NO. AP-76, 051

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS AT AUSTIN

MANUEL VELEZ, APPELLANT,

VS.

THE STATE OF TEXAS

Trial Court Cause Nos.
07-CR-721-G, 06-CR-83-D

Appeal from the 404th Judicial District
Cameron County, Texas

The Honorable ELIA LOPEZ, Judge,
and former Judge ABEL LIMAS, presiding

# REPLY BRIEF FOR APPELLANT

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REQUESTED

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## RESPONDENTS' MISSTATEMENTS OF FACT

Manuel Velez is on death row for capital murder due to the testimony of his accomplice as a matter of law, Acela Moreno, the mother of the child victim. In its brief, the State concedes that the trial court committed error by failing to provide the jury with an accomplice corroboration instruction. The State argues, however, that the error did not cause Velez egregious harm because its non-accomplice evidence of guilt was "uncontradicted" and/or "not weak." Resp. Brief at 55, 56, 60. This argument is patently wrong. *See infra*. In making this argument and others in its brief, the State misleads the Court and/or misrepresents critical facts in its statement of facts and the body of its brief. As explained in this reply brief and summarized in the table at Appendix A, the record shows several of respondent's claims to be utterly false or at best highly misleading.

### 1. Moreno's testimony and the prosecutor's argument that she was guilty merely of failing to protect her child violated Velez's due-process rights, notwithstanding respondent's eleventh-hour "parties" theory.

A. *Moreno's omission of crucial facts left a false impression the State failed to correct, and requires reversal of the verdict.*

In the several months since Velez filed his opening brief, this Court has at least twice reiterated that under *Napue v. Illinois*, 360 U.S. 264 (1959), "testimony is false because it creates a false impression [when a] witness *"omit[s] or glosse[s] over pertinent facts*."[1] For example, in *Ex parte Ghahremani*, 332

[1] *Ex parte Robbins*, __ S.W.3d __, No. AP-76464, 2011 WL 2555665, *14 (Tex.Crim.App. June 29, 2011) (emphasis added) (citing *Alcorta v. Texas*, 355 U.S. 28, 30-32 (1957) (finding false impression left by

S.W.3d 470, 478 (Tex.Crim.App. 2011), the Court granted *Napue* relief when the testimony of the parents of a sexual assault victim "left out" and "glossed over" that their child had already been greatly damaged by a sexual relationship with "a 25-year old drug dealer," resulting in the false impression at sentencing that the defendant's sexual assault was the *sole* cause of the victim's serious psychological injuries. *Id.* at 479. Rejecting an argument that the parents said nothing technically false, the Court noted that these "rules are not aimed at preventing the crime of perjury . . . but are designed to ensure that the defendant is convicted and sentenced on truthful testimony." *Id.* at 477-78.

Velez, too, is entitled to *Napue* relief because, among other falsities, Moreno's accusing testimony glossed over and omitted her own abuse of the victim. Even assuming to be true respondent's eleventh-hour claim that Moreno *pled guilty* only under the law of the parties – which Velez vehemently disputes, *see infra* – he is still entitled to *Napue* relief because Moreno glossed over the highly pertinent fact that she did much worse than fail to protect her child. As respondent concedes, at a minimum, she "'*participated in acts that led to injuries to the baby* but not the actual death of the child.'" Resp. Br. at 13 (quoting trial prosecutor's words at 6 SRR1 5) (emphasis added)). The prosecutor reported this fact at the outset of the plea hearing, respondent does not dispute it, and the prosecutor's report indisputably establishes that Moreno "glossed over" crucial

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witness testimony who described a mere casual relationship with the wife of the accused when in fact the witness was the wife's "lover and paramour")).

facts when she swore to Velez's jury that "I am guilty of not having reported to the police that Manuel was hurting my child." 16 RR 95. And she did the same when she blamed several of the child's injuries in the weeks leading up to his death on Velez, without owning that she herself was injuring the child. 16 RR 82.[2]

Respondent fails to excuse the error by claiming that Moreno merely testified to "*her* understanding of why she was serving a 10 year sentence." Resp. Br. at 14 (emphasis added). That lawyer trick would definitely have been lost on the jury, which undoubtedly heard the substance of her testimony – that she was guilty merely of failing to protect her child. And that substance is precisely what the prosecutor pressed on the jury:

> Every other day this baby was getting an injury and Aclea knew it. *Acela saw those injuries and she didn't act*, and she refuses to admit that to herself because it makes her feel worse but that's her problem. . . . *What she did was not advise people, not call the police and for that you get 10 years maximum and that's what she got.*

Resp. Br. at 14 (quoting prosecutor at 18 RR 148-49). In the trial prosecutor's own words, he was telling the jury "[w]hat [Moreno] did." He was certainly not, as respondent disingenuously claims, merely "reiterate[ing] the understanding of why Moreno plead guilty. . . ." Resp. Br. at 14. The most accurate way to put it is that he was trying to convict Velez of capital murder with falsehood.

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[2] "Q : At some point after you and Manuel and the children moved into the house on Vermont, did you start to notice Angel with bruises or pinches or burns or marks on his body?
A: Yes.
Q: What did you think when you saw those bruises and marks and cuts?
A: That they were harming my son.
Q: Who is they?
A: Him. Manuel."

Indeed, far from somehow eliminating the error, as respondent puzzlingly claims, Resp. Br. at 14, the prosecutor's argument "exploited it . . . to solidify a false impression in the jury."[3] And this improper exploitation happened more than once. 18 RR 112 (without mentioning Moreno herself had injured the child, prosecutor arguing to the jury, "[Angel's] mother let him down. His mother did not protect him. His mother did not call the police.").

In sum, even under the undisputed facts, Moreno lied or, at a minimum, left a false impression by glossing over the pertinent fact that she was abusing her own child. Because Velez's capital murder conviction turned squarely on Moreno's credibility, respondent cannot (and indeed does not try to) show beyond a reasonable doubt that this false testimony, actively endorsed by the State, did not contribute to Velez's guilty verdict. *Chapman v. California*, 386 U.S. 18, 24 (1967). It must therefore be reversed. *Id.*

B. *Respondent's eleventh-hour claim that Moreno pled guilty under the law of parties is contradicted by the law and the facts.*

Even though nothing in this record suggests that Moreno pled guilty under the law of the parties, respondent claims that is the case to avoid reversal of this conviction based on her utterly false testimony against Velez. Resp. Br. at 11-16. The facts and the law show respondent is wrong.

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[3] *See Tassin v. Cain*, 482 F.Supp.2d 764, 773 (E.D.La. 2007) (granting *Napue* relief), *aff'd by Tassin v. Cain*, 517 F.3d 770, 779 (5th Cir. 2008) ("The State not only allowed deceptive testimony to go uncorrected; it also capitalized on its key witness's testimony to argue that there were no pending agreements affecting her credibility.").

