IN THE 404TH JUDICIAL DISTRICT COURT
OF CAMERON COUNTY, TEXAS

EX PARTE	§	Habeas Cause No. _____
	§	
MANUEL VELEZ,	§	
	§	
Applicant.	§	Trial Cause No. 07-CR-721-G

APPLICATION FOR WRIT OF HABEAS CORPUS

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APPLICATION FOR WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE.

TO THE HONORABLE DISTRICT JUDGE ELIA CORNEJO LOPEZ:

Applicant Manuel Velez is currently confined on death row at the Texas Department of Criminal Justice's Polunsky Unit in Livingston, Texas, pursuant to a Judgment entered in this Court on November 18, 2008 by former District Judge Abel Limas. (3 CR 454–60 [Appx 1]) On a disgracefully misleading record and without effective assistance of counsel, Mr. Velez was wrongfully convicted of murdering a one-year old child, and was unlawfully sentenced to die for the alleged crime.

Through undersigned counsel and pursuant to Article 11.071 of the Texas Code of Criminal Procedure, Mr. Velez petitions this Court to issue a Writ of Habeas Corpus, to find that his conviction and sentence of death were imposed in derogation of the Constitutions and laws of the United States and the State of Texas, and to recommend to the Court of Criminal Appeals that Mr. Velez be released from confinement or, alternatively, be granted a new trial.

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INDEX OF RECORD REFERENCES

The record submitted in support of this Application for Writ of Habeas Corpus consists of two components: (1) the official record on appeal, including multiple volumes of Reporter's Records and Clerk's Records, as detailed in the following table; and (2) the Appendix of New Evidence detailed on the following pages.

CLERK'S TITLE (filing date)	**APPLICANT'S RECORD CITATIONS**[1]	**CITED AS**
Reporter's Record Vols. 1-23[2]	Reporter's Record	RR
Supplemental Reporter's Record Vols. 1-13 (6/17/10)	First Supplemental Reporter's Record	SRR1
Second Supplemental Reporter's Record Vols. 1 & 2 (11/14/10)	Second Supplemental Reporter's Record	SRR2
Reporter's Record Vol.1 of 1 (6/2/10)	Third Supplemental Reporter's Record	SRR3
Reporter's Record Vol.1 of 1 (11/10/10)	Fourth Supplemental Reporter's Record	SRR4
Clerk's Record Vols. 1-3 (2/26/09)	Clerk's Record	CR
Supplemental Clerk's Record (4/17/09)	First Supplemental Clerk's Record	SCR1
2nd Supplemental Clerk's Record (6/5/09)	Second Supplemental Clerk's Record	SCR2
3rd Supplemental Clerk's Record Vols. 1-17 (7/12/10)	Third Supplemental Clerk's Record	SCR3
4th Supplemental Clerk's Record (7/26/10)	Fourth Supplemental Clerk's Record	SCR4
4th Supplemental Clerk's Record (12/22/10)	Fifth Supplemental Clerk's Record[3] (incorrectly labeled Fourth)	SCR5
5th Supplemental Clerk's Record (1/24/11)	Sixth Supplemental Clerk's Record (incorrectly labeled Fifth)	SCR6
7th Supplemental Clerk's Record (2/28/11)	Seventh Supplemental Clerk's Record (correctly labeled)	SCR7
8th Supplemental Clerk's Record (3/16/11)	Eighth Supplemental Clerk's Record	SCR8

In this Application, the above listed abbreviations are preceded by the volume number of the record cited and followed by the page number of that volume. Thus, a citation to "6 SRR1 5" refers to volume 6 of the 1st Supplemental Record, page 5. The Reporter Records and Clerk's Records are submitted on a CD in the Appendix.

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[1] Citations correspond to references utilized in Appellant's Brief filed in the Court of Criminal Appeals.

[2] Exhibits admitted at trial are contained in Vol. 21–23 of the Reporter's Record.

[3] Two separate records are labeled the "Fourth" Supplemental Clerk's Record—one filed on July 26, 2010, and another filed December 22, 2010 (which should have been the Fifth). The Sixth Supplemental Clerk's Record is labeled as the "Fifth." The Seventh Supplemental Clerk's Record is correctly labeled. In the citations to the record, this brief follows the list in the right column above, rather than the incorrect labels on the Fifth and Sixth Supplemental Clerk's Record.

INDEX OF APPENDIX OF NEW EVIDENCE

The following new evidence, which is not included in the trial court or appellate record, is submitted in support of this Application for Writ of Habeas Corpus, and referenced as "Appx [Tab No.]." In addition to the attached paper copies, a complete set of these documents is included on a CD, which also includes a PDF copy of this Application.

19. Affidavit of Felicitas Duran dated November 3, 2011
20. Affidavit of Bernardo Duran III dated November 3, 2011
21. Affidavit of Ana Garcia dated November 2, 2011
22. Affidavit of Francisca Garcia dated January 18, 2012
23. Affidavit of Enrique Gomez dated November 2, 2011
24. Affidavit of Maria Hernandez dated October 31, 2011
25. Affidavit of Olga Martinez dated November 4, 2011
26. Affidavit of Esmeralda Mata dated November 3, 2011
27. Affidavit of Gina Salazar dated November 3, 2011
28. Affidavit of Ivonne Salazar dated November 3, 2011
29. Affidavit of Yaritza Salazar dated November 2, 2011
30. Affidavit of Amanda Velez dated November 4, 2011
31. Affidavit of César Velez dated January 17, 2012
32. Affidavit of Consuelo Velez dated November 2, 2011
33. Affidavit of Elmita Velez dated January 17, 2012
34. Affidavit of Jonathan Velez dated November 2, 2011
35. Affidavit of Leticia Velez dated January 17, 2012
36. Affidavit of Margarita Velez dated January 18, 2012
37. Affidavit of Marisol Velez dated January 19, 2012
38. Affidavit of Virginia Velez dated December 13, 2011
39. Affidavit of Wenceslao Velez dated November 3, 2011
40. Affidavit of Wenceslao Velez, Jr. dated November 2, 2011
41. Affidavit of Eunice Zamora dated November 4, 2011
42. Affidavit of Roberto Zamora dated November 4, 2011

Juror Declarations

43. Declaration of Raquel Avalos dated December 3, 2011
44. Declaration of Jennie S. Johnson dated December 3, 2011
45. Declaration of Rosalva Miller dated December 3, 2011
46. Declaration of Frank Steven Peterson dated December 3, 2011
47. Declaration of Ernie Quintanilla dated December 3, 2011

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DOCUMENTS IN DEFENSE COUNSEL'S FILES

48. Certification of Documents Contained in Defense Counsel's Files
49. City of Brownsville EMS Ambulance Activity Report dated August 27, 2005
50. Valley Baptist Medical Center Birth Records of Angel Moreno
51. Brownsville Children's Clinic medical records pertaining to Angel Moreno

52. Valley Baptist Medical Center Medical records pertaining to Angel Moreno dated June 13, 2005
53. Boys and Girls Pediatric Clinic medical records pertaining to Angel Moreno
54. Valley Baptist Medical Center Medical records pertaining to Angel Moreno dated October 31, 2005
55. Valley Regional Medical Center records pertaining to Angel Moreno dated October 31, 2005 and November 1, 2005
56. Valley Regional Medical Center Final Discharge Summary recorded November 1, 2005
57. Dolly Vincent Memorial Hospital records dated October 31, 2005
58. Valley Baptist Medical Center Autopsy Report pertaining to Angel Moreno dated November 3, 2005
59. State's Disclosure of Expert(s) dated August 21, 2008
60. Sworn Statement of Magnolia Medrano dated November 1, 2005
61. Statement of Ivonne Salazar dated February 8, 2006
62. Notes of David Ramirez from interview with Ivonne Salazar
63. Correspondence between defense counsel and experts
64. Memorandum from Gilda Bowen to Gary Ortega dated July 27, 2006
65. Letter from Gary Ortega to J. Keith Rose, M.D. dated August 3, 2006
66. Letter from Gary Ortega to J. Keith Rose, M.D. dated April 30, 2007
67. Letter from Gary Ortega to Dr. Sridhar Natarajan dated April 30, 2007
68. Email exchange between Daneen Milam and Gilda Bowen dated May 3, 2007
69. Handwritten notes of Gary Ortega pertaining to bite marks
70. Gary Ortega's notes of his conversation with Dr. Natarajan
71. Handwritten notes of defense counsel
72. Records from the Texas Department of Family and Protective Services
73. Records from the Texas Department of Family and Protective Services
74. 9/3/08 Subpoenas to TDFPS, FOW, and The Bair Foundation

DOCUMENTS IN DISTRICT ATTORNEY'S FILES

83. Certification of Documents Received from the Cameron County District Attorney
84. Incident/Offense information of Manuel Velez on May 2, 1993
85. Statement of Acela Moreno dated August 4, 2005
86. Voluntary Statement of Accused dated October 31, 2005 and signed by Acela Moreno
87. Valley Baptist Medical Center medical records pertaining to Angel Moreno dated June 13, 2005
88. The Bair Foundation Individual Service Plan Review for Emily Moreno dated November 30, 2005
89. The Bair Foundation Individual Service Plan Review for Alexis Moreno dated November 30, 2005

90. Letter from Gary Ortega to District Attorney dated March 14, 2006 attaching the statement of Ivonne Salazar dated February 8, 2006
91. Offense/Incident report dated July 9, 2005 pertaining to the arrest of Juan Chavez
92. Memorandum from South Texas Family Counseling dated February 7, 2007
93. CPS Monthly Evaluation Assessment from the TDFPS dated February 7, 2007
94. Officer's Return of Service of the Subpoena for Acela Rosalba Moreno, Shawn Michaels, and Blanca Barrera
95. Letter from District Attorney to Dr. Vincent DiMaio dated February 27, 2008
96. Documents pertaining to the compensation of attorney Luis V. Saenz
97. Letter from District Attorney to Dr. Norma Farley dated September 12, 2008
98. Letter from District Attorney to Petra Cruz dated September 22, 2008
99. Letter from District Attorney to A.P. Merillat dated November 4, 2008
100. Articles on battered woman syndrome

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HISTORICAL DOCUMENTS

105. Article from TDCJ Agency News dated January/February 2006
106. News Article in The Brownsville Herald dated April 2, 2006
107. Article from Texas Bar Journal dated September 2006
108. Press Release of United States Attorney's Office dated February 13, 2011
109. News Articles from The Monitor website dated July 11, 2011 and August 24, 2011
110. *State v. Runnels*, excerpts of trial transcript
111. *State v. Quintero*, excerpts of hearing transcript of Pretrial Motions
112. *State v. Chanthakoummane*, excerpts of hearing transcript of Trial on the Merits
113. TDCJ Unit Classification Procedure dated July 2005

RECORDS OBTAINED BY HABEAS COUNSEL THROUGH SUBPOENA

114. Friendship of Women, Inc.'s records of Acela Moreno
115. Order for Protection of a Child in an Emergency dated November 1, 2005
116. Letter from Dr. Farley to Dr. Brown dated December 20, 2005 with attached preliminary report

RECORDS OBTAINED BY HABEAS COUNSEL THROUGH PUBLIC INFORMATION ACT OR RECORD SEARCHES

117. Sealed Indictment of Abel Corral Limas dated March 29, 2011
118. Plea Packet Memo for Abel Corral Limas dated March 31, 2011
119. Reprimand of Hector J. Villarreal dated September 21, 1983

120. Judgment of Fully Probated Suspension and Findings of Fact of Hector J. Villarreal dated June 27, 1997
121. Judgment of Fully Probated Suspension of Hector J. Villarreal dated November 2, 2001
122. Special Prosecution Unit responses to habeas counsel's open records request
123. Criminal Record of Juan Del Carmen Chavez re: July 9, 2005 assault against Acela Manzano (Moreno)
124. Open Records Requests for the criminal records of Brian Martin and David Bradshaw
125. Criminal Record of Brian Martin
126. Criminal Records of David Bradshaw
127. Cameron County Sheriff's Department Employment Records of Rene Gosser

DOCUMENTS RELATED TO THE DIRECT APPEAL

128. Order (directing the Trial Court to prepare and file findings of facts and conclusions of law) dated February 24, 2010
129. Letter from Judge Elia Lopez to Court of Criminal Appeals of Texas dated May 4, 2010
130. Petition of Writ of Mandamus filed by the State, dated February 14, 2011
131. Per Curiam Order (on de novo hearing for Findings of Fact and Conclusions of Law) dated February 16, 2011
132. Brief of Legal Ethics Experts as Amici Curiae on Direct Appeal from the 404th Judicial District dated October 10, 2011
133. Transcription and recording of Oral Argument held on October 19, 2011 before the Texas Court of Criminal Appeals
134. Clerk's Records and Reporter's Records (copy included on CD)

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INTRODUCTION AND SUMMARY OF ERRORS

Manuel Velez is an innocent man who was wrongfully convicted of capital murder and sentenced to die by lethal injection as a result of a unique confluence of constitutional violations before and during trial: grossly ineffective assistance of defense counsel, repeated misconduct by law enforcement and prosecution officials, and grievous errors by a corrupt judge who was subsequently imprisoned for racketeering. This Application for Writ of Habeas Corpus details the many factual and legal reasons why Mr. Velez's conviction and sentencing is a gross miscarriage of justice by the State of Texas that must be rectified. A veritable epidemic of constitutional errors permeating pretrial preparation and the trial itself led inexorably to the conviction of an innocent man.

