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IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

120TH JUDICIAL DISTRICT

THE STATE OF TEXAS)

v.)

HENRY LEE LUCAS)

CAUSE NO. 43314-120

PRETRIAL MOTIONS

STATEMENT OF FACTS

Heard on

OCTOBER 15, 1986

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>IDENTIFIED</u>	<u>OFFERED</u>	<u>RECEIVED</u>
D-61	Affidavit			4041 3116	4042 3117
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IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

120TH JUDICIAL DISTRICT

THE STATE OF TEXAS)
)
V.) Cause No. 43314-120
)
HENRY LEE LUCAS)

 BE IT REMEMBERED that on the 15th day of October,
1986, beginning at 9:00 a.m., came on to be heard the
continuation of pretrial motions in the above styled and
numbered cause, before the HONORABLE BRUNSON D. MOORE, Judge
Presiding in and for the 120th Judicial District Court, and
that the same was reported by Teri L. Yee, C.M., Registered
Professional Reporter and Certified Shorthand Reporter in and
for El Paso County, Texas, and that the following proceedings
were had, to-wit:

1 MORNING SESSION, WEDNESDAY, OCTOBER 15, 1986

2 (The defendant and counsel as previously noted were
3 present, and the following proceedings were had:)

4 MR. PONTON: Your Honor, we're here on the defense
5 motion to disniss the indictment due to a grant of immunity.
6 There were certain conversations held between Mr. Simmons and
7 Mr. Moody and Mr. Jewkes and Mr. Lucas, I believe, in January
8 of this year, maybe late last year, and that's the matters I
9 wish to inquire of Mr. Simmons about.

10 At this time I would ask that the rule be enforced
11 as to this particular point and that Mr. Moody and Mr. Jewkes
12 be excluded from sitting in during Mr. Simmons' testimony,
13 since they each may have to testify as to similar matters
14 following Mr. Simmons.

15 MR. JEWKES: Your Honor, as to the specifics of
16 Mr. Ponton's request, I don't know what conversations he's
17 talking about. I presume he's talking about a session in
18 which Mr. Lucas at that time was represented by Gary
19 Richardson. Gary Richardson made the offer to the
20 prosecution in this case that Henry Lucas wanted to talk
21 to us informally.

22 Three of us were present, among other people, Mr.
23 Simmons, Mr. Moody, and myself. We did listen to Mr. Lucas
24 while he talked.

25 THE COURT: You did not?

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MR. JEWKES: Sir?

THE COURT: You say you did not listen to him?

MR. JEWKES: Oh, we did. We did. We listened while he talked, and as far as Mr. Moody and I being excluded, Your Honor, I think that's patently unfair. We are, with Ms. Pennock, the prosecutors in this case. We have -- I think we have a right to listen to what this witness has to say because this witness will be subject to cross-examination by the State.

MR. PONTON: If I could respond, Your Honor?

THE COURT: Go ahead.

MR. PONTON: Ms. Pennock is available to cross-examine the witness on behalf of the State. I anticipate that it's highly likely that Mr. Moody would have to be called as my second witness on this issue after Mr. Simmons, and I believe that's the very purpose of the rule so that witnesses would not be allowed to listen to the testimony of other witnesses and be able to have the benefit of that testimony prior to the second witness testifying.

And I'm only making this request on this specific issue on this immunity agreement or its existence, and as to any other matters, of course, I would not move to exclude any of the attorneys for the State.

Here they are as witnesses. They were parties to conversations, and therefore, I believe it's incumbent upon

1 Ms. Sipes and me to call them to inquire into the existence
2 and validity of this agreement.

3 THE COURT: Mr. Ponton, how did I ever get to this
4 point? I thought I was hearing a motion to suppress a
5 confession.

6 MR. PONTON: With the Court's permission and with
7 the State's permission, we would like to hear this motion out
8 of order. I anticipate the testimony of the witnesses to
9 be brief, probably five minutes or so each. Mr. Richardson,
10 Your Honor, is also going to be here this morning as the
11 attorney for Vic Peazell, who has returned today to be
12 cross-examined by the State.