While respondent is correct that Texas law does not require an indictment to allege parties liability, Resp. Br. at 15, that is the wrong question. As this Court has held, "Article 1.15 of the Code of Criminal Procedure require[s] the State to introduce some evidence into the record to support a defendant's guilty plea in a felony case." *State v. Chupik*, 343 S.W.3d 144, 147 (Tex.Crim.App. 2011). This statute then requires the judge to accept such evidence "as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same." Art. 1.15.[4]

The trial judge at Moreno's plea followed this statutory procedure to a tee. After conducting a detailed colloquy, including asking Moreno whether she was pleading guilty to committing the offense of injury to a child because she was, in fact, guilty, 6 SRR1 8,[5] the judge asked, "[W]hat is the evidence?" 6 SRR1 9. The prosecutor presented exhibits 1 and 4. In Exhibit 4, Moreno affirmed through her signature that "that each and every allegation in [the indictment] with the offense of injury to a child . . . is true and correct." 1 SRR2 State's Ex. 1 at page 4. The prosecutor and defense counsel signed this document, under the words "approved and agreed." *Id.*

While respondent claims for the first time on appeal that Moreno caused injury through a parties theory that she failed to protect her son, Resp. Br. at 15-16, the

[4] All citations to "art." or article refer to articles of the Texas Code of Criminal Procedure.
[5] Q: "And you are pleading guilty because you are guilty?"
A: "Yes."
Q: "You are guilty?"
A: "Yes."

indictment charged that Moreno caused injury "*by striking Angel Moreno on or about the victim's head with the defendant's hand, or striking the victim's head against a hard surface unknown to the Grand Jury, or by striking victim's head with an object unknown to the Grand Jury.*" 1 SCR3 6-8 (Indictment) (emphasis added); 6 SRR1 5-8. The acts by which Moreno caused the injury are certainly part of "each and every allegation" in the indictment that Moreno swore and the prosecutor agreed were "true and correct." 1 SRR2 State's Ex. 1 at 4. Moreno's direct act as a principal who struck her child's head is far different from liability under the law of parties,[6] which allows the State to "enlarge a defendant's criminal responsibility to acts in which he may not be the principal actor." *Goff v. State*, 931 S.W.2d 537, 544 (Tex.Crim.App. 1996). Having received in evidence this plea agreement (and ascertained Moreno gave her signature to it voluntarily and knowingly), the judge did precisely what the statute required and "[b]ased on the evidence submitted, . . . [found her] guilty." 6 SRR1 12.

Rather than fulfilling its ongoing "duty to correct . . . 'false' testimony," *Estrada v. State*, 313 S.W.3d 274, 287-88 (Tex.Crim.App. 2010), respondent misstates the record in claiming that what happened next was a basis for the plea itself. After having accepted the plea, the court asked *why* the attorneys believed

[6] Contrary to respondent's bizarre argument, Moreno's liability as a principal does not mean that Velez, as "another co-defendant[,] is automatically excluded from culpability and cannot be guilty for the same offense." Resp. Br. at 15. *See, e.g., Rollerson v. State*, 227 S.W.3d 718, 726 n.27 (Tex.Crim.App. 2007) (citing, *inter alia Frias v. State*, 376 S.W.2d 764, 764–65 (Tex.Crim.App. 1964) (testimony showed that defendant was a "lookout" for his burglary cohorts, did not enter the liquor store, but did help load liquor bottles taken from the store into a car to transport and sell it; evidence was sufficient to support defendant's conviction as a principal in the burglary)). The mere fact of Moreno's liability as a principal does not automatically exclude Velez as the culprit – but the weak evidence and numerous constitutional errors do require reversal.

Moreno would testify against Velez if the Court imposed sentenced that day. 6 SRR1 12-13. According to respondent, when the attorney directly answered this question by saying, "'she knows that she should have intervened on behalf of the child, did not, and wants to make sure justice is done. . . .'" Resp. Br. at 13 (quoting 6 SRR1 13), the attorney was really "advis[ing] the trial court . . . *as to why his client was pleading guilty.*" Resp. Br. at 13 (emphasis added). Not so. Defense counsel was answering the court's question, not explaining *why* Moreno was pleading guilty. (Moreno herself had already explained she was pleading guilty because she was guilty, 6 SRR1 8, and the court had already found her guilty. *Id.* at 12).

That counsel answered *his* understanding that Moreno would *testify against Velez* because she blamed him for acts – and herself for not stopping him – is not surprising as the question asked why she would testify against him. To the extent that counsel's answer reflects beyond Moreno's reasons for testifying against Velez to her own actions, it shows only her lack of remorse and zeal to disown the harm she had just admitted to causing in her sworn plea.

* * *

Moreno was the lynchpin of the State's case, she lied and the State knew she lied. Because this constitutional error was not harmless beyond a reasonable doubt, reversal is required. *Chapman*, 386 U.S. at 24.

**2. Special prosecutor Saenz should have been disqualified because he received confidential information from Velez's agent, creating an obligation to Velez as a potential client which respondent wholly ignores.**

Contrary to respondent's argument, the correct legal question here is *not* whether Saenz and Velez formed an attorney-client relationship. Rather, it is whether Velez's sister, Marisol Velez, acting as his agent, conveyed confidential and privileged information to Saenz that created an obligation to Velez as a *potential* client. *See In re Gerry*, 173 S.W.3d 901, 903 (Tex.App.-Tyler 2005, no pet.). She did. And by referring only to Marisol's testimony on cross examination, Resp. Br. at 23, respondent ignores – but does not dispute – that she did. In her affidavit, admitted in evidence at the hearing on the motion to disqualify Saenz, Marisol Velez states unequivocally that she told Saenz that Velez was up north when the child was injured and that Moreno was a "very irresponsible mother." *See* 7 SRR1 61.

Arguing inapposite case law,[7] respondent does not address, much less dispute, Velez's showing that Saenz obliged himself to Velez as a lawyer when he received this confidential and privileged information from his sister and agent. Opening Br. at 34-39 (collecting authorities). *See also* TEX. DISC. R. PROF. COND.

[7] For example, respondent relies heavily on *Terrell v. State*, 891 S.W.2d 307 (Tex.App. – El Paso 1994, *pet. ref'd*) to argue against relief. Resp. Br. at 20, 21, 23. *Terrell*, however, is inapposite. It did not address an attorney's obligation to potential clients from whose agents the attorney has received confidential information. Rather, it addressed whether the defendant's Sixth Amendment rights had been violated when the police interrogated him without his purported counsel. *Terrell.* 891 S.W.2d at 313-14. The court held that "in the absence of any evidence that [appellant's mother] was authorized to enter into an attorney-client relationship on [a]ppellant's behalf, the trial court could have properly concluded that the agreement between [counsel] and [the mother] did not establish the attorney-client relationship as between [counsel] and [a]ppellant. . . ." *Id.* at 314. As noted in the text, the establishment of an attorney-client relationship is not the question here.

1.05 (a) (incorporating TEX. R. EVID. 503 (b)(1)(A) (defining privileged communications as including those made by representative of client for purpose of facilitating rendition of legal services to client)). The trial court erred in denying Velez's motion to disqualify, and reversal is mandated.

**3. Respondent fails to show that the trial court's conceded error in failing to give an accomplice-corroboration charge caused anything less than egregious harm, or that Velez is not entitled to relief under Points Six and Forty-six of his opening brief.**

*The lady doth protest too much* (Shakespeare's Hamlet)

Respondent concedes that Moreno was an "accomplice as a matter of law," Resp. Br. at 26, and that the trial court erred in failing to charge the accomplice corroboration requirement under Article 38.14. Resp. Br. at 54. But respondent strains mightily – devoting nearly a third of its brief (not including its statement of "facts"[8] which includes many of the same "facts" as its response to this claim) – to show that the court's error did not cause Velez egregious harm.[9] As shown below, respondent's effort is utterly unpersuasive. The error was not harmless in this exceedingly weak case of guilt.