Among the many grounds for reversing the judgment discussed below, of particular significance is new medical evidence that defense counsel inexplicably failed to develop, which makes it abundantly clear that the deceased child, one-year old Angel Moreno, received his fatal injuries well before the two-week period posited by the State, and likely when Mr. Velez was working outside of Texas and had no access to the child. To expose the fundamental errors resulting in this judgment, it is necessary to understand the flawed and demonstrably false theory on which the State's case against Mr. Velez was predicated and the abject failures of Mr. Velez's trial counsel to challenge that theory.

According to the prosecutors, Angel was a completely healthy, uninjured child on October 18, 2005, when Mr. Velez and Acela Moreno (Angel's mother) moved into a house on Vermont Circle in Brownsville. The State claimed that in the next two weeks the child suffered a series of injuries, most significantly two incidents of blunt force trauma to his head: first, two skull fractures and subdural bleeding no earlier than October 19, and second, additional head

contusions and fresh internal bleeding on October 31. Additional contusions on his torso and extremities (some of which were described as possible bite marks or burns), which were not life-threatening but were identified as signs of abuse, were also claimed to have been inflicted in the same two-week period. (17 RR 14–19) Because it was undisputed that Mr. Velez had been in Memphis for over five weeks just before October 18, it was central to the prosecution to show that all of Angel's injuries were inflicted after Mr. Velez returned to Brownsville and moved with Moreno into a house apart from their friends and families.

The State sought to attribute all of the child's injuries and death to Mr. Velez through Moreno's testimony that she had observed certain bruises and bite marks in the days preceding October 31, that she *thought* Manuel was harming her son and told him to stop, but he did not. (16 RR 82) The State also elicited false testimony from Moreno (who had pleaded guilty to causing bodily injury by striking Angel on or about October 31) that she was serving a ten-year sentence "[b]ecause I am guilty of not having reported to the police that Manuel was hurting my child." (16 RR 95) Besides Moreno's "accomplice" testimony (which does not purport to tie Mr. Velez to Angel's fatal head injuries), the State admits that the case against Mr. Velez is entirely "circumstantial." (10/19/11 Tr. of Arg. at 8–9 [Appx 113]; State's Appellate Br. at 27 ("cumulative suspicious circumstances"))

The State's theory and misleading supporting evidence are not sufficient to support the judgment—which is one of the grounds for reversal presented on direct appeal. But even assuming the evidence could satisfy the appellate standards for capital murder, this conviction must be vacated in this habeas proceeding because the State's case against Mr. Velez has several

fatal flaws that were not exposed by defense counsel Hector Villarreal.[4] These flaws and the related errors include but are not limited to:

- Angel's most serious head injuries, including an "organizing" or chronic subdural hematoma, occurred more than two weeks before his death. This medical fact is reflected in contemporary records available to but ignored by both the State and the defense. (*See infra* at Part One II.B.1) It is now conclusively established by the **recent affidavit of the State's own neuropathologist**, Dr. Daniel Brown, who dates the "organizing" subdural hematoma as 18 to 36 days prior to death—*i.e.*, a period within the time Mr. Velez was not in Texas. (Brown Aff. ¶ 15 [Appx 2]) Disturbingly, Dr. Brown was not asked about the age of the hematoma when he did his report in 2006. In addition, other medical experts, including two forensic pathologists and a neurological surgeon, have analyzed the medical evidence and concluded that the skull fractures were more than two weeks old, and perhaps months old. (Dr. Janice Ophoven Aff. ¶ 21 [Appx 3]; Dr. Daniel Spitz Aff. ¶ 9 [Appx 5]; Dr. Ronald Uscinski Aff. ¶¶ 12-14 [Appx 4]) Had defense counsel contacted Dr. Brown or retained a forensic pathologist before trial, this critical evidence would have been presented to the jury. Villarreal, however, essentially conceded the State's medical evidence, which was an egregious error. **Thus, the jury never learned that the most serious head injuries were inflicted at a time the State insisted Mr. Velez had no opportunity to abuse Angel.**

- Other medical evidence available to but ignored by both the State and Mr. Velez's defense counsel indicates that Angel suffered serious head trauma 3–4 months before his death that went undetected by medical personnel—including Dr. Asim Zamir, who testified (based on hearsay, not personal observation) that Angel was perfectly healthy on October 18, 2005. Specifically, Angel's pediatric records from that period reflect a significant and rapid increase in head circumference (from the 50th percentile to the 95th percentile in less than a month), which can only be explained by internal swelling caused by violent trauma. (Sirotnak Aff. ¶¶ 12-13 [Appx 7]; Ophoven Aff. ¶¶ 24-25 [Appx 3]; Spitz Aff. ¶ 12 [Appx 5]; Uscinski Aff. ¶ 13 [Appx 4]; *see infra* at Part One II.B.2) None of the State's doctors commented on the alarming increase in head size, and defense counsel did not even provide Angel's pediatric records to any doctors for review. (Rene Flores Aff. ¶ 16 [Appx 14]) **Thus, the jury never learned that Angel had suffered violent trauma prior to July 28, 2005, contrary to the State's entire theory.**

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[4] References to "trial counsel" or "defense counsel" generally refer to Hector Villarreal, who was appointed in September 2007 and served as Mr. Velez's lead counsel through the trial in October 2008. Villarreal was assisted by O. Rene Flores, who rarely appears in the record and did not examine any witnesses or present the opening or closing statements. Previously, Mr. Velez had retained counsel Gary Ortega, who began representing him in January 2006, and was assisted by attorney Larry Warner. Both Ortega and Warner were disqualified and removed from the case by the trial court in September 2007. (8 SRR1 5–12; *see infra* at 41–43)

- Acela Moreno's testimony that she was in prison because she had failed to report Velez's purported abuse of Angel was false and highly misleading. She had been indicted with Velez for capital murder and lesser-included offenses, and pleaded guilty to "knowingly and intentionally" causing bodily injury to her son Angel by "striking" him with her hand, an object, or a surface on October 31, 2005. The State sponsored Moreno's false and misleading testimony, and compounded the error by crediting and relying on it in closing arguments. (*See infra* at Part One IV.B) In addition, defense counsel failed to object to or expose Acela's false testimony. **Thus, the jury never learned that Moreno admitted she had struck the victim in the head on or about October 31, 2005.**

- To the extent defense counsel articulated any theory of Mr. Velez's defense, it was that Angel's injuries and death were inflicted by Moreno. Villarreal did not, however, support that theory with any evidence. Villarreal did not object to Moreno's false testimony, effectively cross examine her, or otherwise present to the jury available evidence of Moreno's own abuse of her children, including Angel. In addition to her admissions that she bit Angel's face and may have burned him with a cigarette, evidence from multiple sources describes Moreno's abuse of her children. Although Villarreal argued to the jury that Moreno was responsible for Angel's death, he did not present the abundant supporting evidence that was readily available to him. (*See infra* at Part One II.C) **Thus, the jury never learned of the copious evidence that Moreno physically abused her children, including Angel.**

One fundamental, inexcusable error for which the trial judge and all the lawyers are responsible is the omission of the accomplice-witness instruction. The Court did not instruct the jury that it could not convict Mr. Velez based on the testimony of Moreno (an "accomplice" as a matter of law) unless her incriminating testimony was "corroborated by other evidence tending to connect [Velez] with the offense committed." TEX. CODE CRIM. PROC. art. 38.14. The State has acknowledged this error. (State's App. Br. at 54) As explained in Part One, Section II.F.1 (*infra* at 171), the admittedly erroneous omission of this powerful instruction constitutes an unconstitutional deprivation of the effective assistance of counsel, where the State's purported "corroborating" evidence is not substantial and the record reveals a rational basis for the jury to doubt or disregard such evidence. Indeed, even without a request by counsel, the trial court erred by not *sua sponte* giving such an instruction. (*See infra* at 172)

Mr. Velez's erroneous conviction and sentence were the product of a toxic brew of ingredients, including substantive, evidentiary, and procedural errors by a trial judge, Abel Limas, who was at the time engaged in corrupt and illegal practices to which he later confessed; a pattern of misconduct by law enforcement and prosecution officials; and woefully inadequate and ineffective assistance of retained and appointed defense counsel. In addition to the errors noted above, other fundamental errors resulting in the unsustainable verdict include, but are certainly not limited to:

- The special prosecutor, Luis Saenz, should have been disqualified in this case because, as a lawyer in private practice, he had spoken to Mr. Velez's sister and had discussed confidential information pertinent to Mr. Velez's defense with her before accepting an appointment by the State as special prosecutor. Nevertheless, Judge Limas (who was at the time himself engaged in unethical and criminal conduct) refused to disqualify Saenz from prosecuting Mr. Velez. (*See infra* at Part One IV.A)

- The State created two versions of a written statement attributed to Mr. Velez, then improperly accused the defense of "forging" one of the versions. Defense counsel failed to preserve Mr. Velez's constitutional right to be present during proceedings related to the two statements, failed to adequately present evidence of the suspicious circumstances surrounding the creation of the two statements to the jury, and failed to properly object to the prosecution's highly prejudicial accusations of fraud relating to the statements. (*See infra* at Part One II.D)

- The State violated *Brady v. Maryland* by withholding material evidence that could have demonstrated Moreno's child abuse and impeached the testimony of at least three of its witnesses. (*See infra* at Part One IV.D)

- The State presented more false and misleading testimony during the punishment phase of the trial, including statements by A. P. Merillat, its purported expert on the supposed future dangerousness of prisoners given life sentences, who incorrectly told the jury that a defendant sentenced to life without parole could receive an inmate classification providing significant visitation and other interaction privileges, and thus have substantial opportunities to commit violent crimes against other persons. Defense counsel did nothing to refute or discredit Merillat's testimony, despite several available avenues of attack. (*See infra* at Part Two II.A)

Finally, Villarreal offered only a disjointed, incoherent, and wholly ineffective effort to obtain a positive answer to the mitigation question, virtually ensuring that Mr. Velez would be

sentenced to death, although substantial mitigating evidence of his difficult background, moral character (including care for children), and limited mental capacity was readily available. (*See infra* at Part Two III)

Because of these and other errors and misconduct detailed in this Application, this Court should recommend that the Court of Criminal Appeals vacate Mr. Velez's conviction and sentence, and either release Mr. Velez from confinement or grant him a new trial conducted in accordance with statutory and Constitutional principles, including the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF FACTS

Understanding the erroneous verdict and sentence in this case requires a review of not only what the jury saw and heard, but also the evidence that was never presented to the jury—either because the State improperly withheld it, defense counsel chose not to present it, or defense counsel never discovered it. At virtually every stage of the story, the jury heard an incomplete, distorted version of facts. A clearer, more complete view set forth in the following pages reveals the fundamental injustice that resulted in the conviction and sentencing to death of an innocent man.

I. FACTUAL BACKGROUND AND TRAGIC INCIDENT

A. Angel's Life of Chaos, Neglect, and Abuse.

At the heart of this case is the tragic death of one-year-old Angel Moreno. The jury heard very little about events in his life before October 31, 2005; these earlier events shed light on the cause of his fatal injuries. In short, Angel was born to an abusive mother, who was in turn abused by Angel's father with whom they lived until he was imprisoned for assaulting Acela when Angel was eight months old. Acela and her three children were then sheltered by Mr. Velez, who provided a non-violent home and saw that Angel received routine pediatric care. Acela's neglect and abuse of her children, including Angel, continued, but unfortunately the abuse was not detected by medical personnel. Indeed, personnel at medical clinics who saw Angel in late July and after missed an unusually rapid growth in his head circumference—a "red flag" that signaled serious head trauma and should have prompted diagnostic tests to determine the cause.

1. Angel was born into an unstable, abusive environment.

Angel Moreno was born November 1, 2004, the third child of unmarried Acela Rosalba "Chiquis" Moreno, who had moved from Mexico to Brownsville two years earlier with her daughter Emily (then 6 months old) and pregnant with a son Alexis (born in February 2003). (16 RR 69–74) Before becoming pregnant with Angel, Acela lived briefly with her sister Magnolia Medrano, then for a longer time with her sister Dora Moreno. (14 RR 37–39) Had she been asked to testify, Ivonne Salazar, a friend and neighbor of Acela's sister Magnolia, would have described Acela as unhappy, moody, and subject to quick personality changes. According to Ms. Salazar,

> Acela struggled a lot and felt left out from her family because they preferred her other sisters. Acela was prone to sudden sadness and frequent crying. . . . She would get worked up and desperate with sadness. She would say that she had nothing and no one loved her.

(Ivonne Salazar Aff. ¶ 3 [Appx 28]) Ms. Salazar's daughters, Yaritza and Gina, also observed Acela's abrupt change of moods, from "cheerful" to "depression" (Gina Salazar Aff. ¶ 3 [Appx 27]) or from "friendly" to "enraged" (Yaritza Salazar Aff. ¶ 3 [Appx]). This was reflected in the neglect and abuse of her own children, as described in detail below.

Angel's father was Juan Chavez, who met Acela while she was with her sister Dora, and lived with her there until he, Acela, and her two children moved to a trailer by Dakota Street. (16 RR 73–75) A couple of months later, Chavez, Acela, and her children moved to a house on Manzano Street. (16 RR 55–59, 75–76) Chavez drank heavily, did drugs, and was violent toward Acela. (I. Salazar Aff. ¶ 6) Ivonne Salazar explained, "Acela would come crying to my house after a fight with Juan. Acela was scared of Juan." (I. Salazar Aff. ¶¶ 6, 9 ("Acela . . . feared what he would do to her.")) Ms. Salazar also observed that Acela drank and smoked most of the day and continued to do so with the same frequency when she was pregnant with Angel.

