level verification was sought regarding procedures and laws. An interview was held at the General Consular Office, Ministry of Exterior Relations with Dr. Lotty Bendana Vogel and Lic. Ana Cecilia Solis Diaz. They were informed of the process followed in the Registry office and the laws and policies cited. The Consular's official was able to assert the information that was given was correct and according to the law. She was able to assert that the Registry office is not allowed to do rectifications. They only document the actual facts from the microfiche records of the original books.
10. I conducted a diligent search for the original birth record. The importance of this was to see if it had been altered in any way. The Central Registry microfiche's source must be original and untampered with in order for that document to be valid and accurate. The following steps were taken to locate the original birth record.
 - a. Bernardo was reportedly born at the Clinica Union. I drove to León and I found that the Clinica Union no longer exists. I learned from medical director that the physician who worked there when Bernardo was born died seven years ago. The clinic was bought out by a private group named Polymesa. The medical director for the Polymesa group stated they did not keep any of the old records. The old records were not retained by the new group; they stayed in the old doctor's storage. I spoke with the widow of the doctor, Eda de Aragon, and she stated all old records had already been destroyed.
 - b. In León, I visited the Governor's office to the Official Registry Department. There, I interviewed Lic. Evelyn Del Socorro Rojas Abarcas, the head of that department. She and her staff did an extensive search for Bernardo's birth record which included going through original birth record books from through several years. I was shown the original birth record books indicating that the births were not registered with them. She stated that I should go to Chichigalpa as individuals who lived in rural areas often registered their children in Chichigalpa. Lic. Rojas Abarcas provided an official document "Constancia" which affirms the diligent search results. The Constancia states she made a diligent search for the birth record of Bernardo Aban Tercero across several years to assure that any record in existence would be found. The Constancia further states that no birth record was found for a child with that name.
 - c. I went to the Office of Registry in Chichigalpa. I interviewed Lic. Maria del Carmen Echavarría Perez who is the Head Registrar Chichigalpa. I explained the goal of locating the original birth registration and gave her

TERCERO V. THALER

No. 4:06-CV-3384

PETITIONER'S REPLY AND REQUEST FOR
EVIDENTIARY HEARING AND DISCOVERY

Page 10

the Bernardo Aban Tercero as well as a date range which would include 1976 through 1979. I assisted her in looking for the books which would encompass the years needed. Lic. Echavarría Pérez and I were able to locate the birth record for the older brother, as well as the birth record for our client. I examined the entries. Neither entry had been altered or corrected in any way to include being scratched out, use of white out, or by any other means. I also examined the books for several pages prior and after the entries to see if any pages had been added, torn out or altered. After a very close inspection, I found no pages had been torn out, added, or altered. Also, I found that the birth records indicated the following:

- I. There was a birth record for a child named Bernardo Aban Tercero who was born on August 20, 1976 and who was registered by the mother María Lidia Tercero on August 30, 1976.
- ii. There was a second entry in the birth record for a child named Bernardo Aban Tercero who was born August 20, 1979 and who was registered by the mother Lidia Tercero on January of 1980.

These records correspond closely with the information given by the family and friends who were interviewed as to the existence of two separate brothers who were born to the same mother and who had the same name.

D.C. Docket No. 31-2 at 3-8.

Further, through their investigation counsel and Ms. Villanueva discovered that the naming of a second born child with the same name as that of a deceased older sibling is not uncommon in Nicaragua. Attached hereto as Exhibit "A" and by this reference made a part hereof is the affidavit of María Sánchez Schirch, who was born and raised in Nicaragua and spent 34 years of her life there. In a family situation almost identical to that of the Petitioner, Ms. Sánchez-Schirch reports that her parents named her brother with the same name as that of one of their children who died of tetanus.

In contrast to Ms. Villanueva's detailed findings, the Respondent sets forth a number of conclusory allegations based upon a report of an investigation by a body that

does not set forth the names of the persons who conducted the investigation, nor does the Respondent submit the actual report, or affidavits by those individuals who may have made the report.

It is respectfully submitted that because the Petitioner's life is at stake, his counsel should at the very least be entitled to obtain this information either by testimony or deposition of the individuals who conducted the investigation, given the obvious disparity between the Petitioner's and the Respondent's information.

Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts (hereinafter Habeas Rules) provides that "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery."

Habeas Rule 6(b) provides that "[a] party requesting discovery must provide reasons for the request." The rule further provides that the party requesting discovery must specify interrogatories and requests for admission and specify any requested documents.

Given the gross disparity of the facts surrounding the Petitioner's birth certificate between the Respondent's and Petitioner's investigations, and the paucity of details given by the Respondent about the nature and persons conducting the investigation, the Petitioner respectfully requests leave of the Court to prepare and submit interrogatories

and requests for the production of documents, which will be submitted to the Court for approval and further requests leave to take the depositions of those unnamed persons who conducted the investigation on behalf of the Respondent.

Finally, because of the apparent conflict pertaining to the origin and/or existence of the documents that may resolve the issue of the Petitioner's birth date, pursuant to Habeas Rule 8(a), counsel respectfully requests that the Court set this matter for an evidentiary hearing.¹

ADDENDUM

On April 4, 2011 counsel received e-mail correspondence from Samuel Trejos, the Consul General of Nicaragua requesting that certain documents in their possession pertaining to Mr. Tercero's case "be sent to the court." Counsel notified the Court of this development and requested additional time to be able to translate, examine and substantiate their origin, which the Court granted.

Contemporaneously with notifying the Court of this development counsel requested Mr. Trejos to provide information pertaining to the origin and purpose of these documents. Counsel received no further communication from Mr. Trejos, but on April 12, 2011 counsel received an additional document captioned "Testimony," which

¹ Counsel has been informed by the office of the Chief Judge of the 5th Circuit that if an evidentiary hearing or other "significant work" is required in the instant case, counsel must submit a budget to the Court for approval.

purports to be a translation of the documents provided. One of these documents was a translation of an affidavit of Luisa Amanda Huetes Torrez, the grandmother of the Petitioner, which ostensibly provides information about the birth and death of one of her grandsons and the other was a translation of a “Baptism Certificate,” that was included in the package received from Mr. Trejos.

On May 4, 2011 counsel received further correspondence from Mr. Trejos informing counsel that the original documents were not to be sent to the Court, as he was supplying counsel with revised documents, which arrived on May 7, 2011. The new documents consisted of an affidavit and translation allegedly executed by Mr. Tercero’s grandmother.

Out of respect for the government of Nicaragua and at the specific request of its Consul General, counsel is attaching these documents as Exhibit B, but as counsel has not been provided with sufficient information regarding their foundation, a fact which he communicated to Mr. Trejos on two occasions, counsel will present them to the Court and let them speak for themselves.

RESPECTFULLY SUBMITTED this 11th day of May, 2011,

/s/

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COUNSEL FOR BERNARD ABAN TERCERO

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was filed electronically and also was mailed to the Petitioner at the following address:

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3872 Fm. 350 South
Livingston, TX 77351

/s/

Don Vernay