At the outset, respondent agrees with appellant that the appropriate standard asks whether the non-accomplice evidence is "so unconvincing in fact as to render

[8] One of respondent's many direct regurgitations of its argument section into its statement of facts resulted in respondent inadvertently citing an accomplice-corroboration case in its statement of facts. *Compare* Resp. Br. at 9 ("statement of facts" citing *Castaneda*) *with* Resp. Br. at 50-51 (exact same passage in argument).

[9] In pages 28-52 of its brief, respondent argues that the corroboration is legally sufficient under article 38.14 of the Code of Criminal Procedure. Respondent later incorporates this discussion by reference in arguing that the court's charge error was harmless. Resp. Br. at 53-75. Resp. Br. at 56. In showing this charge error was not harmless under any standard, this reply brief addresses some of the initial corroboration offered by respondent in its section on the sufficiency of the evidence.

the State's overall case for conviction clearly and significantly less persuasive." Resp. Br. at 55 (quoting *Saunders v. State,* 817 S.W.2d 688, 692 (Tex.Crim.App. 1991)). As respondent correctly states, under *Saunders*, 817 S.W.2d at 692, if the "non-accomplice evidence is weak and contradicted by other evidence a defendant may be egregiously harmed." Resp. Br. at 55.

Yet the vast majority of the non-accomplice evidence here – and the theories of guilt respondent attaches to it – is weak and contradicted. Other evidence on which respondent relies is either irrelevant or improperly offered under this Court's precedents.

A. *Respondent wrongly asserts that its non-accomplice testimony is "uncontradicted" and "not weak."*

Respondent repeatedly claims that its non-accomplice evidence of guilt is "uncontradicted" and/or "not weak," Resp. Br. at 55, 56, 60, and goes so far as to assert it was "overwhelmingly uncontradicted." Resp. Br. at 68. Nothing could be further from the truth. Below, appellant demonstrates: (1) Velez's confession was disputed and that, in any case, offers only weak corroboration; (2) Respondent's newly-minted timeline theory is weak and contradicted by the State's trial evidence; (3) Respondent's "opportunity" theory was contradicted and weak because Acela Moreno had the greatest opportunity to harm the child; (4) That Moreno was a good and caring mother was disputed by the State's own evidence and was exceedingly weak corroboration; (5) Respondent's "demeanor" theory clashed with the State's trial evidence; and (6) Respondent's claim that

Velez evaded authorities contradicted the record. This demonstration, moreover, is not meant to be a comprehensive list of respondent's contradicted corroboration, only the most glaring examples.

1. *Velez's confession was disputed and that, in any case, it offers only weak corroboration.*

According to respondent, "the most convincing non-accomplice corroborating evidence was Appellant's voluntary statement to police." Resp. Br. at 59. Respondent relies heavily on this hotly-contested and contradicted, though ultimately untelling, evidence. The reliance is misplaced.

First, even if the jury did consider Velez's statement, it offered little, if any, corroboration. The statement directly accused Moreno of abusing her children and clearly denied having caused Angel Moreno's fatal injuries. State's Ex. 64. Thus, the corroboration it offered, if any, was weak at best.

Second, Velez vigorously disputed at trial that he made this statement by arguing – and proffering persuasive and substantial expert testimony to show – that he could not read the English-language statement presented for his signature without it being read to him. *See, e.g.*, 17 RR 172, 174-75. Furthermore, his cognitive and language limitations made it impossible for him to have knowingly and intelligently waived his *Miranda* rights. Not only that, he secured a jury charge that would have allowed the jury to disregard his statement if it found either that he did not voluntarily make the statement or waive his rights. 18 RR 88-89. Under *Herron v. State*, 86 S.W.3d 621, 632-33 (Tex.Crim.App. 2002) and

*Burns v. State*, 703 S.W.2d 649, 652 (Tex.Crim.App. 1985), then, not only was Velez's statement contradicted, but also there is a strong basis for this Court to discount it in its egregious-harm analysis.

Respondent nevertheless urges the Court to consider the statement by relying on: 1) a highly misleading claim that even the defense expert himself testified that Velez could speak and read English,[10] 2) testimony of jailhouse informants who made various claims about Velez's English-speaking abilities, and 3) a photograph showing a supposed English-language newspaper in Velez and Moreno's home. Resp. Br. at 65-67. As shown in note 10, Velez's English was limited at best. The unreliability of jailhouse informants is notorious. *See* Opening Br. at 85 n.124. And close examination of the photograph respondent relies on shows that the "newspaper" is a classified ad or advertising circular printed in English. State's Ex. 46. Beside the fact (ignored by respondent) that both Velez *and* Moreno relied on translators at trial, 18 RR 34-35, 131,[11] advertising circulars and classified ads are often delivered unsolicited in the U.S. Mail and are as commonplace in American homes as floors and walls. Their mere presence says next to nothing about the reading and language abilities of a home's inhabitants.[12]

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[10] The expert, in fact, stated that Velez tested in English as mentally retarded, could read English only at a second-grade level, could understand it at only a kindergarten or first-grade level, and in no way could have understood the *Miranda* warnings. 17 RR 168, 170, 174-76, 179-180, 182, 201, 202. Further, there was no way he could have read the 10th-grade level statement he supposedly read before signing. *Id.* at 174-75.

[11] According to respondent, "Because Moreno required an interpreter at trial and spoke only Spanish, the newspaper could *only* have belonged to Appellant as the only English speaker in the home." Resp. Br. at 66-67 (emphasis added).

[12] In any case, both with respect to this "newspaper" and the claim by jailhouse informants that Velez read one, Dr. Rabin gave undisputed testimony that readers need only a third to fifth-grade reading level to read

Respondent's argument that the jury necessarily rejected Velez's voluntariness claims is wholly without merit. In fact, the jury may well have done the opposite. The record strongly suggests that it gave this argument the serious consideration it deserved. 19 RR 4; 3 CR 399 (jury's first note requesting both Dr. Rabin's report and testimony).

*2. Respondent's newly-minted timeline theory is weak and contradicted by the State's trial evidence.*

A huge chunk of the supposed corroboration respondent seeks to rely upon is a "timeline theory" falsely portraying the testimony by Magnolia Medrano, Moreno's sister. Respondent claims that Angel Moreno "suffered injuries, both life threatening and fatal, *only while residing with Appellant at a location away from friends and family*." Resp. Br. at 56. According to respondent's appellate argument, the child "was healthy and there were no signs of abuse" before that because Velez had no "opportunity to abuse" Angel *until* he and Moreno and the children moved into a new home on October 18, 2005. Resp. Br. at 31. Before then, the argument goes, they lived directly across the street from Medrano, who observed Velez with a "watchful eye" – a phrase respondent coins on appeal and not spoken by Medrano at trial. Resp. Br. at 31; *see also id.* at 4. Medrano's "watchful eye," respondent claims, prevented Velez from harming the child during this period. *Id.* As supposedly "undisputed" corroboration under this timeline, respondent presents pages of evidence of witnesses who saw Angel Moreno doing

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newspapers, but would require a 10th-grade reading level to read the police statement contained in State's Exhibit 64. 17 RR 174-75. Respondent did not at trial and does not here dispute this expert evidence.

okay before October 18, 2005 (Dr. Zamier and Juan Chavez), along with pages of others who saw him badly injured thereafter (including first responders, physicians, and medical examiners). Resp. Br. at 31-36.