(*Id*.) According to Cesar Velez (Marisol's son), "it seemed like Chiquis [Acela] liked to drink, and always had a beer in her hand. Chiquis was always smoking when she was holding baby Angel." (Cesar Velez Aff. ¶ 4 [Appx 31])

Acela and Chavez separated in September or October 2004, because they were having "problems." At trial, Acela testified, "Sometimes he didn't want to work." (16 RR 75) Chavez was not living with Acela when Angel was born on November 1, 2004. In Chavez's words, "I was on a boat and we had a little problem and we separated." (16 RR 55) According to Ivonne Salazar (who did not testify), Acela complained that Chavez was physically and emotionally abusive. "Acela was consistently scared of Juan and feared what he would do to her." (I. Salazar Aff. ¶ 9) She and Chavez got back together at some point (16 RR 56), however, and were living together on Manzano Street in June and early July 2005, when Angel was around eight months old. (16 RR 57–58, 74–75) According to records obtained from the agency Friendship of Women ("FOW"),[5] where Acela later went for help with Ivonne Salazar's assistance (I. Salazar Aff. ¶ 8 [Appx 28]), Acela reported that Chavez subjected her to physical and emotional abuse on June 1, 2005. (6/1/05 FOW Client Victimization Info. [Appx 114])

Chavez beat and raped Acela on July 9, 2005. (14 RR 52–53; Client Information from Friendship of Women and accompanying case notes [Appx 114]) According to Chavez, he "slapped" Acela after she got a call from another man. (16 RR 58)[6] Acela testified she did not

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[5] Friendship of Women's records were obtained by subpoena and order of this Court dated November 10, 2010. [Appx 99] They had previously been requested by defense counsel, but were never released. (9/3/08 Application for Subpoena Duces Tecum to FOW [Appx 99]; 9/18/08 Hearing on Final Pretrial Motions, 13 SRR1 25–26 (Judge Limas promising to review document *in camera* and provide ruling on 9/19); 16 RR 40–41 (Judge Limas indicating no ruling at that time))

[6] Apparently seeking to minimize Chavez's criminal assault, the State on direct appeal repeatedly refers to this communication as the "instigating phone call." (State's App. Br. at 2, 28, 29, 30, 40)

know who called the police when Chavez was arrested,[7] and that he hit her because he found out she was "going around" with Manuel. (16 RR 76) At the time of the incident in July 2005, the arresting officer (David Navarro) reported that when he arrived at 238 Manzano, Acela was in distress, "was relieved to see this officer and said she needed help." (7/9/05 Offense Report [Appx 91]) Acela told Officer Navarro that while she and Chavez were driving in his car, she received a call on her cell phone from another man, then "Chavez pulled her hair several times with force causing her pain [and] pinched her left side of the face and neck with his closed right first, also causing her extreme pain." (*Id*.) Acela also told Officer Navarro that after the cell phone call, "Chavez was very violent and out of control and she feared for her safety." (*Id*.)

After Chavez was arrested for family violence assault, Acela told Officer Navarro that Chavez had sexually assaulted her after they returned home, and provided details of her rape while her daughter Emily was in the house—including Chavez's statement (translated from Spanish): "OK, I will leave but I am going to make you mine one last time." (*Id*.) On August 4, 2005, Acela signed a sworn statement describing the July 9 event, adding that she had told him she wanted "to separate from him" a couple of days before that event, but he had refused to leave her alone. (8/4/05 Moreno Sworn Statement [Appx 85])

Acela charged Chavez with assault and rape. (16 RR 58) As euphemistically described by Special Prosecutor Saenz, Acela and Chavez separated and Chavez "leaves the household." (14 RR 19) Actually, he went to jail. Chavez pleaded guilty to family violence assault for hitting Acela; the rape charge was dismissed. (16 RR 62–64) (Criminal Court File 05-CCR-3910-A [Appx 123]; *see also* 1 SCR3 166–67 (copy of Chavez Judgment)) Chavez was

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[7] FOW's records indicate Acela called the police after Chavez raped her. (7/22/05 FOW Casenotes [Appx 99])

sentenced to 200 days in Cameron County Jail. (*Id*.) The record of Chavez's conviction was not offered or admitted as an exhibit. (16 RR 62–63)

2. Manuel sheltered Acela and her children in a safe environment.

Acela met Manuel Velez in June or July 2005, while Acela was still living with the abusive Juan Chavez. When she sought assistance from Friendship of Women on July 22, 2005, she reported her address as 238 Manzano Street, the home she shared with Juan Chavez. (7/22/05 FOW Client Info. Form [Appx 114]) Sometime in late July, Acela and her children moved in with Manuel in an apartment on Chilton Street where he paid the rent. (16 RR 77–79; *see also* 14 RR 42 (testimony of Acela's sister); Elmita Velez Aff. ¶ 23 [Appx 34])

Sheltering Acela and her children was consistent with Manuel's long history of caring for children—his own and others. As his sister Elmita has explained, Manuel "always wanted to help" women with children. (E. Velez Aff. ¶ 20 [Appx 33]) The jury heard nothing about this history. In 2005, Manuel was the father of several children, including two young boys. (J. Camacho Aff. ¶ 2 [Appx 16]; 18 RR 10–11) Family members, friends, and others who had known him most of his life recall his playing with and watching children. Esmeralda Mata, who "grew up with" Velez and attended school with him, recalls him as "a good person who always tried to help others." (Esmeralda Mata Aff. ¶ 5 [Appx 26]) Specifically, she said:

> I remember Manuel taking care of his own and other people's children, including the children of his brother Rafael and Rafael's wife Josefina Camacho. When children were with him, they obeyed Manuel because they loved him. He never raised his voice to them. He would not let them run off or get out of his sight.

(*Id*. ¶ 6) Josefina Camacho confirmed Ms. Mata's observations:

> I observed that Manuel took good care of his children, Benita and Manuel Jr. Manuel also took good care of my four children, with whom I trusted Manuel completely.

(Josefina Camacho Aff. ¶ 2 [Appx 16]) Ms. Camacho further explained:

> At times Manuel lived with me and my husband, and during those times I would leave Manuel in charge of my children, including changing diapers and preparing bottles. Manuel took my children to the park, and shampooed and braided my girls' hair. . . . He was never careless with children. If he had a cigarette, he would put it out when children were around. Manuel loved my children, and in turn they loved Manuel. He took such good care of my kids.

(*Id*. ¶ 3) One of Ms. Camacho's daughters (Manuel's niece), Amanda Velez, recalled Velez babysitting her and her siblings. (Amanda Velez Aff. ¶¶ 3–6 [Appx 30])

> He was a nice guy. . . . He was never violent, he was always calm . . . when me and my siblings were disobedient, . . . he would never hit us or scream at us. I remember visiting Manuel around other children and he behaved the same way with them.

(*Id*. ¶¶ 5–6) Jonathan Velez, one of Manuel's nephews, has similarly positive memories of Manuel babysitting him and other children. (Jonathan Velez Aff. ¶¶ 3–7 [Appx 34]) As shown *infra* at Part Two III.D.2, numerous other parents and children echo these positive portrayals of Manuel's character and conduct with children. Not one of these witnesses, however, was contacted or asked to testify by Manuel's defense attorneys, and the jury had no opportunity to learn about this side of the man charged with murdering the infant Angel.

The only glimpse of Manuel as caregiver during the "guilt-innocence" phase at trial came in the brief testimony of Maria Hernandez, with whom Manuel had lived for about five years until they separated amicably in 2004. (18 RR 10–11, 15) Ms. Hernandez had three children from a previous relationship before getting together with Manuel, and they had two children together, Jose Manuel and Ismael. (*Id*. at 11) She testified that Manuel never struck any of the children, either her "children from before or [her] children with him." (*Id*.) She had previously told sheriff's investigators and child protective services that Manuel was not a violent man. (*Id*. at 11–13) Her direct testimony concluded with her confirming that Manuel was "just not that kind of person to hurt a kid." (*Id*. at 16) The jury did not, however, hear any more details about

Manuel's care and concern for children before, during, and after his relationship with Ms. Hernandez.

The jury did not, for example, hear that Ms. Hernandez's sister, Ana Garcia, who regularly stayed with Maria and Manuel during visits and later lived with them for two years, observed that Manuel was "very attentive" to the children Maria brought to the relationship. (Ana Garcia Aff. ¶ 2 [Appx 21]) She recalled that Manuel got up early to wake the children and make sure they got to school, and took good care of all of them. (*Id*. ¶ 4) Similarly, Manuel's younger sister Leticia lived with Manuel and Maria for a period of time, and observed "Manuel was very good with Maria's children. He dressed, bathed, and fed them, played ball with them in the park, and bought them sweets and ices." (Leticia Velez Aff. ¶ 9 [Appx 35]) Manuel's brother-in-law Enrique Gomez (Marisol's husband) visited Manuel and Maria when they lived in Los Fresnos, and commented, "I did not even realize that Maria Hernandez's children were not also Manuel's, because he was like a father to them." (Enrique Gomez Aff. ¶ 10 [Appx 23])

Nor did the jury learn that after Acela and her children moved in with Manuel, her children benefitted from Manuel's caregiving. Leticia Velez observed this first-hand when she lived across the street from Manuel and Acela:

> There was a period when I did not have any running water in my apartment, so I would go to Manuel's apartment to take a shower. Acela would stay in bed all morning. She never changed the diapers of her children and never fed or bathed them. Manuel performed these tasks and cooked for the children every day.

(L. Velez Aff. ¶ 3 [Appx 35]) Others living in the same neighborhood had similar observations. Ivonne Salazar noted that "[u]nlike Acela, Manuel always treated children very well and took good care of them." (I. Salazar Aff. ¶ 18 [Appx 28]) She "never saw Manuel do anything in any way wrong or inappropriate toward any child." (*Id*.) Her daughter Gina said, "I remember that after Acela and her children moved in with Manuel, Manuel cooked for and fed Acela's children,

and took good care of them." (G. Salazar Aff. ¶ 9 [Appx 27]) She also saw "Manuel feed Angel with a bottle," and noted that Angel did not "cry when he was with Manuel, but he cried all the time when Acela was taking care of him." (*Id.* ¶ 10) Yaritza Salazar had similar observations:

> I would see Manuel play with the children. He would gently toss Angel in the air and catch him. This was always done in the spirit of play and the baby liked it. Angel never screamed or cried when Manuel played with him. I never saw Manuel angry with the baby or any of the children or with any intention whatsoever of harming them—a stark contrast to Acela. When Acela would scream at her children and cry in desperation over them, Manuel would tell her to pay attention to them.

(Y. Salazar Aff. ¶ 11 [Appx 29])

These accounts of Manuel's conduct with children were confirmed by Acela's own statements. Acela told a defense psychologist (hired by Ortega) that Manuel had never abused the children (Dr. Kim Arredondo Decl. ¶ 5 [Appx 11]) and she doggedly insisted, in spite of prolonged pressure by police investigators during her interrogation, that Manuel was never malicious with Angel and that Manuel had never hurt her. (State's Ex. 49A at 4, 9, 10, 11, 18, 26, 27, 28, 33, 35, 36, 43) She told police that when throwing the child in the air and catching him, Manuel said "my son" and acted sweetly to him. (*Id.* at 43) The jury heard a very different, distorted portrayal of Manuel and these relationships.

3. Manuel worked in Memphis from September 10 through October 14, 2005.

After living with Acela and her children for a few weeks, Manuel left Brownsville on September 10, 2005, for temporary construction work in Memphis, Tennessee. (14 RR 14, 43) While Manuel was gone, Acela was evicted from the Chilton Street apartment for not paying the bills and moved with her children into the home of Ivonne Salazar. (16 RR 79) She also stayed for a couple of days with her sister Magnolia (11/1/05 Magnolia Medrano Statement to Police [Appx 60]) and for a few days with Manuel's sister Marisol (M. Velez Aff. ¶ 14 [Appx 37]).

Meanwhile, Juan Chavez was released from jail on September 19, 2005, after serving a total of 69 days for assaulting Acela. (Commitment of Juan Chavez [Appx 123]) Chavez visited Angel and Acela at Ivonne Salazar's apartment after he was released and while Manuel was in Memphis. (16 RR 58–59)

Manuel returned from Memphis on October 14, 2005. (14 RR 20, 43; 16 RR 79–80) On October 18, 2005, Manuel borrowed his sister's car to take Acela and Angel to the doctor. (16 RR 80–81) That same day, Acela and her children moved with Manuel into a small house on Vermont Circle, along with Manuel's youngest son, Ismael. (14 RR 20; 16 RR 80–81) After that, according to Acela, Manuel would sometimes go out, but she was always at home. (16 RR 81–82; *see also* Arredondo Decl. ¶ 5 [Appx 11] (Acela said "she was always with her children and during their brief relationship had never left them alone with Manuel"))

After Manuel and Acela moved into the house on Vermont Circle, they remained in close contact with their friends and family. Elmita Velez recalls seeing them frequently at Ivonne's, and again when Manuel hosted a cookout at the Vermont Circle house on Saturday, October 29. (E. Velez Aff. ¶¶ 26–27 [Appx 33])

4. Acela continued to neglect and abuse her children, including Angel.

Manuel's sister Marisol told Luis Saenz (before he was appointed special prosecutor in this case and while Marisol was asking Saenz to represent Mr. Velez) that Acela was "a very irresponsible mother." (7 SRR1 Def. Ex. 1; 2 CR 212) Although the jury did not hear evidence of Acela's irresponsibility and abuse of her children, it was available to the police, the prosecution, and defense counsel. There are many sources of the evidence of Acela's abuse of her children, including (1) records of two separate Texas Department of Family and Protective Services organizations that worked with Emily and Alexis after Acela was imprisoned for the death of Angel; (2) Acela's confession to knowingly or intentionally striking Angel in the head

on the day in question; and (3) statements from various people who have seen Acela harm her children, including Acela's own family and friends.