13 Therefore, he would also be able to testify as to
14 this issue, and today we have all these people together that
15 can testify on this issue. I don't anticipate any of it to
16 be lengthy, Your Honor.

17 THE COURT: See, my problem is I don't understand
18 what that has to do with -- what are you saying here, Mr.
19 Ponton?

20 MS. SIPES: Does the Court have a copy of your
21 motion?

22 MR. PONTON: Yes, and I filed it.

23 THE COURT: Well, I've got a copy of it, Mr.
24 Ponton.

25 MR. PONTON: What I'm saying, Your Honor, is that

1 in the motion I have said that -- and there's an affidavit
2 from Gary Richardson to attest of what I'm telling the Court,
3 that Gary Richardson, I believe, entered into certain
4 discussions with Bill Moody regarding allowing his client,
5 Henry Lucas, to testify or not testify, to talk about where
6 Henry Lucas was in May of '83 when Apodaca was killed, and
7 letting Henry Lucas talking to the D.A.'s office regarding
8 Henry Lucas's confessions to killing Librada Apodaca.

9 It was Gary Richardson's understanding that if Mr.
10 Lucas told the truth, if Mr. Lucas's whereabouts could be
11 confirmed, and if Mr. Lucas then passed a polygraph examination,
12 that Mr. Simmons and Mr. Moody would dismiss the indictment
13 against Mr. Lucas.

14 That, I contend, Your Honor, is an informal grant
15 of immunity and an agreement to dismiss the indictment if
16 what Mr. Lucas told them, if that two hour long conversation
17 was true.

18 Therefore, under the authority of Zani v. State,
19 which I have attached as Exhibit C to my motion, I believe
20 that if such an immunity agreement is established by Ms.
21 Sipes and me by a preponderance of the evidence, that then
22 the burden shifts to the State to prove beyond a reasonable
23 doubt at pretrial hearings that the agreement is either
24 unenforceable or the defendant has not lived up to his end of
25 the agreement.

1 That's what the Court of Criminal Appeals says
2 regarding immunity agreements in the State of Texas. There-
3 fore, Your Honor, since I think the existence of it is -- the
4 informal existence of it is clearly referred to in the first
5 page of Exhibit B attached to my motion, which is the
6 transcript of the conversation recorded between Mr. Lucas,
7 Mr. Simmons, Mr. Moody, and Mr. Jewkes, that Mr. Lucas,
8 the citizen accused herein, has abided by his end of that
9 contract.

10 He sat down. He talked to them. He told them the
11 truth. He told them where he was in May of '83, and he told
12 them how he came to give the confessions in this case, and I
13 believe that his testimony in court substantiates much of what
14 he said in that conversation with Mr. Simmons and Mr. Moody
15 and Mr. Jewkes.

16 Therefore, under the case law of Zani vs. State,
17 I believe there was an informal immunity. I don't believe
18 that Mr. Richardson nor any attorney would allow his client
19 who is accused of capital murder and who has a potential
20 death penalty hanging over his head, to sit down and talk
21 with the district attorney's office on a whim.

22 I believe that of course he would not have allowed
23 that to happen unless there is an agreement that, well, Mr.
24 Lucas, if you tell the truth and we can confirm it and you
25 pass the polygraph, we'll dismiss.

1 With that kind of agreement I believe that someone
2 would provide their client, and I believe that's exactly
3 what happened, and that's what I intend to elicit from the
4 witnesses, if that is the case.

5 And therefore, if there was an immunity agreement,
6 then Mr. Lucas can't be prosecuted, and that's why I filed
7 the motion yesterday because Mr. Richardson was coming in
8 today as counsel for Vic Feazell. I request to hear this
9 motion briefly out of order, Your Honor.

10 THE COURT: Do you all have anything further, Mr.
11 Moody?

12 MR. MOODY: Well, just a couple of points, Your
13 Honor, very briefly. I do not think this motion needs to be
14 heard out of order as far as the State's witnesses are
15 concerned. Mr. Simmons, myself, Mr. Jewkes, we're here
16 all the time. If they want to put on their other testimony
17 about Mr. Richardson, I don't have any problem about that.