The first thing to know about this theory is that it is an attempted mulligan. *At trial*, the prosecutor had a different theory. Ignoring evidence to the contrary, he argued that Velez did not have an earlier opportunity to hurt the child because he was living *with* Moreno's relatives: "At this time, *neither one of them has a house to live in* so the couple, Acela and Manuel, and the three children that Acela has . . . . *live with friends and relatives*." 14 RR 19 (emphasis added); 18 RR 143 (similar). Velez's opening brief proved these claims factually baseless. Opening Br. at Point 22, p. 111. *Now*, therefore, respondent argues they were living *near,* not *with,* relatives, including one who had a "watchful eye." Resp. Br. at 4, 31.

This new argument equally misrepresents the facts. Under questioning by the prosecutor, Medrano revealed that she paid little attention to, and knew very little about, Velez, Moreno, and their household when she was supposedly keeping a "watchful eye" on them:

- Medrano did not know "more or less" when Moreno left Juan Chavez for Velez, 14 RR 41-42;
- she did not know how long Velez, Moreno, and the children lived across the street from her, 14 RR 42;
- she did not talk to Velez "on a daily basis," *id.*;
- she did not talk with Velez "much," *id.*;

- she learned that they were moving out only "when they were taking out the things." *Id.*

Indeed, the record does not even disclose whether she visited the home because the prosecutor never asked. And Medrano's lack of interest extended to whether Velez had ever hurt Angel Moreno. Asked on cross examination, Medrano stated that Moreno had never told her that Velez hurt him, and that she (Medrano) never asked. 14 RR 51.

In sum, respondent's timeline theory – presented for the first time on appeal to this Court – crumbles like a house of cards. It is of course contradicted. In addition, while respondent asks this Court to defer to the "factfinder's resolution of" this "conflicting view," it is clear that the Court need not defer here because the factfinder was never presented with this newly-minted "watchful eye"-from-across-the-street theory.

3. *Respondent's "opportunity" theory was contradicted and weak because Acela Moreno had the greatest opportunity to harm the child.*

In conjunction with its timeline theory, respondent repeatedly claims there was "abundant non-accomplice corroboration evidence of opportunity." Resp. Br. at 29; *see also id.* at 31, 32, 33, 35, 56, 57. This theory flops because the State's own evidence reveals that, between the two, Moreno had the greatest opportunity to hurt the child. For example, during Moreno's testimony, the State attempted to show that Velez spent time with Angel Moreno at home. The State asked, "So was [Velez] home all the time?" 16 RR 81. She answered, "no, because he used to go out." *Id.* But Moreno herself admitted to staying home "*all the time*." 16

RR 81-82 (emphasis added). Further, Moreno stated in her recorded police statement, introduced at trial, that she "never" left Velez alone with Angel Moreno. State's Ex. 49A at 19. Therefore, the State's own evidence, here again, contradicts the corroboration it seeks to rely upon to save this conviction. Indeed, the State's undisputed evidence that Moreno had the best opportunity to harm the child is strikingly like the evidence it argued recently was sufficient to prove that a different Cameron-County mother, Melissa Lucio, must have killed her own child.[13]

4. *That Moreno was a good and caring mother was disputed by the State's own evidence and exceedingly weak corroboration.*

Again undeterred by the record, respondent argues that non-accomplice evidence corroborates Moreno's accusations against Velez by showing she did not mistreat her children and in fact treated them well, Resp. Br. at 40-41, including testimony by Medrano "that Moreno *did not mistreat her children.*" Resp. Br. at 56 (emphasis added). In fact, respondent not only had an opportunity to injure her child, she did so.

In support of its theory, respondent twice tells the Court that Medrano testified that she saw "a bite mark on Baby Angel's cheek, which Moreno, *likely covering for Appellant*, told Medrano she [Moreno had] caused." Resp. Br. at 30 n.3; *id.* at 3 (citing 14 RR 48-49) (emphasis added). But respondent misstates the

[13] *See Lucio v. State*, __ S.W.3d __, No. AP-76,020 (Tex.Crim.App. Sept. 14, 2011) (slip opinion) (adopting State's opportunity argument); State's Brief on Appeal by Cameron County District Attorney, at 26 (arguing that Lucio had an opportunity to harm the child because she "admitted that she and [the child] were alone together everyday after 11:00 a.m.").

record: Medrano unequivocally stated that *Moreno* admitted to biting the child, but never said one word to suggest that Moreno was covering for Velez. 14 RR 48. Not surprisingly, the trial prosecutor who heard Medrano's testimony did not argue that she established Moreno to be a good and caring mother.

Similarly, in making this claim, respondent misstates the record by twice claiming that Moreno told the police "she did not burn the child," Resp. Br. at 46, 48. This is not the truth. The truth is that Moreno *admitted* repeatedly to burning the child, although claiming accident, and the police interrogators clearly understood what she said to be an admission:

| | |
|---|---|
| Lt. Carlos Garza: | Yesterday, you explained to me that possibly one of the burns . . . |
| Moreno: | That has been there for a while, that perhaps it was me accidentally, but I don't rememb . . . |
| Lt. Garza: | Accidentally, you told me. |
| Det. Javier Reyna: | Let's do it. How are you going to burn the baby? Tell me. How was it that you burned the little baby? Accidentally? |
| Moreno: | I was holding him. |
| Det. Reyna: | With a cigarette? |
| Moreno: | Perhaps, maybe as he was crawling. |

State's Ex. 49A at 13-14. As this exchange makes clear, Moreno admitted to burning the child both in the recorded interrogation and during the one that took place with Lieutenant Garza the day before. Respondent blatantly misrepresents the record by repeatedly claiming she denied having done so.[14]

[14] Respondent goes so far as to claim – without support from a scintilla of evidence – that the jury could have found that Velez burned the child. Resp. Br. at 48.

In addition, while claiming "it was Moreno who . . . took [the child] to the doctor and hospital when he was sick," Resp. Br. at 56, respondent fails to acknowledge that Moreno admitted that when she saw the injuries from the burns she "never had taken him to the . . . doctor." *Id.* at 49A at 41.

Furthermore, respondent fails to take into account that State's Exhibit 64, Velez's police statement, disputes the claim that Moreno never mistreated her children. It states the opposite – that Moreno brutally abused her children, including Angel Moreno. State's Ex. 64.

The claim that non-accomplice testimony shows Moreno to have been a good and caring mother is more than contradicted and weak. It is a sham.

5. *Respondent's "demeanor" theory clashed with the State's trial evidence*

Respondent asserts that Velez's supposedly indifferent demeanor after the child's death corroborates Moreno's accomplice testimony. Even assuming that a third party's brief observation of an accused's response to a crisis were probative of consciousness of guilt, respondent's theory is wrong. It goes against much of the record. In fact, by cherry picking the facts it believes support its theory, respondent completely distorts the picture. The result is yet another contradicted and weak theory of corroboration.