Two reports spanning fourteen months from two different organizations working with Acela's children at the request of the Texas Department of Family & Protective Services ("TDFPS") state that Acela's children had been abused by Acela and that the children told their therapists the that their mother harmed Angel:

- "Alexis was being physically abused by her biological mother. He was placed into TDFPS custody with his sister, Emily Moreno. She was also a target of the mother's abuse and neglect." (11/30/05 Bair Foundation Individual Service Plan Review [Appx 89])

- Emily "constantly thinks about her mother in jail and what her mother did to her little brother. There is never any closure for her—the incident is constantly refreshed every time she sees her mother in jail." (2/7/07 Memorandum from South Texas Family Counseling at 1 [Appx 92])

- "With their mother, [Emily and Alexis] constantly remember what she did to their brother and they are afraid of her." (*Id*. at 2)

The State had the TDFPS records in its possession, but failed, in violation of *Brady v. Maryland*, to produce the exculpatory evidence to the defense. Mr. Velez's counsel had received some documents from TDFPS in 2007, but they did not include these records. Defense counsel sought to obtain additional records from TDFPS and the Bair Foundation before trial (9/3/08 Defense Subpoenas [Appx 74]), but Judge Limas never ruled on the agencies' objections to the subpoenas (16 RR 40–41), and the State did not produce copies of those records held by the District Attorney's office. (Habeas Counsel's Certification of files received from District Attorney [Appx 83]) As a result, the jury never learned of this evidence.

Ivonne Salazar was Acela's friend who lived next door to Acela's sister Magnolia Medrano on Chilton Street. (I. Salazar Aff. ¶¶ 2–3 [Appx 28]; Y. Salazar Aff. ¶ 2 [Appx 29]; G. Salazar Aff. ¶ 4 [Appx 27]) Later, Acela moved into Manuel's apartment, which was across

the street from Ivonne's house. (I. Salazar ¶ 10) The Salazars regularly saw Acela and her children and they all observed Acela's neglect and abuse of her children. Ivonne Salazar noticed:

> Acela would get very frustrated with her children and she would get especially agitated when they cried. . . . Acela would scream at them "Shut up already, I can't stand it!" Acela was always yelling at her kids and she would throw things at her children, especially Emily. I saw her hit her daughter Emily with a shoe.

(I. Salazar Aff. ¶ 14) According to Yaritza, "Acela was constantly angry with her children, and screamed at them often." (Y. Salazar Aff. ¶ 4) Yaritza saw Acela hit both her son Alexis and her daughter Emily. (*Id*. ¶¶ 5, 6) Others had similar observations. (G. Salazar Aff. ¶¶ 4, 6; *see also* C. Velez Aff. ¶ 6 [Appx 31]) The jury did not hear any of this evidence.

Maria Hernandez, the mother of Manuel's youngest sons, reported another disturbing incident that was withheld from the jury:

> Once, in 2005, our child, Jose Manuel, who was six years of age at the time, was staying with Manuel and Acela Moreno. Manuel had left the house and while he was gone, Acela locked Jose Manuel in the closet. Jose Manuel was scared and told me about the incident when he returned home.

(Maria Hernandez Aff. ¶ 3 [Appx 24]) Ms. Hernandez reported this incident to a woman from the TDFPS in December 2005. (*Id*. ¶ 4) There is no record of any further investigation. Nor did Villarreal solicit any testimony about this incident from Ms. Hernandez or Jose Manuel, although they both testified at trial.

According to a statement Manuel gave to the police, which was offered by the State and admitted by the court, Manuel reported to the police that Acela was "very abusive towards her kids, she has hit her kids pretty bad including the baby (Angel)," and, on one occasion, she "grabbed and pushed her little girl (Emily) against a ceramic statue of a panther and spilt her head open a little." (State's Ex. 64; Def. Ex. 2) He further stated:

> I have seen when she has slapped her kids and has caused them to bleed from the mouth and nose. She will hit them with her hands and with anything she can get a hold of. She will hit them with sandals, with a belt; she has even thrown her cell phone at them when she had a phone.

(*Id*.) As described *infra* at Part One IV.A, Manuel's sister Marisol, before Luis Saenz was appointed special prosecutor in this case, told Saenz that Acela was a very irresponsible mother. (M. Velez Aff. ¶ 20) Although the jury did not hear this evidence, it was available to the police, the prosecution, and defense counsel. These statements were corroborated by other evidence, including Acela's subsequent confession.

a. Emily and Alexis.

On August 27, 2005, Brownsville EMS responded to a call at the home of Ivonne Salazar. (Brownsville EMS Ambulance Activity Report No. 5-32029 [Appx 49]) Salazar's daughters, Yaritza and Gina, saw Acela become enraged because Emily had paint in her hair; Acela hit Emily hard enough to make her fall and hit her head, causing it to bleed. (Y. Salazar Aff. ¶ 5 [Appx 29]; G. Salazar Aff. ¶ 6 [Appx 27]; I. Salazar Aff. ¶ 12 [Appx 28]) Leticia Velez was there, and called 911:

> Acela became angry with her daughter Emily and grabbed Emily by the arm. She threw Emily so hard that the child fell into a ceramic statue of a tiger, broke the statue, and cut her head. Emily's head was bleeding and the child was crying. I called the EMS. Acela told Emily to tell the EMS that she had fallen. Acela repeatedly refused to permit the EMS to take Emily to the hospital.

(L. Velez Aff. ¶ 6 [Appx 35]; *see also* EMS Report [Appx 49] (documenting Acela's statement that Emily slipped and refusal of transportation to hospital)) Manuel recounted this incident in his statement to the police. (State's Ex. 64; Def. Ex. 2)

The jury never learned of this incident, although Mr. Velez's first attorney, Gary Ortega, told the District Attorney about it in March 2006. (3/14/06 Letter from Ortega to Chuck

Mattingly, with attached statement by Ivonne Salazar [Appx 90]) In fact, when trial was set in 2007, the State said it intended to show that Manuel failed to report Acela's physical abuse of Emily. (*See* 10/1/07 Notice of State's Intention to Introduce Extraneous Offenses at 8 [2 CR 256]) This event was omitted from the State's Amended Notice, filed 9/15/08 (2 CR 304), shortly before the trial where Acela would testify against Manuel. Manuel's defense counsel, of course, was also aware of this incident; Ivonne Salazar's statement and the EMS Report were in the file Villarreal received from Ortega. (Habeas counsel's certification of files received from trial counsel [Appx 48]) Nevertheless, Villarreal failed to present any evidence of this incident to the jury.

Nor did the jury learn that when Emily was examined for possible abuse after the incident, the doctors found she had two bite marks on her body as well as multiple bruises. (Dolly Vinsant Memorial Hospital Report, at 17 (referring to "2 bites" and "multiple bruises" on Emily) [Appx 57]) Other evidence not shown to the jury shows that Acela's son Alexis was a troubled child who had a history of biting other children, including Emily, and even adults. For example, a report dated one month after the medical examination showing bite marks on Emily, shows Alexis is a biter. (11/30/05 Bair Foundation Individual Service Plan Review at 3–4 [Appx 89]) The report, from the foster care agency that placed Alexis in a foster home, notes that Alexis had attempted to bite other children in his foster home including his sister. (*Id*.) In addition, a TDFPS evaluation of Alexis from February 2007 indicates that he bit two of his teachers. (2/7/07 TDFPS Monthly Evaluation/Assessment at 2 [Appx 93])

b. Angel.

Neighbors and family members who saw Acela's interaction with Angel regularly observed her neglect and abuse of the child, but (despite defense counsel's assertion that Acela inflicted Angel's injuries), none of this evidence was presented to the jury. Ivonne Salazar and

her daughters Yaritza and Gina noticed that Acela treated Angel carelessly, frequently leaving him on the sofa unattended, or telling four-year-old Emily to take care of him. As a result, he often fell on his head. (I. Salazar Aff. ¶¶ 15–17 [Appx 28]; Y. Salazar Aff. ¶¶7, 9 [Appx 29]; G. Salazar Aff. ¶¶ 7–8 [Appx 27])

One time during the summer of 2005, Ivonne saw Angel fall from the sofa in Ivonne's apartment and bruise his cheek. (I. Salazar Aff. ¶ 15) Acela frequently placed Angel on the couch by himself, and Ivonne was nervous that he Angel would fall. (*Id.* ¶ 16) At one point, Ivonne asked Acela to place some pillows around Angel to protect him, and Acela's sister Magnolia said, "that baby falls all the time." (*Id.*)

During the summer of 2005, Yaritza Salazar also saw Angel fall on several occasions, including one occasion when Angel fell head first from the sofa. (Y. Salazar Aff. ¶ 9) Angel tried to cry, but was out of breath. (*Id.*) Gina Salazar remembers Acela being careless with Angel, and that Acela's other children, Emily and Alexis, were rough with the baby. (G. Salazar Aff. ¶ 7) Gina tried to take care of Angel because she did not like how Acela treated her children. (*Id.* ¶ 8) Emily would often pick Angel up when he was crying, and sometimes she would drop him because he was too big for her. (I. Salazar Aff. ¶ 17 [Appx 28])

Once when Manuel and Marisol were outside working on a car, Cesar Velez (Manuel's nephew) saw Acela get mad at Angel because he was crying; she "threw him about five feet into the couch." (C. Velez Aff. ¶ 6 [Appx 31]; *see also* M. Velez Aff. ¶ 17 [Appx 37]) On another occasion in late July 2005, Ivonne Salazar saw Acela (who was drinking and smoking a cigarette at the time) fall down the metal stairs outside the Chilton Street apartment with Angel in her arms. (I. Salazar Aff. ¶ 11) As discussed in the following section, there are no records that Acela brought this incident—or any other of Angel's frequent falls—to the attention of any

medical personnel. Nor was this evidence brought to the jury's attention, despite its obvious relevance to the injuries suffered by Angel.[8]

Angel's injuries were not confined to falls; he also incurred several contusions described as bite or burn marks. Magnolia Medrano gave the police a sworn statement on November 1, 2005, stating that while Manuel was in Tennessee, she noticed a bite mark with teeth impressions on Angel's cheek. Magnolia further explained that when she asked Acela what had happened, Acela admitted she had bitten the baby on the cheek. (11/1/05 M. Medrano Sworn Statement to Police [Appx 60]) Magnolia repeated this statement in her trial testimony, but claimed not to remember whether the conversation occurred before or after Manuel left for Memphis. (14 RR 47–49)[9]

Several people noticed a burn mark on Angel's foot. Cesar Velez recalls "seeing a cigarette burn on Angel's foot when it was still red and raw." (C. Velez Aff. ¶ 7) He was told "Angel burned his foot by stepping on one of Chiquis' lit cigarettes." (*Id*.) In her videotaped interrogation, Acela confessed that she "accidentally" had burned Angel "perhaps" with a cigarette, when "holding him . . . maybe as he was crawling." (State's Ex. 49A at 13–14) She claimed that because the burns on his feet appeared to be "blisters," she did not have him treated by a doctor. (*Id.* at 41–42, 45) When Gina Salazar saw something she thought was a cigarette burn on Angel's foot, she mentioned it to Acela, who said it was a "bug bite." (G. Salazar Aff. ¶ 5) [Appx 27][10]

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[8] Dr. Vincent DiMaio's textbook, FORENSIC PATHOLOGY (2d ed. 2001), p. 166, notes that a "large number of subdural hematomas are caused by falls."

[9] On direct appeal, the State repeatedly claims—citing no evidence whatsoever—that Acela's admission to her sister was "an attempt to cover for [Manuel]." (State's App. Br. at 3, 30 n.3)

[10] Acela may have told a nurse practitioner the same thing; records of a medical visit on October 18, 2005, indicate "insect bites" on Angel's body. (10/18/05 Child Health Record [Appx 51])

Most disturbing and wholly inexplicable, the jury did not hear Acela's admission that she had intentionally and knowingly caused bodily injury to Angel on or about October 31, 2005, by striking Angel on or about his head with her hand, by striking Angel's head against a hard surface, or by striking Angel's head with an object. (SCR4 at 4 (plea papers); 6 SRR 6, 8 (plea transcript); 1 SCR3 6–8 (Indictment)) Rather, the prosecution—and defense counsel—allowed Acela to testify falsely without objection that she had pled guilty merely to failing to protect Angel from Manuel. (16 RR 95)

5. Angel's medical history reveals undiagnosed injuries.

Although Angel's doctor, Dr. Asim Zamir, testified at trial that Angel was a healthy baby with no signs of injury as of October 18, 2005, he did not actually see Angel that day, and the medical records tell a story of a very sick baby, with signs of abuse or internal injuries that the medical professionals inexcusably failed to recognize.

a. What the medical records reveal.

Investigation has uncovered no records that Angel saw a doctor or other medical professional following his discharge from the hospital after his birth in November 2004 until June 2005. Between June 11, 2005 and September 2, 2005, however, Angel visited a doctor or the hospital no less than ten times, suffering from repeated bouts of vomiting and other ailments that medical experts believe stem from an undiagnosed severe head trauma.

i. Angel suffers from multiple bouts of extensive vomiting.