18 But what they're stating, and of course, the case
19 that they're citing to the Court is a case entirely different
20 from this case. It's a case wherein immunity agreements
21 were put forward and made clear, and in this case you notice
22 there's no way they've even reached that point.

23 There was never any immunity agreement in this
24 case. There's a tape recording of that conversation. Of
25 course, that was I guess the reason, part of the reasons that

1 we tape recorded it so that we would know and we could be
2 able to prove what he said and what was said at that meeting
3 with Mr. Henry Lucas.

4 And clearly throughout -- I mean, Mr. Richardson
5 states repeatedly, "I don't think you're in a position to make
6 that determination on this point about whether you want to
7 dismiss."

8 THE COURT: Let's don't get into that, Mr. Moody,
9 at this time. I want to find out why, you know, you
10 shouldn't be called to testify or why you shouldn't be asked
11 to step out of the room.

12 MR. MOODY: Well, the issue of having to step out
13 of the courtroom, I don't see any precedent for removing the
14 State's attorney from this case. There's other people that
15 are allowed to sit in on the case. Obviously, defense sits
16 in on all the testimony.

17 The defense attorneys, if we tried to call them
18 as witnesses in some regards, why they'd be screaming and
19 yelling that you can't take us out of the courtroom and not
20 make us a witness.

21 You know, what they're doing is they're trying to
22 remove the State's counsel from the case so that we cannot
23 effectively cross-examine these witnesses, and that is
24 exactly what they're trying to do. They know there was no
25 immunity agreement. I mean, it's obvious from the face of

1 the transcript that they had, which has been in their
2 possession for a long time.

3 When he tried to put words in Mr. Jay Armes' mouth
4 the other day and said, oh, Mr. Moody said so and so. Then
5 Mr. Armes, who is no great fan of the district attorney's
6 office --

7 THE COURT: Well, let me ask you this question.
8 Assuming, and I'm looking to the future, now, I'm not looking
9 at what's happening today. I'm looking to the future of this
10 case, and assuming this case ever was appealed to a higher
11 court. There's certainly going to be something written about
12 whether you and Mr. Jewkes should have been here when this
13 question came up.

14 And I would hate to think that we were going to
15 lose the case on some kind of technicality like that. You
16 know, most of the time we lose our cases on technicalities.
17 We don't lose them on the hard facts. Technicalities are
18 the things that the courts are looking at when we get up to
19 the appellate courts.

20 And that's where most of the cases are reversed.
21 They're not reversed on the facts generally. They're reversed
22 on some technical point that we missed.

23 You know, I don't see how it would hurt you. I
24 don't know that it would help Ponton, but I can't imagine
25 how it could hurt anybody, you know, to tell what they know

1 about this statement. I haven't read the full statement, but
2 I did read part of it, and I just --

3 MR. PONTON: And I'm not trying to exclude them for
4 any other part of this trial.

5 THE COURT: I understand that, Mr. Ponton. You
6 know, Mr. Ponton, I understand a lot about this case. I
7 understand that you're putting on a fact case here for a
8 motion to suppress a confession. I understand all that, and
9 if you think I'm not a little upset with it, you're wrong.

10 And I'm just about ready to cut you off. Do you
11 understand that? I want you to understand something.

12 MR. PONTON: Yes, Your Honor.

13 THE COURT: That I'm getting a little tired of it.
14 Mr. Moody, I'm going to ask you and Mr. Jewkes to please step
15 out, and if he indeed wants to call you, that will be fine.
16 Ms. Pennock is very capable and can handle this, and I think
17 just for the -- it possibly will be the best thing that we
18 could do at this point in time.

19 MR. JEWKES: Does Mr. Ponton intend to put me on
20 the witness stand?

21 THE COURT: I have no idea.

22 MR. PONTON: Mr. Jewkes, I can't say at this time.
23 I may, based upon the testimony elicited from Mr. Simmons
24 and Mr. Moody.

25 MR. JEWKES: All right, sir.