First, respondent relies heavily on the testimony of a neighbor, Aparicio, arguing that "[i]n contrast to [Velez's] *indifferent demeanor*, after handing Appellant the phone and stepping outside to check on the child, Aparicio saw Moreno *appropriately concerned*. . . ." Resp. Br. at 43 (emphasis added). There

are two problems with this argument. One, respondent conceals that when Velez came to Aparicio's home to make the 911 call, *Velez* "came *yelling* and [Aparicio] came out." 14 RR 91 (emphasis added). Two, although respondent is correct that Medrano testified that she believed Velez was insufficiently concerned, this belief was not "in contrast to" her belief regarding Moreno, whom Aparicio described like this: "Well, [Moreno] only would complain, she would say my baby, my baby, but I never really saw any tears." 14 RR 85. Contrary to respondent's claims, Aparicio was not impressed with Moreno's concern.

Respondent also relies on the reports of the officers about Velez's demeanor while he waited for Angel Moreno to be treated and spoke with the police. Resp. Br. at 44-45. However, it conveniently ignores police testimony demonstrating that Velez stood very near to where paramedics were giving the child aid, "looking . . . [l]ike what's going on with the baby." 14 RR 103. Respondent also ignores that Velez played a very important role for his and Moreno's family during the chaos that followed the 911 call he initiated: he was taking care of his and Moreno's other children. 17 RR 47, 49; 16 RR 14-15. In this stressful scene, Velez acted responsibly and appropriately, not indifferently. *Contrast with Smith v. State*, 332 S.W.3d 425, 442 (Tex.Crim.App. 2011) (cited by respondent repeatedly) (finding corroboration in case of woman convicted of killing her husband where defendant answered the door for police using her maiden name, made mean-spirited remarks about the victim during her police interrogation, and told family members to tailor their stories for the police).

6. *Respondent's claim that Velez evaded authorities contradicts the record.*

More than just disputing the State's theory that Velez attempted to "avoid the police," Resp. Br. at 45, the record shows that just the opposite is true.

In repeatedly claiming that Aparicio's testimony shows that Velez "refused" to call 911, Resp. Br. at 7, 44, 57, respondent misstates and distorts the record on at least two levels. First, whatever may be concluded about why Aparicio and not Velez ultimately made the call, no one disputes that Velez's intentional action in walking over to the neighbor's house and "yelling" to get her attention, 14 RR 91, *resulted* in 911 being called and help coming. Second, Officer Guerra, who talked to Aparicio immediately after her 911 call, wrote in his report that Aparicio said Velez was "too nervous" to make the call, 14 RR 87-90; Def. Exhibit 1 (profferred), which is consistent both with what two different officers recorded that Velez *independently* said in his statement, State's Ex. 64 (witnessed by Rene Gosser and Carlos Garza), and with what Velez later told the defense expert Dr. Rabin. *See* Def. Ex. 6 at 10 (stating "he was so nervous that he *could not use the phone*"). The consistency in the reporting by Velez and Aparicio that he was too nervous to dial is not due to "inadverten[ce] or . . . happenstance." *De La Paz v. State*, 279 S.W.3d 336, 347 (Tex.Crim.App. 2009). It is due to these consistent reports being the truth.

In addition, contrary to respondent's claim (*see* Resp. Brief. at 45), a comparison of respondent's cases and the facts here show that, if anything, Velez

wanted to aid the police and completely lacked any guilty conscious. For example, respondent cites a case where the appellate court found corroboration in the defendant's use of a false name when contacted by the police about the crime, as well as his answering the door for the police *only* after the police employed a ruse. Resp. Br. at 45 (citing *Alvarado v. State*, No. 3-8-5-541CR, 2010 WL 2680341, at *2 (Tex. App. – Austin July 1, 2010, *no pet.*) (unpublished)). Similarly, respondent relies on *Gonzales v. State*, No. 3-1-524-CR, 2002 WL 1987616, at * 5 (Tex.App. – Austin Aug. 30, 2002, *pet. ref'd*) (unpublished) (cited at Resp. Br. at 46), where the defendant had tried to persuade the murdered child's mother "not to call the ambulance" and made "threatening statements to [the mother] in an attempt to keep her from talking to anyone about the incident." *Id.* In *Castaneda v. State*, No. 14-5-1151CR, 2007 WL 1215825, at * 6 (Tex.App. – Houston April 26, 2007, *pet. ref'd*) (unpublished) (cited at Resp. Br. at 45-46), the defendant failed to get a badly-injured child medical attention.

By contrast, [w]hat is an innocent man or woman's reaction when a baby has a serious accident? . . . He or she administers first aid, calls an ambulance, calls a neighbor for help, drives the baby to the hospital-in short, takes remedial action." *Ex parte Henderson*, 246 S.W.3d 690, 697 (Tex.Crim.App. 2007) (Keasler, J., dissenting). Here, unlike respondent's cases, the evidence shows Velez took all sorts of remedial actions and did everything he could to help the police: 1) he alerted the child's mother, Moreno, when he noticed the child injured, State's Ex. 64, 16 RR 89; 2) accompanied the child and his mother to the

neighbor's house, where he "yell[ed]" for her to come out and prompted her to dial 911, 14 RR 57, 91; 3) remained at the scene while first-responders did their work, 17 RR 47, 51; 4) gave his true name to the police, State's Ex. 64; 5) took care of the other children (his and Moreno's) during this busy scene, 17 RR 49; and then 6) went to the police station where he gave what respondent repeatedly calls a "voluntary statement." Resp. Br. at 49, 51, 52, 59. Velez did the opposite of giving a false name, evading the police, or attempting to persuade anyone not to call the police. He sought out help, cooperated with the police, and did everything a responsible adult would in the circumstances.[15]

* * *

In short, much of respondent's claimed corroboration is, in fact, contradicted, disputed, and weak.

B. *Respondent's other non-contradicted "corroboration" is meaningless.*

Much of respondent's claimed corroboration relies on theories so attenuated that not even the trial prosecutors attempted to argue them. Because the jury never heard these theories, contrary to respondent's repeated claims, there are *no conflicting views of the evidence* which must be resolved in favor of the "factfinder's resolution." Resp. Br. at 33 (citing *Smith*, 332 S.W.3d at 442).[16] Respondent's ad nauseam arguments repeatedly claim that any evidence not completely inconsistent with Moreno's accomplice testimony is gold-plated

[15] Indeed, although Velez disputes this allegation, the prosecutor went so far as to argue that Velez attempted to revive the child using air and water. 18 RR 144-45.

[16] *See also* Resp. Br. at 28, 40, and 49 (each asking this Court to defer to factfinder's resolution of conflict).

corroboration. The problem with these claims is simply stated: if an accomplice were to claim to have heard a defendant confess at high noon on a sunny day, non-accomplice testimony that it never rained that day would not be inconsistent, but it would lend little added credibility to the accomplice's claim to have heard a confession. A few examples from respondent's brief should suffice.