When Angel was almost seven months old, he began suffering successive episodes of vomiting and other ailments that his pediatricians failed to recognize as symptoms of more serious injuries. In mid-June, 2005, Angel suffered from ten straight days of vomiting multiple times a day, and was admitted to the hospital two separate times for treatment. Eleven days later, Angel suffered from another bout of vomiting lasting at least two days. Angel's pediatricians

failed to acknowledge the severity of these symptoms, blithely dismissing them as mild or common.

On June 11, 2005, Moreno brought Angel to the Brownsville Children's Clinic to see Dr. Zamir for the first time. (15 RR 58, 66; 6/11/05 Brownsville Children's Clinic Form [Appx 51]) According to the medical records and the testimony of Dr. Asim Zamir, that day Angel had vomited ***five times***, already had been vomiting for ***five days***, and was suffering from chest congestion. (6/11/05 Brownsville Children's Clinic Form [Appx. 60]; 15 RR 67) Although it is unclear from the medical records who actually saw Angel that day, Dr. Zamir testified Angel was diagnosed with bronchiolitis (lung infection) and acute gastroenteritis (stomach infection). (15 RR 66–67) At trial, Dr. Zamir characterized this diagnosis as "very mild" and "very common." (*Id*. at 67–68) Angel continued to suffer similar symptoms, however, for at least five more days, and spent two nights in the hospital.

On June 13, 2005, Angel was admitted to the ER after vomiting four times that day. (6/13/05 Valley Baptist Emergency Physician Record [Appx 52]) The Emergency Physician Record indicates that Angel's fever and vomiting had started three days prior and the nurse's notes from the ER visit reflect that Angel had been vomiting four times a day for the past five days. (*Id.*; 6/13/05 Nurse's Notes [Appx 87]) Angel was diagnosed with pharyngitis (sore throat) (6/13/05 Valley Baptist Emergency Physician Record at 2 [Appx 52]), given an injection for vomiting, cough, and wheezing and then discharged the same day. (15 RR 68–69) However, the next day, June 14, 2005, Angel was still vomiting, coughing, and wheezing, and had vomited three times in the last twenty-four hours. (15 RR 68-69; 6/14/05 Brownsville Children's Clinic Form [Appx 51]) Dr. Zamir again diagnosed Angel with acute bronchiolitis and dehydration, but explained that, despite the same diagnosis, Angel had not improved and was then admitted to the hospital for rehydration and further treatment. (6/14/05 Physician's Order Sheet [Appx 51]; 15

RR 70) Angel remained in the hospital for two days, and was discharged on June 16 on Dr. Zamir's order. (15 RR 70– 71)

Eleven days later (June 27, 2005), Dr. Zamir saw Angel at his office yet again for vomiting four times in one day, and having no bowel movements for three days. (6/27/05 Brownsville Children's Clinic Form [Appx 51]; 15 RR 71) Dr. Zamir treated Angel with suppositories and Phenergan. (15 RR 72) The very next day, June 28, 2005, Angel was seen by a different doctor at a different clinic, Dr. Vahid Mirafzali at the Boys & Girls Pediatric Clinic. (6/28/05 Informacion Del Paciente Form [Appx 53]) Angel had vomited three times that day and was still constipated. (6/28/05 TDH Child Health Record [Appx 53]) Angel had lab work done and was again given a suppository. (*Id*.)

It appears that Angel was not taken back to either Dr. Zamir or Dr. Mirafzali for vomiting after the June 28 visit, but Angel did visit both clinics in July and August to treat other symptoms. On July 25, Angel returned to Dr. Zamir's clinic, presenting with irritation to his eyes, a cough, and a runny nose. (7/25/05 Child Health Record [Appx 51]) Angel was diagnosed with upper respiratory infection, conjunctivitis (pink eye), and reactive asthma. (15 RR 72–73) On August 16, 2005, Angel was taken back to the Boys & Girls Clinic, where he saw Dr. Mirafzali. (8/16/05 Medical Records [Appx 53]) Angel had a cough that day and was given a round of vaccinations during this visit. (*Id*.)

Two weeks later, on August 30, 2005, Angel again visited Dr. Zamir's clinic to be treated for a runny nose and a cough. (8/30/05 Brownsville Children's Clinic Form [Appx 51]) Although Dr. Zamir testified at trial as though he had personally examined Angel, the medical records reflect that a nurse practitioner named Sarah Ramirez actually handled the visit and prescribed treatment. (*Id*.; 15 RR 75) In addition to the cough and runny nose, Nurse Practitioner Ramirez noticed an "abrasion" on Angel's forehead and prescribed Bactroban to

help heal it. (8/30/05 Brownsville Children's Clinic Form [Appx 51]) Dr. Zamir, not having seen the abrasion itself, described it as "a little scratch mark," a "very normal finding," and attributed it to the baby's small fingernails. (15 RR 75, 77–78)

Three days later on September 2, 2005, Angel came back to Dr. Zamir's clinic. (9/2/05 Brownsville Children's Clinic Form [Appx 51]) Angel had a cough with phlegm, had a fever the night before, and had sores on his mouth. (*Id.*) Dr. Zamir did not testify about this visit at trial.

ii. Angel's head circumference grew dramatically in a short period of time, reflecting an undiagnosed, severe head trauma.

Angel's head circumference at birth on November 1, 2004, was recorded as 34.5 cm, which is in the 25th percentile for newborns. (Birth records [Appx 50]) During Angel's first visit to the Brownsville Children's Clinic on June 11, 2005, Angel weighed 18.01 lbs, was 27.5 inches long, and had a head circumference of 45 cm. (6/11/05 Brownsville Children's Clinic Form [Appx 51])[11] This measurement placed Angel in approximately the 50th percentile for head circumference. (*See* Sirotnak Aff. ¶¶ 12–14 [Appx 7]) As of June 28, 2005, when Angel visited the Boys' and Girls' Clinic, Angel weighed 18 lbs. 6 oz., was 28 inches long, and again had a head circumference of 45 cm. (6/28/05 TDH Child Health Record [Appx 53]; Boys: Birth to 36 Months CDC US Growth Chart reflecting 7 mo. and 9 mo. measurements [Appx 53]) These measurements generally were consistent with those taken more than two weeks earlier by Dr. Zamir's clinic.

Despite the fact that plotting a child's head circumference is standard pediatric protocol, Dr. Zamir's clinic failed entirely to plot Angel's first head circumference measurement. And,

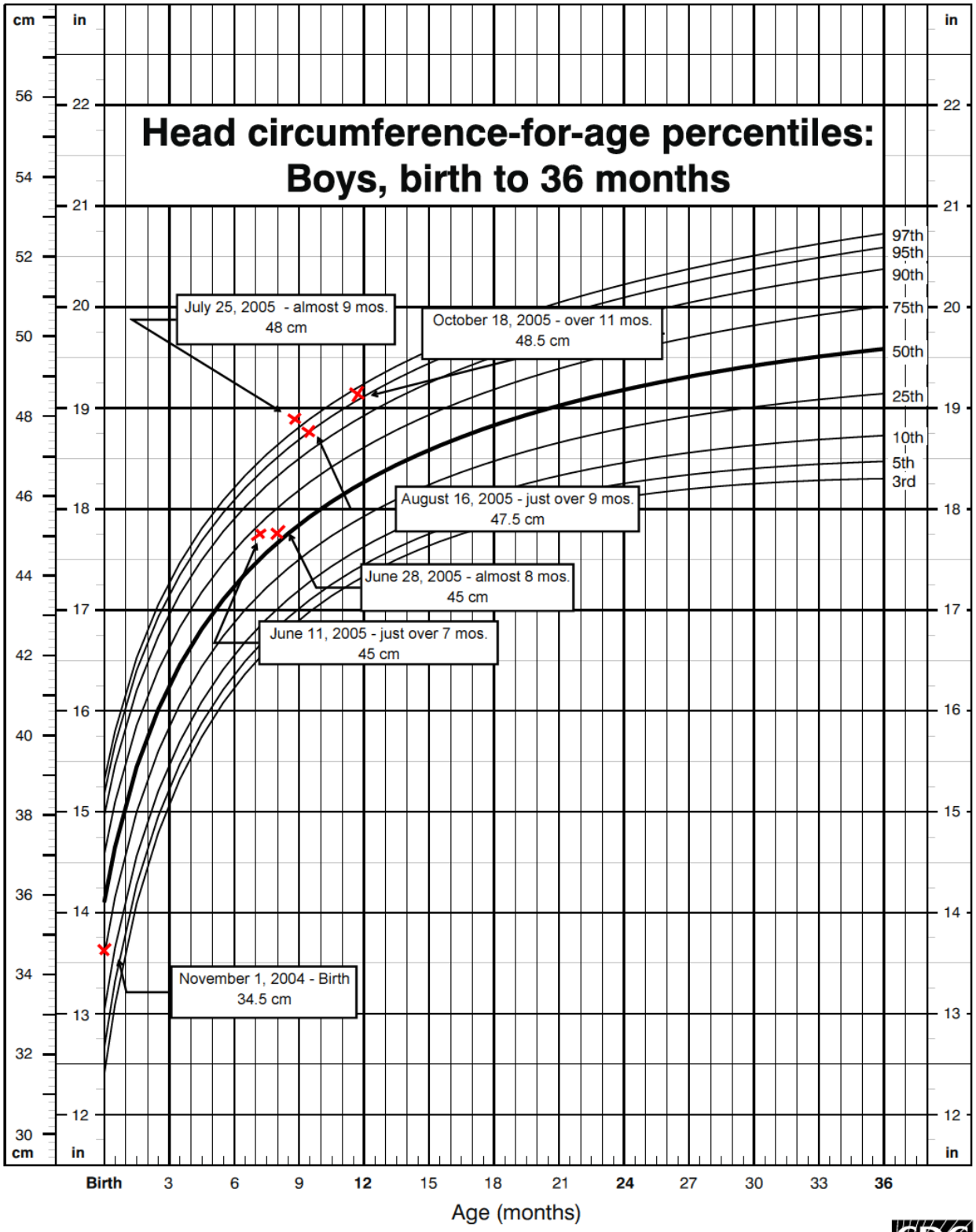
[11] No records of his head circumference—or any other medical attention—have been located between that date and the vomiting episode on June 11, 2005. It is not known, therefore, whether the increase in circumference from birth to age seven months occurred steadily over that period or began to accelerate shortly before the June 11 measurement.

while it appears the Boys' & Girls' Clinic plotted Angel's height and weight measurements, it did not plot Angel's head circumference measurement. (Boys: Birth to 36 Months CDC U.S. Growth Chart reflecting 7 mo. and 9 mo. measurements) These were critical failures.

During Angel's visit to Dr. Zamir's clinic on July 25, Angel's weight, height, and head circumference were measured. Although Angel's weight and height remained consistent with prior measurements, there was a dramatic increase in Angel's head circumference to 48 cm, a full 3 cm larger than the measurements taken just a month before, which placed him in approximately the 95th percentile. (7/25/05 Child Health Record [Appx 51]) This measurement essentially was confirmed by the Boys' and Girls' Clinic, which independently measured Angel's head circumference at 47.5 cm as of August 16, 2005 (8/16/05 Medical Records), and again by the Brownsville Children's clinic, which measured Angel's head circumference at 48.5 cm during Angel's last visit there on October 18, 2005 (10/18/05 Child Health Record [Appx 51]). Thus, Angel's head circumference measurements remained well above the 90th percentile.

Remarkably, and indefensibly, this significant increase in Angel's head size went unnoticed. Had Angel's doctors plotted his head circumference changes, it would have looked something like the chart on the following page.

CDC Growth Charts: United States



Published May 30, 2000.
SOURCE: Developed by the National Center for Health Statistics in collaboration with the National Center for Chronic Disease Prevention and Health Promotion (2000).

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Such a dramatic growth in such a short period indicated a serious condition—either hydrocephalus, a brain tumor, or severe head trauma—and standard pediatric protocol required further tests to determine its cause. (*See* Sirotnak Aff. ¶¶ 12–14 [Appx 7]; Ophoven Aff. ¶ 24 [Appx 3]) The medical records do not reveal any acknowledgment of this dramatic change, and contrary to pediatric protocol, no tests, such as a CT scan or MRI, were ordered to determine the cause. The jury never heard anything about this dramatic increase in Angel's head size, or its likely link to the severe symptoms from which Angel suffered during the summer of 2005.

iii. Angel's final doctor's visit.

On October 18, shortly after Manuel returned to town, he borrowed his sister Marisol's car to take Angel and Acela to Dr. Zamir's office for Angel's "well baby check-up" required by Medicaid. (15 RR 76; 16 RR 80) This visit would prove to be the last regular doctor's visit before Angel lost consciousness on October 31. That day, Nurse Practitioner Ramirez again examined Angel, who was suffering from a fever, cough with phlegm, a runny nose, and constipation for two days. (15 RR 78; 10/18/05 Child Health Record [Appx 51]) Ramirez noted "insect bites" on Angel's skin as well. (*Id.*) Again, although Dr. Zamir did not examine Angel on October 18, he testified about this visit without objection by defense counsel, concluding from the chart that Angel was in the 70th percentile for his weight and that his height was "excellent." (15 RR 79) Dr. Zamir testified that Angel was "above average" and "developing normal." (*Id.*)

Despite Angel's dramatic increase in head size that could only be explained by hydrocephalus, tumor, or severe head trauma, Dr. Zamir insisted that nothing in the medical records suggested any signs of abuse on October 18, and did not note anything unusual about Angel's head size. (15 RR 77–78) None of the bruises, abrasions, or "bite marks" that were noticed by friends and family and were described by emergency responders as "old" on October

31 were documented by Dr. Zamir's staff on October 18. (14 RR 120–25; 15 RR 80) Nor did Dr. Zamir comment on Angel's low levels of protein and albumin, which are signs of poor nutrition and lack of care. (*See* Ophoven Aff. ¶ 45 [Appx 3])

b. Family members and friends observed Angel's symptoms.