1. *Respondent's "motive" theory is nonsensical and was never presented to the jury.*

In respondent's lead corroboration claim, it contends that a "reasonable jury could have determined that Chavez's beating of Moreno, Appellant's paramour, following Appellant's instigating phone call, could have given Appellant ample motive for hurting Baby Angel, Chavez's only child with Moreno." Resp. Br. at 29. Respondent claims this is "convincing uncontradicted evidence of motive . . ." *Id.* at 56; *see also id.* at 28, 31, 32, 33. But the facts show otherwise.

In making this argument, respondent fails to acknowledge that not a single person whispered a word of this theory at trial – not Moreno, not her sister Medrano, not Chavez, and not any of the three prosecutors in their various jury arguments. Indeed, when the prosecutor attempted to explain motive at trial, he struggled, but never ventured the newly-minted theory the State now posits as its leading corroborator. 18 RR 139-40 (prosecutor arguing merely that Velez's motive was that he was "impulsive" and that "Angel didn't like him and he knew that"). Respondent's new motive theory is nonsensical, desperate, and cannot be a

basis for concluding that the jury would have found corroboration absent the charge error because the jury below never heard of or even considered it.

*2. The hearsay statement is meaningless, and its content does not support the use to which respondent puts it.*

Respondent argues that a flight nurse stated that it was "his understanding that Baby Angel was flung into a wall by the father, referring to Appellant." Resp. Br. at 39 (citing 15 RR 53). Respondent further argues that the jury heard "testimony that medics and hospital staff immediately following Baby Angel's admission to the hospital believed that the only adult father figure in the child's home had violently thrown him into a wall causing fatal head injuries." *Id.* In fact, however, the nurse merely answered whether he knew who hurt the child by relaying this hearsay claim: "When I receive report [sic], the report that was given to me was by the nurse was that the patient was flung into a wall by the father. That was report given to me, sir." 15 RR 53.

Contrary to respondent's claim, the nurse did not say he believed the father was Velez, and no witness claimed that to have been the case. In fact, the nurse said "I had no idea who the man was, sir." *Id.* And of course Velez is not the child's father. Further, this single hearsay statement by one witness in no way shows that "medics and hospital staff" *believed* the "only adult father figure" had hurt the child. Resp. Br. at 39. The trial prosecutor who heard the evidence firsthand never attempted any argument based on this isolated and oblique hearsay statement, much less attempted to assign it the farfetched meaning the appellate

prosecutor now suggests. In short, this hearsay statement offers neither anything of relevance nor the corroboration respondent seeks. The hearsay statement is meaningless, and its content does not support the use to which respondent puts it.

*3. Velez's presence around the time of the injuries does not inculpate him.*

Respondent relies heavily on the fact that Velez was present in the home when the child was found injured and when first responders arrived. Resp. Br. at 35, 38, 56. But so was Moreno. And *of course* they were both present: they both lived there. This is not the common accomplice case in which the accomplice testimony makes *both* the accomplice and the accused guilty;[17] rather, here, Moreno completely blames Velez and exonerates herself. For her testimony to be true, Velez must be guilty and she must be guilty of nothing more than failing to protect her child. The corroboration necessary to exclude egregious harm in this case thus needs to tend to establish that Velez, and not Moreno, was the culprit. *See, e.g., Smith*, 332 S.W.3d at 444 (citing corroboration establishing that defendant "was the *only person* who could have shot the two men while they slept") (emphasis added).[18] Velez's presence does not move the ball a single inch.

[17] *See Jackson v. State*, 745 S.W.2d 4, 13 (Tex.Crim.App. 1988) (analyzing sufficiency of accomplice-corroboration evidence where accomplice actively aided the defendant as he abducted, raped and murdered the victim).

[18] An example here of evidence identifying Velez and exculpating Moreno would be corroboration of her accomplice claim that the child was alive and well when she left him on a couch twenty minutes before he was discovered injured and struggling to breathe. 16 RR 94-95. There was no such corroboration.

C. *Respondent cites corroboration tied to the accomplice which this Court has held is irrelevant to the inquiry.*

According to respondent, "[o]ther non-accomplice corroborating evidence that a rational jury could infer to be a suspicious circumstance includes State's Exhibit 39 [sic][19]. . . . Moreno's video statement . . . " Resp. Br. at 46. This Court has squarely ruled otherwise. *McDuff v. State*, 939 S.W.2d 607, 612 (Tex.Crim.App. 1997). Although Respondent has cited *McDuff* for other purposes, Resp. Br. at 38, it apparently did not notice that this Court clearly held there that "hearsay from an accomplice cannot corroborate the accomplice's trial testimony." *McDuff*, 939 S.W.2d at 612. Thus, Moreno's hearsay statement to the police, albeit admitted in evidence, can play no role in saving the State from the egregious harm caused by the court's charge error.

D. *This prejudicial error requires reversal under three standards.*

Moreno was clearly the lynchpin of the State's case against Manuel Velez. What is the State's case against him without the testimony of accomplice Moreno? Nothing but suspicion, speculation, and innuendo. In claiming corroboration, respondent grasps at elusive straws. The trial court's error in failing to charge the jury on accomplice corroboration denied Velez a fair trial, caused him egregious harm, and requires reversal under Point 3 of Velez's brief.

Reversal is also required under Point 6 of Velez's opening brief because respondent does not dispute that there was no conceivable legitimate strategic

[19] Respondent apparently refers to State's Exhibit 49, Moreno's police statement.

reason for defense counsel to have failed to request this charge. Resp. Br. at 81 (skipping to prejudice prong of ineffectiveness inquiry). And as respondent apparently admits, under this Court's precedent, the standard for relief for ineffectiveness is a lower bar than the egregious harm standard: "when the claimed deficiency is the failure to object to the trial court's omission of an accomplice-witness instruction, the record is generally reviewed to determine whether 'there was a substantial amount of non-accomplice evidence and whether the record reveals any rational basis on which the jury could have doubted or disregarded that evidence.'" *Id.* (quoting *Davis v. State*, 278 S.W.3d 346, 353 (Tex.Crim.App. 2009)). In establishing this standard in *Davis*, 278 S.W.3d at 353, this Court cited its precedent in *Herron*, 86 S.W.3d at 633, a case setting forth the "some harm" test for a *preserved* accomplice-corroboration charge error in exactly the same terms used in *Davis*.

Applying this standard, as shown above, the corroboration here was not even close to being substantial and the record reveals numerous rational bases to have doubted and disregarded it. Velez is thus entitled to reversal due to counsel's ineffectiveness.

Finally, the jury charge error in this case requires reversal under Point 46 – cumulative error. The charge error in Point Four of Velez's opening brief is also conceded error, Resp. Br. at 73, and Velez's appeal presents numerous other errors. Therefore, even if the Court finds this charge error alone to be harmless, it

should consider it in tandem with other errors to find cumulative reversible error. *Stahl v. State*, 749 S.W.2d 826, 832 (Tex.Crim.App. 1988).