Although his doctors were oblivious to Angel's condition, several friends and family members observed Angel's abnormal demeanor and appearance during the summer of 2005, which are consistent with the child's alarming head expansion. Once again, however, the jury heard nothing about Angel's condition or appearance in the summer of 2005.

Yaritza and Gina Salazar saw Angel a lot and noticed he had a disproportionately big head. (Y. Salazar Aff. ¶ 8 [Appx 29]; G. Salazar Aff. ¶ 8 [Appx 27]) Yaritza thought it was strange that the soft spots on Angel's head had never hardened. (Y. Salzar Aff. ¶ 8) According to Yaritza, Angel was a slow baby, who rarely crawled or moved, and rarely blinked. (*Id.*) Gina remembers Angel being slow with an unusually large head and a slightly lifted upper lip. (G. Salazar Aff. ¶ 8) Gina also recalls that Angel rarely blinked and, when he did, he did so extremely slowly. (*Id.*)

After Acela was evicted from the Chilton Street apartment in September 2005 while Manuel was in Memphis, she and her children stayed with Marisol, Manuel's sister, for a few days. (M. Velez Aff. ¶ 14 [Appx 37]) During that time, Acela's mother and Marisol both noticed that Angel's head was getting bigger, and Marisol mentioned it to Acela. (*Id.* ¶ 15) Marisol also noticed that when she visited Acela at Ivonne's house, "Angel would always be on the couch, with his head down to the side, . . . was very inactive for a baby, and barely moved most of the time." (*Id.* ¶ 16; *see also* C. Velez Aff. ¶ 5 [Appx 31])

Another of Manuel's sisters, Elmita, had similar observations when she visited Manuel and Acela in August 2005:

> [Angel's] head was very big. He was non-responsive. When I tried to give him food, he just sat there and didn't try to eat. It was very strange.

(E. Velez Aff. ¶ 22 [Appx 33]) Elmita later told the reporters from the Brownsville Herald that Angel's head was too large and that he didn't act like a one-year old child should. (*Id*. ¶ 23; *see* 4/2/06 *Brownsville Herald* article [Appx 106])

Neither the observations of Angel during the summer of 2005 nor the medical records suggesting a medical basis for concern about the unusual expansion of Angel's head were presented to the jury or considered by the medical experts who testified at trial. Angel's symptoms prior to October 18—rapidly increasing head circumference, visibly enlarged head, sluggishness, apparent cognitive and affective deficiencies, as well as vomiting and fever—are possible manifestations of serious medical conditions, including subdural hematomas or cerebral edema. *See, e.g.*, Vincent DiMaio, FORENSIC PATHOLOGY (2d ed. 2001) at 169; Jan E. Leestma, FORENSIC NEUROPATHOLOGY (2d. ed. 2009) at 360–61 (noting that "symptoms may wax and wane"). (*See also* Ophoven Aff. ¶¶ 24–27 [Appx 3]; Uscinski Aff. ¶ 13 [Appx 4]) The jury heard nothing about Angel's symptoms or how they relate to an assessment of the cause of Angel's death.

B. Events of October 31, 2005.

1. Events culminating in Angel's loss of consciousness and the call for emergency assistance.

In describing the events of October 31, the statements of Acela and Manuel are generally consistent. Material facts from other sources, however, were withheld from the jury.

Before the State put Acela Moreno on the stand, the jury watched a videotape of two officers interviewing Acela in Spanish on November 1, 2005, and received the Spanish transcript and an English translation of that interview. (16 RR 44–46; State's Ex. 49, 49A, 49B) In the

videotaped statement, Acela told sheriff's investigators that Angel had fallen off the bed twice the night before October 31. (State's Ex. 49A [English transcript] at 8; *see also* 10/31/05 Voluntary Statement of Accused, Acela Moreno [Appx 86]), saying "Two nights ago, Angel fell from my bed and could have hit his head.")) Manuel's statements to the police also noted that Angel "had fallen off the bed several times" when Acela left him there unattended. (State's Ex. 64; Def. Ex. 2) As discussed above and noticed by family and friends, Angel's falls were a common occurrence.

Dr. Kimberly Arredondo, a psychologist who interviewed Acela in prison as part of her psychological evaluation of Manuel (under the direction of Manuel's first counsel, Gary Ortega), learned a few additional facts that Acela did not tell the jury. According to Dr. Arredondo, Acela said that when Angel fell off the bed twice the night before, she "heard his head hit hard on the floor and he began crying." (Arredondo Decl. ¶ 4 [Appx 11]) The next morning, "Angel appeared not to be feeling well before eating breakfast and was crying." Acela told Dr. Arredondo "the crying seemed unusual for him and he seemed like he was getting sick and appeared tired. She said that he looked more and more 'decaido' (feeling bad) so she gave him Tylenol when he was sitting on the couch. Then she put him to take a nap." (*Id*.) Dr. Arredondo relayed this information to Villarreal, but he did nothing with it. (*Id*. ¶ 6)

The jury did hear that present for breakfast at the Vermont Circle house were Manuel, Acela, her three children—Emily (4), Alexis (2 1/2), and Angel (1)—and Manuel's son Ismael (2). According to Acela's interview, Angel sat crying in an armchair before breakfast. (State's Ex. 49A at 26) She recounted that Manuel picked him up and began playing with him, including shaking him gently. (*Id.* at 26–27) The child then ate breakfast, and Manuel put him to bed for a nap. (*Id.* at 28) Pressed by the officers to say Manuel put the child to bed by throwing him, Acela insisted that Manuel put him to bed "well." (*Id.*)

According to Acela, the child awoke "well" and he was okay after lunch a while later, when she placed him on the sofa with her 4-year-old daughter Emily. (*Id.* at 20, 29–30) Acela said that, having left Angel on the sofa, she went to nap with her other son in the bedroom. (*Id.* at 20–22) When Acela came into the bedroom, Manuel got up from a nap with his young son Ismael, and left the room. (*Id.* at 22; 16 RR 87) He did not get up "moody" or complaining about anything. (State's Ex. 49A at 22) Acela said she was in the bedroom for twenty minutes, never fell asleep, and heard nothing in the small home; she did not hear a hit or the child crying. (*Id.* at 22, 30, 31; 16 RR 89–90, 93–94, 100; State's Ex. 47 (showing tiny size of home)) Acela claimed she heard someone blowing two or three times, as though giving mouth to mouth resuscitation, and heard water running. (16 RR 92–93; State's Ex. 49A at 34–35) At trial, Acela confirmed on cross-examination that during the twenty minutes she was in the bedroom with Alexis, she "could hear everything that was going on in the . . . house," and Angel didn't cry. (16 RR 100) She didn't hear "any sound, any noises" like someone hitting anyone. She didn't hear Angel hitting any surfaces, or anybody hitting or kicking him. (*Id*.)

Manuel's description of the events of October 31 begins around 2:30 p.m., when he got up from a nap to take a shower because some friends were picking them all up to go trick or treating. (State's Ex. 64) Acela and Alexis were in one of the bedrooms. Manuel used the toilet and then went to the kitchen to look for his hairbrush. In the living room, Manuel noticed that Angel was having problems breathing—gasping for air and taking short breaths. He picked up Angel and placed him down on the bed. (*Id*.)

When Manuel found the baby struggling to breathe, he went into the bedroom where Acela was lying down with Alexis and alerted her. (State's Ex. 64; Def. Ex. 2) Acela said she was "already getting up" when Manuel came to the bedroom, and told her to come see Angel

because he was not breathing. Manuel seemed "nervous" or "frightened." (State's Ex. 49A at 31, 22; 16 RR 89–90)

When Acela moved the child, "he was like choking. Like, he was about to pass out." (State's Ex. 49A at 24) At trial, she said he took his "last breath." (16 RR 91–92) She told Manuel "to go out and look for help because the child is already dead." (16 RR 91–92) There was no working telephone in their house, so Manuel went next door, knocked on Veronica Aparicio's door, and asked to use her phone to call for help. (14 RR 55–56) Acela followed Manuel out of the house with the baby. (16 RR 92) Ms. Aparicio brought the phone outside. According to her written statement taken at the scene a few minutes later, "He was so nervous; he could not dial 911 so I dialed for him and requested ambulance." (Veronica Aparicio Sworn Statement 10/31/05 [Def. Ex. 1]) At trial, she disclaimed her previous statement, and described Manuel as not appearing as "worried as any person . . . in this situation would be." (14 RR 56) On cross-examination, Villarreal attempted to introduce Aparicio's prior inconsistent statement, but the court excluded it on the State's hearsay objection. (14 RR 87–89) Trying to revive the baby, Manuel asked Ms. Aparicio for alcohol, and put it on the baby's face as they waited for emergency responders. (14 RR 85)

Once the EMS arrived and while Angel was receiving emergency medical attention at the scene, Brownsville law enforcement personnel were beginning to investigate the incident. Manuel, Acela, the neighbor Aparicio, and others were interviewed at the scene by several officers. (16 RR 8–10) At least two of the early responders, Constable Jesus Coria and EMT Rivera, tried unsuccessfully to get information from Acela, but they were not able to get a clear indication of what occurred from her. (14 RR 102–03, 129–30) Investigator Alvaro Guerra spoke to Manuel, who was "watching the kids." (16 RR 10–11, 15) Sergeant Rene Gosser noticed Manuel was holding the hand of a little girl (17 RR 49), presumably Acela's daughter

Emily. Constable Coria saw Manuel standing by the fire truck looking to see "what's going on with the baby." (14 RR 102–03) Acela was transported to the emergency room by a constable, interviewed there, then taken to the sheriff's office for further questions. (14 RR 104; 16 RR 29–30) At Lieutenant Carlos Garza's direction, Manuel and the other children were taken directly to the sheriff's office, where one officer watched the children while others interrogated Manuel. (16 RR 13–14, 29–33) The children were then taken to the hospital to be examined for signs of possible abuse. (Dolly Vinsant Memorial Hospital Report [Appx 57]) Manuel and Acela were both charged with injury to a child and incarcerated. (16 RR 34)

Emily and Alexis were later taken by TDFPS personnel and eventually placed in to foster care; proceedings were initiated immediately to remove Acela's parental rights. (*See* 11/1/05 Order for Protection of a Child in an Emergency [Appx 115]) Ismael was returned to the custody of his mother, Maria Hernandez.

2. Emergency response and medical treatment.

Following the successful 911 call, Angel received emergency treatment from a succession of responders: first a constable, who performed CPR; then fire department EMTs, who continued CPR and unsuccessfully attempted intubation; finally paramedics with Brownsville EMS who transported Angel by ambulance to the Valley Regional Medical Center in Brownsville. (14 RR 94–106; 14 RR 114–19; 14 RR 135–45) At the Valley Regional Emergency Room, Angel's care was transferred to Dr. Ben Nunez. (14 RR 145–46) Angel's pediatrician, Dr. Zamir, also responded to the emergency call. (15 RR 59–63)

Many of the emergency responders and medical personnel who treated Angel observed and reported "old" bruises or contusions on Angel's body, variously described as "grayish" (14 RR 105–06), "fading . . . yellow brown . . . old . . . almost gone" (14 RR 120–25), "brown in

color" (14 RR 145). Villarreal asked no questions about these older injuries on cross-examination, and did not mention them in closing.

After a couple of hours of stabilizing care, Angel was transported by helicopter to Valley Baptist Medical Center in Harlingen. (15 RR 37–40, 46) Rene Perez, a nurse and paramedic with AirCare, admitted that the number of medical providers administering treatment to Angel could have caused bruising and redness on his body. (15 RR 51–52) At Valley Baptist, Dr. Maria Camacho assumed responsibility for Angel's care. (15 RR 9–14, 47) Dr. Camacho conducted a CT scan that showed bilateral chronic subdural hematomas ("blood between the brain and the skull"), which was confirmed by Dr. Dones-Vasquez. (15 RR 15–16, 33–35; *see also* VBMC History & Physical—Camacho Assessment [Appx 54]; VBMC Dones-Vasquez Consultation Report [Appx 54]) According to the textbook authored by the State's pathology expert, Dr. Vincent J. DiMaio, FORENSIC PATHOLOGY (2d ed. 2001) at 167, "Subdural hematomas can be acute, subacute, or chronic. Acute subdural hematomas manifest themselves clinically within 72 h of injury; subacute between 3 days and 2–3 weeks, and ***chronic more than 3 weeks after injury***" (emphasis added).

After conducting additional diagnostic tests, Dr. Camacho believed Angel was brain dead. (15 RR 18–21) This assessment was confirmed by another doctor, and Angel was removed from the respirator and pronounced dead at 9:55 a.m. on November 2, 2005. (15 RR 21–24; Patient Expiration Record [Appx 54])

3. Police investigation.

a. Manuel's interrogation and statements.

Officers took Manuel to the sheriff's office directly from the scene on October 31. After an interrogation of 1½ to 2 hours, the officers apparently had Manuel sign two English-language typewritten statements purportedly reflecting Manuel's oral communications to them during the

interview. (State's Ex. 64; Def. Ex. 2) One statement (Def. Ex. 2) is two pages in length and appears to be signed by Manuel at the exact same date and time as the other statement (State's Ex. 64) that is three pages in length. The difference between the two versions of the statement and the controversy surrounding their creation are explored *infra* at IV.C.

Manuel speaks Spanish; the court appointed an English-Spanish translator to aid him at trial. (1 CR 117, 122; 3 RR 9; 18 RR 130; 18 RR 35) Manuel reads English only at a first or second-grade level. (17 RR 170; 1 CR 120; Def. Ex. 6 at 8) Gosser did not claim to have read the statement to Manuel, only that Manuel "appeared" to have read the statement himself before signing it. (17 RR 72) Gosser admitted he did not verify that Manuel could read English before giving him his *Miranda* warnings and statement to sign. (17 RR 84–85) Gosser testified at trial that he spoke English to Manuel who responded in English (17 RR 50), but Gosser had previously admitted in the pretrial suppression hearing that he spoke both English and Spanish to Manuel during the interrogation. (8 RR 96–97)

On cross-examination, Gosser testified that he had made notes during the interview, but they were not in his custody because he was no longer with the sheriff's department. (17 RR 85–86) (His notes were requested by defense counsel, but never provided.) The police did not video record the interrogation from which they generated the written statement(s) (16 RR 36; 17 RR 98–99), but could have; they video recorded their interrogation of Acela the next day. (16 RR 35) A videotape, of course, could have resolved the question of how it came to be that there are two different statements bearing the exact same date and time of execution.

b. Acela's interrogation and statements.

The videotaped interrogation of Acela (State's Ex. 49, 49a, 49b) described in the previous section was conducted on November 1. During the interrogation, the police pushed hard to get Acela to say that Manuel intentionally harmed the child. (*See* State's Ex. 49A) The effort failed.

Acela knew what Manuel did (and did not do) with her children because she never left Manuel alone with them. (*Id.* at 19) She consistently said that though Manuel was at times rough in his play with Angel, he did not act maliciously. (*Id.* at 4, 9, 10, 18, 26, 27, 28, 35, 43) She said Manuel would playfully bite the child, grab the child's cheeks, throw him in the air and catch him, and shake him gently. (*Id.* at 4, 9, 13, 26, 27, 36, 42, 43, 45) When throwing the child in the air and catching him, Manuel said "my son" and acted sweetly to him. (*Id.* at 43) Manuel never burned the child with a cigarette, never burned him while playing, and never hit him with a belt or his hand. (*Id.* at 12–14) At trial, Acela admitted that Manuel had never hit Angel with his hands, feet, or any object. (16 RR 100–103; *see also* Arredondo Aff. ¶ 5 [Appx 11] (reporting similar statements))

The police also repeatedly accused Acela of lying to protect Manuel—either because she feared violence from him or loved him. But she consistently responded that Manuel had never beat her or the children, she did not fear him, and she did not love him. (State's Ex. 49A at 12, 33, 36–37, 48) Although Acela changed her story at trial by claiming she noticed bruises and "bite marks" and "thought" Manuel was hurting her child (16 RR 82, 94), she never claimed to have observed Manuel striking or otherwise harming Angel. Villarreal did not cross-examine her about the discrepancies in her story or confront her with her previous story. Nor did he have her confirm that she had sole access to and responsibility for Angel while Manuel was in the bedroom napping with Ismael.

After Angel was declared dead on November 2, the charges against both Manuel and Acela were escalated to capital murder. (16 RR 35)

II. PROCEDURAL HISTORY

The following sections summarize the procedural history of Manuel's case following his arrest on capital charges, beginning with his frustrating efforts to secure competent, diligent counsel to defend him against the capital charges and continuing through trial, sentencing, and post-judgment events.

A. Mr. Velez's Search for Representation.

1. Mr. Velez's family contacted Luis Saenz, who later prosecuted Velez after Judge Limas refused to disqualify Saenz.

After Manuel's arrest and incarceration in the Cameron County jail, he asked his sisters Elmita and Marisol to find him an attorney, and they agreed to borrow money to hire a lawyer. (E. Velez Aff. ¶ 28 [Appx 33]; M. Velez Aff. ¶ 20 [Appx 37]) Marisol sought legal representation for Manuel at the office of Luis Saenz, an attorney in private practice. (7 SRR1 Def. Ex. 1; 2 CR 212) Saenz asked Marisol about the case. (*Id*.) She told him that her brother had returned from being out of town only two to three weeks before the child's death and that Acela was a "very irresponsible mother." (*Id*.) Saenz advised her that the State did not have a case against Manuel. (*Id*.) Saenz quoted a fee of $30,000, which the Velez family neither accepted nor rejected. (7 SRR1 22) Saenz told Marisol that he worked on some cases as a DA and that he would check on the status of the case for Manuel and that Marisol should contact him to follow up. (M. Velez Aff. ¶ 21)

Elmita called Saenz several times and was informed he was not in the office. Elmita finally spoke with Saenz's secretary who informed her that Saenz could not take the case as he did not have the time to work on it. (E. Velez Aff. ¶ 30; M. Velez Aff. ¶ 22) At some point after his conversation with Marisol, Saenz was retained by the State as a special prosecutor in this

case. (3 SRR1 2) Saenz prosecuted both Manuel and Acela, negotiated a plea bargain with Acela, and obtained a conviction and death sentence against Manuel based on the theory that all of Angel's injuries occurred after Manuel had returned from Memphis. Saenz was paid $50,000 after Manuel's trial. (11/3/08 Letter from Saenz to D.A. Villalobos & Payment Record [Appx 96])

Texas legal ethics experts have described Saenz's conduct as an obvious conflict of interest and an egregious ethical violation. (*See* 10/10/11 Brief of Legal Ethics Experts as Amici Curiae, Court of Criminal Appeals Case No. AP-76,051 at 15 [Appx 132]) ("[W]hat happened here is that Marisol consulted Saenz in an honest and good faith effort to obtain assistance for her brother. He rewarded her trust in him by prosecuting her brother and getting him sentenced to death.")

On August 22, 2007, Manuel's attorney filed a Motion to Recuse the Special Prosecutor, Luis Saenz, supported by the Affidavits of Elmita Velez and Marisol Velez. (2 CR 199–202, 212) At the hearing on August 28, 2007, the prosecutor asked Marisol Velez if the family had given "facts" to Luis Saenz, and she misunderstood it as "fax," so the court found no confidential information was given to him. (Marisol Velez Aff. ¶ 23) Judge Limas denied Defendant's motion. (7 SRR1 23; 2 CR 219)[12]

2. Mr. Velez's family retained Ortega, and Warner was appointed to assist, but both were later removed as unqualified.

After learning that Saenz would not accept the case, on January 14, 2006, Manuel's sister Elmita retained Gary Ortega to represent Manuel. Ortega primarily did immigration work, but

[12] After Ortega was disqualified, Judge Limas vacated all previous rulings in the case. Villarreal, appointed by Limas, did not refile or otherwise pursue the motion to recuse Saenz. (*See infra* at 41)

assured Elmita he was qualified to handle a capital murder case. (E. Velez Aff. ¶ 31 [Appx 34]) Ortega entered his appearance as counsel retained by Velez on January 24, 2006. (1 SCR3 10–11; *see also* 1 CR 16) He requested and received $12,000 as a retainer.

Ortega did not maintain regular contact with Manuel or his family. He spoke to Elmita only about four times in the almost two years he represented Manuel. (E. Velez Aff. ¶ 31) With the assistance of a friend fluent in English, Manuel wrote Judge Limas two letters expressing frustration at lack of communication from Ortega and asked for assistance in moving the case forward. (Letter received 11/20/06, 2 SCR3 236–38; Letter received 4/3/07, 3 SCR3 454–56) Manuel complained that Ortega was not telling him what was happening or talking to him about the incident in question. Ortega "says he doesn't have to inform me about my case." Manuel explained that his family has paid $12,000 in fees, and he had not received $12,000 worth of representation. He asked the judge to respond to his letter regarding his "ineffective counsel." (3 SCR3 454–56)

Ortega attempted to assemble a team to prepare Manuel's defense. He contacted, and eventually secured funding from the court for, an investigator (Domingo Chavez, later replaced by Ed Gerusa), a mitigation specialist (Gilda Bowen), two psychologists (Daneen Milam and Kim Arredondo), a forensic pathologist (Sridhar Natarajan), and a surgeon (Keith Rose). (*See* 1 SCR3 18–36, 72–81, 168–79, 185; 2 SCR3 192, 203–05, 245–46; 3 SCR3 434; 1 CR 25, 42–54, 58–71; 2 CR 171–77, 220–38, 253–56) He also secured the appointment of attorney Larry Warner to assist him in November 2006. (1 SCR3 39–40, 148–50; 2 SCR3 195–96, 213–14) Ortega and Warner filed a host of substantive and procedural motions. (*See e.g.*, 1 SCR3 41–71, 82–89, 91, 138–40, 151–57, 186–87; 2 SCR 3 208–11, 216–34, 240–42, 248–376; 3 SCR3 379–433, 457–82, 498–519; 1 CR 17–24, 28–40, 72–98, 123–61; 2 CR 180–209) But the "team" was dysfunctional, as reflected in correspondence between Ortega, Warner, Bowen, and the retained

experts. (*See* Correspondence between counsel and experts [Appx 63]) Ultimately, Dr. Natarajan, Dr. Rose, and Dr. Milam all refused further involvement with Ortega. (*See* 1 CR 164; Flores Aff. ¶ 13; Rose Aff. ¶ 5) On May 3, 2007, Dr. Milam sent an e-mail to Ortega's assistant Norma Lopez, copying Gilda Bowen, saying, "I strongly suspect that on appeal Gary [Ortega] will get a 'ineffective assistance of attorney.'" (5/3/07 Email Daneen Milam to Gilda Bowen [Appx 68])

Finally, Ortega and Warner apparently realized they were in over their heads. On August 15, 2007, Warner filed a "Motion to Preclude Death," seeking to remove the death penalty as a sentencing option on several grounds, including that Velez's attorneys "will not be able to provide the effective assistance of counsel as [they] do not have the qualifications required by law." (1 CR 148, 150) Warner specifically noted that although he had been appointed lead counsel, he did "not have trial experience in investigating and presenting mitigating evidence at the penalty phase of a death penalty trial." (*Id*. at 155) This motion was followed on August 23, 2007, by a Motion for Appointment of 1st Chair (Craig Washington). (2 CR 203–09)

On September 4, 2007, Ortega filed a "Motion to Preclude the Death Penalty Due to Unqualified Lead Counsel" because he did not have trial experience in a death penalty trial, and because Larry Warner had been disqualified as lead counsel for the same reason on August 21, 2007. Ortega requested that "Lead Counsel be appointed with Death Penalty experience." (2 CR 217–18, 251) He filed an amended motion the next day, emphasizing the court's obligation "to ensure that Mr. Velez receives the effective assistance of counsel." (2 CR 239–40) At a hearing on September 7 (2 CR 245), Ortega was disqualified as counsel. (8 SRR1 9–11) The court appointed new counsel for Velez, and set aside all previous rulings in the case. (*Id*. at 10–13; 9 SRR1 5; 2 CR 252)

B. Villarreal's Appointment and Preparation for Trial.

At the September 7 hearing, Judge Limas appointed Hector Villarreal to represent Velez, having previously discussed the matter with him and ensuring Villarreal was in the courtroom at the time of the hearing. (8 SRR1 10–13; 2 CR 252) The Court subsequently granted Villarreal's motion to have Oscar Rene Flores appointed co-counsel. (9 SRR1 4) Villarreal made motions to interview expert witnesses already on the case and have files transferred from Ortega, which were granted. (8 SRR1 14, 19)

Villarreal, who died of liver failure in July 2011, had a reputation as a heavy drinker and a "gunslinger" in the courtroom. (7/11/11 The Monitor, *Courtroom 'Gunslinger' Hector Villarreal Remembered as Friend, Foe* [Appx 109]) Mr. Velez's family noticed that Villarreal drank too much. (M. Velez ¶ 24) Villarreal also had previously been reprimanded or suspended from practicing law because of professional misconduct on at least three separate occasions—1983 (reprimanded for neglecting a matter entrusted to him and failing to refund unearned fees) [Appx 119]; 1997 (probated suspension for revealing and using confidential information to a client's disadvantage, and represent one former client in a matter adverse to another former client without informed consent [Appx 120]); and 2001 (failing to properly distribute funds in a trust account for the benefit of a child [Appx 121]).

Villarreal and Flores received files from Ortega, which were poorly organized. (Flores Aff. ¶ 7 [Appx 14]) They also contacted the consultants and experts previously retained by Ortega. Dr. Kim Arredondo, who had been retained by Ortega, spoke with Villarreal and Flores on more than one occasion. (*Id*. ¶ 19) Dr. Arredondo informed them about her psychological evaluation of Manuel and her meeting with Acela in which Acela told her the following:

- Angel was tired and sick and was crying a lot on October 31. Acela had given him Tylenol just before putting him down for a nap.

- Angel had fallen from the bed twice the night of October 30 and had hit his head hard on the floor and began crying.
- On October 16, Angel had fallen and hit his forehead outside of Ivonne Salazar's house.
- Acela did not know why the State had asked her to testify against Manuel since she did not hear or see anything that would indicate that Manuel had done anything to Angel on that day or on any other day.
- Manuel had never abused the children.
- Acela was always with her children and during their brief relationship Acela had never left her children alone with Manuel.

(Arredondo Decl. ¶¶ 3–5 [Appx 11]) Dr. Arredondo had difficulties getting paid and Villarreal argued with her about payment for her work. (Flores Aff. ¶ 19 [Appx 14]) Villarreal did not ask Dr. Arredondo to testify at trial, although if asked, Dr. Arredondo would have testified consistent with the facts set forth in her Affidavit. (Arredondo Aff. ¶ 6)

As noted above, Sridhar Natarajan, M.D. was a forensic pathologist contacted by Gary Ortega who refused to do any further work on the case. Dr. Natarajan refused to communicate with Villarreal and Flores after they were appointed to represent Velez. (Flores Aff. ¶ 13) Villarreal and Flores, disregarding the advice of another doctor, did not contact or retain another pathologist. (*Id*.)