**4. The court's conceded charge error in not limiting its charge on intent to the result of Velez's alleged conduct was extremely prejudicial and requires reversal.**

Because murder is a "result of conduct" offense, the court's jury charge, telling the jury it could convict the defendant based on his intent with respect to the *nature of his conduct*, was error. 18 RR 82-85. Respondent concedes as much. Resp. Br. at 73. But respondent is wrong that the error is harmless because the trial judge charged the jury to consider whether Velez "did intentionally and knowingly cause the death [of the victim]." Resp. Br. at 74. Because the court specifically defined "intentionally and knowingly" as they appeared in this sentence as referring *either* to the result of conduct *or* the nature of the conduct, there is a reasonable likelihood that the jury understood the charge to allow it to find Velez intentionally and knowingly caused the death of the victim by finding that Velez acted intentionally and knowingly with respect to the conduct that caused the death. 18 RR 83.

Further, this case is striking for the dearth of evidence concerning exactly what result Velez intended – even assuming he was responsible for the offense. *See* Opening Brief at 52 ("The evidence supported a conviction on the unlawful theory that the accused merely engaged in intentional acts which happened to cause death."). When that evidentiary hole is combined with the prosecutor's arguments in summation that Velez sought to save the child's life (i.e., not cause

death) and acted impulsively – which respondent wholly fails to address or refute, 18 RR 139-40, 144-45, grave questions exist regarding the intent issue. *See also* Opening Brief at 52-54. The jury charge expanding intent beyond result of conduct caused Velez egregious harm and requires reversal of his conviction.

Further, reversal is required under Point 6 of Velez's opening brief as the State does not contest that counsel could have had no legitimate strategic reason for not correcting this false jury charge and there is a reasonable probability that a corrected charge would have resulted in a different outcome. Resp. Br. at 82.

**5. Respondent's efforts fail to refute that A.P. Merillat again provided false testimony that inmates sentenced to life without parole may promote up from G-3.**

In *Estrada*, 313 S.W.3d at 287-88, A.P. Merillat falsely testified that an inmate sentenced to life without parole (LWOP) could promote up from the G-3 custody level when the truth is that G-3 is the most lenient level such an inmate can ever achieve. He did the same thing at Velez's sentencing trial, and offered even more prejudicial testimony than he did in *Estrada* by falsely leaving open the possibility that an inmate sentenced to LWOP could "promote up" to a G-2 or even G-1 status, where supervision is "very light, like a trustee type status." 20 RR 16. Merillat's false testimony at Velez's October 2008 trial was not surprising: he stated in a 2009 affidavit to this Court in the *Estrada* case that he had not learned his G-3 testimony was false until January of 2009.[20]

[20] The brief and Merillat's attached affidavit were filed in this Court. Undersigned counsel has served a copy of this brief and Merillat's accompanying affidavit on respondent.

Respondent's effort to claim that Merillat nevertheless testified correctly in 2008 is based on a reading of the record so strained that it would be humorous if Velez's life were not on the line. As respondent's cited passage shows, Resp. Br. at 76-77, Merillat gave the testimony at issue in response to this question by the State: "And in the event that a person is placed or sentenced to life in prison without parole, where do they serve that sentence?" 20 RR 16. After describing the classification system and stating that capital murderers start at a G-3 custody level, the same as a "burglar or thief or a forger, or DWI felon," Merillat made the false statement at issue here: "*You* can promote up to better classification if you behave, you can go down to more strict classification." *Id.* (emphasis added). Respondent's claim that this sentence refers back to the burglars, thieves, and forgers is ludicrous. It completely ignores the context of the question. It also ignores that Merillat's very next sentence makes clear that the "you" is the inmate serving LWOP: "But because *you're* convicted of capital murder does not mean you're going to be locked away in a concrete bunker and chained to the wall or not given any freedoms at all." 20 RR 17 (emphasis added) He again said "you."

It is thus the State that has shorn Merillat's testimony from its context. He was indisputably referring to capital murderers sentenced to LWOP. As shown in Velez's opening brief at 59-60, in this exceedingly weak case of future dangerousness, the lack of any jury note concerning the false testimony does not prove this constitutional error harmless beyond a reasonable doubt, *Chapman*, 386

U.S. at 24, or under any other standard including the "fair probability" language from *Estrada*, 313 S.W.3d at 287. This death sentence must be reversed.

**10. Respondent's waiver argument in defense of the erroneously-issued findings of fact and conclusions of law issued below is wrong and, in any case, itself waived.**

Respondent argues that it was permissible for the trial court to violate this Court's precedent holding that only the judge who presided at the hearing may issue findings of fact and conclusions of law under Article 38.22, by claiming that Velez waived his right to have the findings and conclusions completed by the original trial judge because he did not request them in writing. Resp. Br. at 89-91. Respondent's argument is waived, and wrong.

First, respondent omits a salient fact. In January of 2010, Velez filed a motion in this Court seeking an order that the trial court file findings of fact and conclusions of law, which the Court granted the next month. Respondent fails to acknowledge, however, that the State never opposed that motion on the grounds it now belatedly presses. In fact, the State filed no response at all. This Court thus granted the motion requiring the findings and conclusions without having heard any objection whatsoever from the State. By raising its argument that Velez should have requested the findings and conclusions in this Court fifteen months after this Court granted this relief, it is respondent who has waived the claim.[21]

[21] *See Wilson v. State*, 311 S.W.3d 452, 457 & n.14 (Tex.Crim.App. 2010) (citing *Tallant v. State*, 742 S.W.2d 292, 294 (Tex.Crim.App. 1987)) (holding "the State must call to the attention of the court of appeals in orderly and timely fashion that an alleged error was not preserved"); *Farrell v. State*, 864 S.W.2d 501, 503 (Tex.Crim.App. 1993) (holding that State waives the waiver argument by not insisting on preservation "in an orderly and timely fashion" by providing the courts "with the first opportunity to

Furthermore, the State's waiver argument is wrong as a factual matter. Velez's trial attorney properly requested the findings and conclusions *orally* after the hearing, and then objected to the court's failure to have done so in his motion for a new trial. 12 RR 67-68; 3 CR 466. There is absolutely no requirement that these statutorily-required findings and conclusions be requested in writing in the first instance, and the trial judge thus had no excuse for failing to meet this obligation while he remained on the bench. Here, where Velez repeatedly sought the findings and conclusions at both the trial and appellate level, there is certainly no forfeiture under *State v. Terrazas*, 4 S.W.3d 720 (Tex.Crim.App. 1999), or any other authority.

## CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays this Court to uphold these points of error, and those set forth in his opening brief, and order the relief requested herein and in his opening brief.

Respectfully submitted,

BRIAN W. STULL, ESQ.
JOHN HOLDRIDGE, ESQ.

ATTORNEYS FOR APPELLANT

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resolve the various issues associated with the appeal"); *Rochelle v. State*, 791 S.W.2d 121, 125 (Tex.Crim.App. 1990) (similar)).

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief for Appellant has been mailed by First Class U.S. mail to:

Mr. Rene B. Gonzalez
Assistant District Attorney
Judicial Building
964 E. Harrison Street
Brownsville, TX 78520

BRIAN W. STULL, ESQ.

On this 30th of September, 2011

# Appendix A

| Resp. Br. at | State's Misrepresentation or Highly Misleading Statement | Record-Based Truth | Record Cite |
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| 3, 30 n.3 | Medrano testified that she saw "a bite mark on Baby Angel's cheek, which Moreno, *likely covering for Appellant*,[1] told Medrano she caused." | Medrano's testimony on prosecutor's examination:<br><br>Q: "*Did Acela tell you who had bitten the child*?"<br><br>A: "*She said she had.*"<br><br>Q: "*So Acela tell you that she, Acela, bit the baby, correct?*"<br><br>A: "Yes." | 14 RR 48 |
| 46<br><br>48 | "Moreno stated that *she did not burn Baby Angel*, never saw Appellant do it either, and thought that the burn may have happened accidentally when Baby Angel was crawling."<br><br>Claiming that "a reviewing court must view this circumstantial non-accomplice evidence as corroborative of Moreno's account that *she did not burn the child* and as a suspicious circumstance that rational jurors . . . could have found sufficiently tends to | Questions by police on this and Moreno's answers:<br><br>Q: "*Yesterday, you explained to me that possibly one of the burns . . .*"<br><br>A: "*That has been there for a while, that perhaps it was me accidentally, but I don't rememb . . .*"<br><br>Q: "*Accidentally, you told me.*"<br><br>Q: "*Let's do it. How are you going to burn the baby? Tell me. How was it that you burned the little baby? Accidentally?*" | State's Ex. 49A at 13-14 |

[1] Although a plausible reading of the phrase "likely covering for Appellant" is that *respondent* asserts this was likely, the natural impression on the reader is that this phrase, which respondent artfully couches in the passive voice, means that Medrano believed that Moreno was likely covering for Appellant.

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| | connect Appellant to these burn injuries and Baby Angel's murder." | A: "*I was holding him.*"<br><br>Q: "*With a cigarette?*"<br><br>A: "*Perhaps, maybe as he was crawling.*" | |
| Resp. Br. at 63 | "Dr. Rabin testified that Appellant could read and speak English . . . [and is] not mentally retarded." | Dr. Rabin testified as follows as to Velez's ability to read and speak in English, and as to his retardation:<br><br>"*He has never learned how to read in school because of this learning problem. He cannot read now.*"<br><br>"*When [intelligence] tested in English, he functions at the retarded level.*" (Said same thing various times as cited)<br><br>"*Testing in English, his verbal IQ level is 62. Performance IQ level is 70, full scale IQ is 65. 69 or less is and mental retardation and he scored below 70 means mentally retarded.*"<br><br>"*His ability to read Spanish is the kindergarten level. His ability to read English is second grade level. And at the* | 17 RR<br><br>169<br><br>168, 180, 182, 201, 202<br><br>179-80<br><br>170 |

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| | | *same time his ability to understand English is at the kindergarten to first grade level."*<br><br>*"He could not have read his rights because he can't read . . . he reads at a second-grade level."*<br><br>*"He can probably understand something to be able to read which team won the game in the sports scores, be able to read comics. He could not read an editorial or front page newspaper article. He only reads the very most simplest things. A few headlines they are written in a simple fashion and not read the body of the report. So someone who saw him say read that the Spurs beat the Rockets 10 points, he could read that. Someone could say he is reading the comics, he could read that. He is not able to read the paper itself."*<br><br>*"Yes, he did speak English to me. Only a simplified level of English where anything complicated either I had to have Mr. Flores translate for me or he had to answer in Spanish and then Mr. Flores translated his answer back to me. He tried to speak with me English most of the time, but most of the time anything complicated he couldn't answer, anything complicated he didn't know the English language enough to answer back to me. I had to go through Mr. Flores and translate the answer back to me."* | 174<br><br>174-75<br><br>175-76 |
| Resp. Br. at 6 | "Aparicio noticed that, *in sharp contrast to Moreno*, Appellant did not | On examination by the prosecutor, Aparicio testified only to this observation of Moreno's concern, and was | 14 RR 85 |

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| Resp. Br. at 43 | look worried as a person should be in that situation."<br><br>"In contrast to Appellant's indifferent demeanor, after handing Appellant the phone and stepping outside to check on the child, Aparicio *saw Moreno appropriately concerned* "complaining" and holding a pale, limp, and lifeless Baby Angel." | obviously not impressed:<br><br>Q: "*Will you describe the mother's demeanor?*"<br><br>A: "*Well, [Moreno] only would complain, she would say my baby, my baby, but I never really saw any tears.*"<br><br>In addition, this passage shows there was no sharp contrast between the two, but that Velez did show concern:<br><br>Q: *"Is this the statement that you gave the investigator?"*<br>A: *"In the part that Mr. Velez cam knocking at my door. He came yelling and I came out."* | 14 RR 91 |
| Resp. Br. at 4, 31 | Medrano watched Velez from her home across the street with a "*watchful eye*" (which the State says accounts for why Velez had no opportunity to injure the child during a period when the child was not injured) | Medrano said nothing about watching out for Angel Moreno or the other children. On prosecutor's exam, she said only:<br><br>• Medrano did not know "more or less" when Moreno left Juan Chavez for Velez.<br>• She did not know how long Velez, Moreno, and the children lived across the street from her.<br>• She did not talk to Velez "on a daily basis,"<br>• She did not talk with Velez "much."<br>• She learned that they were moving out only "when they were taking out the things." | 14 RR 41-42 |

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| Resp. Br. at 39 | States that flight nurse testified it "his understanding that Baby Angel was flung into a wall by the father, *referring to Appellant.*"<br><br>Jury heard "testimony that medics and hospital staff immediately following Baby Angel's admission to the hospital believed that *the only adult father figure in the child's home had violently thrown him into a wall causing fatal injuries.*" | The flight nurse testified as follows on cross examination:<br><br>Q: "Do you know how or by whom these injuries if they were perpetrated by any, were caused?"<br><br>A: "When I receive report [sic], the report that was given to me was by the [hospital] nurse was that the patient was flung into a wall by the father. That was report given to me, sir."<br><br>. . .<br><br>Q: "So you have no evidence to implicate a man by the name of Manuel Velez do you?"<br><br>A: "When I picked . . . . up [Angel Moreno], I had no idea who the man was, sir." | 15 RR 53 |
| Resp. Br. at 13 | "During the May 18, 2007 plea hearing, Moreno's attorney advised the trial court of the following understanding as to *why his client was pleading guilty*: . . . .*she knows that she should have intervened on behalf of the child, did not, and wants to make sure justice is done* . . ." | The question the attorney was answering was not why Moreno was pleading guilty or to what, but this question by the judge:<br><br>"If I sentence her today and I sign the judgment and this, how are you going to force her to testify?"<br><br>The judge asked Moreno herself why she was pleading guilty, and this was her response:<br><br>Q: "*Okay, and are you pleading guilty because you are* | 6 SSR1 13<br><br>6 SRR1 8 |

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| | | *guilty*?"<br><br>A: "*Yes.*"<br><br>The plea papers Moreno, the prosecutor, and defense counsel signed said that "each and every allegation" in the indictment was "true and correct," which included the allegation that she caused the child's injury by hitting him about the head. | 1 SRR2 State's Ex. 1 at 4. |
| Resp. Br. at 7, 44, 57 | Velez "refuse[d] to call 911" | After going to Aparicio's home and "yelling" to get her attention, either Velez was too "nervous" to dial, as Aparicio told the police immediately after the incident, or he incorrectly said the phone not working and returned it to Aparicio to dial. | 14 RR 56-57, 87-91 |