Flores also contacted Dr. Keith Rose, a surgeon in Corpus Christi who had conferred with Ortega and withdrawn from the case. (Dr. Keith Rose Aff. ¶ 5 [Appx 8]) Dr. Rose recommended that counsel retain a forensic pathologist to assess the age of Angel's chronic subdural hematoma and healing skull fractures. (*Id*. ¶ 8) Dr. Rose was not given Angel's pediatric records and was not asked to testify at trial. (*Id*. ¶¶ 10, 14)

Flores contacted Dr. James Lukefahr, a pediatrician in San Antonio who had testified for the State in another case in which Flores represented the defendant. (Flores Aff. ¶ 15; Dr. James

Lukefahr Aff. ¶ 7 [Appx 6]) Dr. Lukefahr is certified by the American Board of Pediatrics in General Pediatrics and Child Abuse Pediatrics. (Lukefahr Aff. ¶ 5) Flores provided Dr. Lukefahr the autopsy report and other medical records from the end of Angel's life, but did not give him or any doctor Angel's pediatric records from before October 31, 2005. (Flores Aff. ¶ 16 [Appx 14]; Lukefahr Aff. ¶ 8 [Appx 6]) After reviewing the medical records in the case, Dr. Lukefahr informed defense counsel that the skull fractures and older subdural hematoma could be more than 14 days old. (Lukefahr Aff. ¶ 9) Trial counsel asked Dr. Lukefahr if he could opine that Mr. Velez could not have abused the child on October 31. (*Id*. at ¶ 13) Dr. Lukefahr told them he could not opine as such, but that there was medical evidence of abuse during times when Manuel did not have access to the child. (*Id*.) Defense counsel did not ask Dr. Lukefahr to testify in Manuel's defense. (Lukefahr Aff. ¶ 10; Flores Aff. ¶ 15)

Mr. Velez's defense counsel did not talk to Angel's pediatrician, Dr. Zamir before trial and did not contact Dr. Farley, Dr. Brown, or Dr. DiMaio. (Flores Aff. ¶¶ 16, 17) They did not obtain a copy of Dr. DiMaio's text on Forensic Pathology. (*Id*. ¶ 17) They also did not discuss using a neuropathologist and did contact a neuropathologist. (*Id*.)

The only expert Villarreal used in Manuel's defense was Dr. Michael Rabin, a clinical and forensic psychologist, who was asked to evaluate Manuel's cognitive abilities and psychological status only as it related to his ability to understand, and thus knowingly and competently waive, his constitutional rights. (Dr. Michael C. Rabin Aff. ¶ 4 [Appx 9]) Dr. Rabin's testimony on these issues at the hearing on a motion to suppress Manuel's statements is described *infra* at 47–48. Dr. Rabin gave similar testimony at the culpability phase of trial. (*See infra* at 159) Dr. Rabin was not asked to evaluate Manuel for factors relevant to future dangerousness or mitigation, and was not asked to testify at the punishment phase of trial. (Rabin Aff. ¶ 7) As recounted by Rene Flores, "Hector [Villarreal] would not call Dr. Rabin to

testify at the punishment phase despite my urging him to do so, because, in Hector's words, 'the jury already heard him.'" (Flores Aff. ¶ 18) The opinions Dr. Rabin could have provided if asked, as set forth in his affidavit, are summarized *infra* at 300–04.

In fact, defense counsel did very little to prepare for the punishment phase. Although Gilda Bowen continued (after Ortega was removed from the case) as mitigation specialist, the information she discovered, including evidence of Manuel's good nature with children, was not used by Villarreal at trial or as mitigating evidence. Ms. Bowen, who was present in the courtroom for the sentencing phase of the trial, did not testify at the trial. As recounted by Flores, Villarreal refused to prepare for the punishment phase until the conclusion of the guilt/innocence phase, which, it turned out, was the night before the punishment phase began: [13]

> [Hector] told me he thought preparing for punishment before the verdict on guilt would make him less effective in the guilt-innocence phase of trial. We had received mitigation evidence from Gilda Bowen, but Hector never articulated a mitigation theory and he decided to put on very little of the evidence available. I urged him to call Dr. Rabin, . . . but Hector refused to do so . . .

(Flores Aff. ¶ 21 [Appx 14])

In the end, despite the availability of significant exculpatory evidence that should have been presented through qualified medical experts, Villarreal inexplicably chose to submit no medical evidence other than Dr. Rabin's assessment of Manuel's ability to understand the *Miranda* warnings. And he presented almost no mitigating evidence during the punishment

[13] As set forth below, Judge Limas attempted to begin the punishment phase twenty minutes after the guilty verdict was read. Defense counsel did not object. It was only due to a dispute over the proper role of alternate jurors that the punishment phase began the next morning. (19 RR 24–41)

phase, although extensive mitigating circumstances existed, including evidence of the limited mental capacity and borderline mental retardation of Mr. Velez.

C. Other Pre-Trial Proceedings.

In addition to the hearings described in the previous section, several important events occurred prior to Velez's trial in October 2008, each of which had a significant impact on the outcome of the trial.

1. Acela Moreno pleaded guilty to causing bodily injury to Angel by striking him.

On May 18, 2007, Acela Moreno entered a plea of guilty to Count III of the indictment, specifically:

> On or about the 31st day of OCTOBER, 2005, . . . [she] did then and there intentionally or knowingly cause . . . bodily injury to ANGEL MORENO . . . by striking on or about the victim's head with the defendant's hand, or striking the victim's head against a hard surface . . ., or by striking the victim's head with an object . . . .

(1 SCR 3, 6–8; 6 SRR1 5–8) Although this is the least of the three offenses charged in the indictment, it was predicated on the same conduct alleged in Count I (capital murder) and Count II (murder). (*Id*.) Judge Limas accepted Acela's plea based on her own testimony that she was, in fact, guilty (6 SRR1 8) and on Special Prosecutor Saenz's assurance that the State had "evidence that she participated in acts that led to injuries to the baby." (*Id*. at 5) Saenz also told the court that Acela's statements to the district attorney's office were "consistent with the statement" given to the police, with no deviations. (*Id*. at 11–12)

One of the conditions of Acela's plea agreement was that she "testify for the State" against Manuel. (4 SCR 3) As described *infra* at 208–11, Saenz elicited testimony from Acela at trial that deviated materially from her previous statements to the police and her plea

agreement: Acela testified that she pled guilty to failing to prevent Manuel from harming her child. Saenz emphasized and repeated the false testimony throughout trial and Villarreal never told the jury what Acela actually pled to, never corrected the record and never objected.

2. Judge Limas denied a defense motion to suppress Mr. Velez's statements.

On March 6, 2006, Manuel's counsel Gary Ortega filed a Motion to Suppress Statements and requested a pretrial hearing on the motion. (SCR4 58–59) This motion was not set for hearing. On October 17, 2007, Manuel's new counsel Rene Flores filed a Motion to Suppress the Written or Oral Statements of the Defendant on the grounds that his statements were not made voluntarily in violation of, *inter alia*, Texas Code of Criminal Procedure art. 38.21. (SCR5 82–85) Flores also filed a Motion for Hearing on Admissibility of Any Statement by Defendant whether Written or Oral or Evidence Resulting from Same and requested the trial court conduct a hearing in accordance with Texas Code of Criminal Procedure art. 38.22 § 6. (SCR5 125–27)

After being rescheduled multiple times, on October 6, 2008, ten days before the capital murder trial began, Judge Limas conducted an evidentiary hearing on the Motion to Suppress Manuel's statements. (8 RR 78–219) At the hearing, Judge Limas ordered the defense to proceed with its evidence first. (8 RR 87) Villarreal first called Officer Rene Gosser, who interviewed Manuel and prepared the written statement offered by the State, and examined him for a total of three transcript pages. (*Id.* at 88–91) Villarreal established that Officer Gosser did not utilize video recording to document his interview with Manuel even though such equipment was available to him. (*Id*. at 90, 100–01)

Special Prosecutor Saenz cross-examined Officer Gosser and offered State's Exhibits 1 and 2. Exhibit 1 purported to be the five-paragraph *Miranda* warnings and waiver Officer Gosser provided to Manuel. Exhibit 2 purported to be a three-page statement prepared by

Officer Gosser and signed by Manuel and two officers. Both exhibits were admitted for purposes of the hearing over Villarreal's objections. (*Id.* at 94–96)

During his re-direct examination, Villarreal produced a two-page statement that appeared to be signed by Manuel at the exact same date and time as the three-page statement marked as State's Exhibit 2. (*Id.* at 120–22) Villarreal represented that the two-page statement had been received from the State. (*Id*. at 122–23) The two-page statement was marked as Defense Exhibit 1, but apparently not admitted during the hearing. (*Id*. at 120) Officer Gosser acknowledged that Defense Exhibit 1 appeared to be a statement produced by his department. (*Id*. at 120–22)

Judge Limas noted differences in the two statements—different signatures by Manuel, witness signatures in a different order—and requested an *in camera* review of the original statement and examination of the other witness to the statement, Lieutenant Carlos Garza. (*Id*. at 124–26, 129) After a break, the State provided the Court with a manila envelope reportedly containing the originals of State's Exhibits 1 and 2. These documents are not included in the record. (*Id*. at 138–39)

In between cross-examination and redirect examination of the defense's next witness, Judge Limas asked that counsel come to chambers with two witnesses—Officer Gosser and Lieutenant Garza—to discuss the two statements. (*Id*. at 195) The defendant was not present for this portion of the hearing; his counsel did not object to conducting this portion of the hearing in his absence. (Flores Aff. ¶ 9 [Appx 14]) There is no record of the proceedings in chambers, and Judge Limas did not make a ruling or explain what had happened in chambers when proceedings went back on the record. The mystery of the two statements remained unresolved.

Meanwhile, the hearing continued, focused on the "voluntariness" issue raised by the motion to suppress. Villarreal called Dr. Michael C. Rabin, a forensic psychologist who examined Manuel with the aid of a translator. Dr. Rabin testified to his experience, the tests he

administered to Manuel, and the protocol for whether an individual understood and was able to waive his *Miranda* rights. (8 RR 137–97) Dr. Rabin testified that Manuel's ability to read English was at a first or second grade level and his ability to read Spanish was at a kindergarten level. (*Id*. at 147) Based on the findings of Dr. Arredondo, Dr. Rabin testified that an individual would have to read at a high school sophomore level to understand State's Exhibit 2. (*Id.* at 148) Dr. Rabin concluded that Manuel could not have understood the written statement of his *Miranda* rights and could not voluntarily relinquish those rights. (*Id*. at 162) On cross-examination, Dr. Rabin admitted that Manuel understood certain elements of certain questions asked of him, but remained steadfast that the tests administered were objective and standardized. (*Id.* at 193) As his redirect examination, Villarreal offered Defense Exhibit 2, Dr. Rabin's Report of Neuropsychological Evaluation, which was admitted over the State's hearsay objection. (*Id*. at 197–98)

The State presented two witnesses at the hearing—David Bradshaw and Brian Martin—who were incarcerated with Manuel and who testified that Manuel spoke, read, and understood English. (*Id*. at 200–03, 207–10) On cross-examination of these witnesses, Villarreal elicited testimony that they were not psychologists (*id*. at 204, 214), that they could carry on conversations with third graders (*id*. at 205, 213), and that Mr. Martin had never told a lie (*id*. at 216).

A week later, during jury selection on the morning of October 13, Judge Limas orally denied the Motion to Suppress, but failed to file the findings of fact and conclusions of law required by Texas Code of Criminal Procedure art. 38.22 § 6 despite defense counsel's request for such findings. (12 RR 66–67) Judge Limas said his ruling encompassed both the two page and the three page statements without further explanation. (*Id*.) Both versions of the statements were admitted at trial, as State's Ex. 64 and Def. Ex. 2. (17 RR 74; 17 RR 104)

The differences between the two written statements purportedly reflecting Manuel's comments to the police will be thoroughly explored *infra* at Part One II.D.1, as well as the prosecutor's unfounded and prejudicial accusations that the Court had declared the two-page statement (Def. Ex. 2) a "fraud," and that Manuel or his attorneys somehow "forged" that document. (18 RR 101–02, 138–39)

3. A jury was selected after 12 days of questioning.

Villarreal's haphazard approach to defending Velez was evident from the beginning of the trial proceedings. Jury selection took place over 12 days. Sixty-eight members of the venire pool were questioned. (3 RR 8–13 RR 165) During the entire voir dire process, Villarreal demonstrated little purpose or coherent strategy—he failed to ask meaningful questions about key issues, particularly with respect to opinions concerning the death penalty and mitigation in cases concerning the death of a child. (*See, e.g.*, 4 RR 17–19; 5 RR 80–86; 7 RR 15–31) Instead, as would become a pattern throughout the trial, Villarreal filled his limited voir dire time with superficial, pointless, and confusing stories that often focused on himself. (*See, e.g.*, 4 RR 16–17; 5 RR 34–36; 5 RR 60–61; 5 RR 155–57; 5 RR 175–80; 7 RR 19–21; 10 RR 63–67; 9 RR 29–31 9 RR 39–42)

Twelve jurors and 2 alternate jurors were eventually accepted by agreement of the State and Villarreal. Among the twelve selected jurors were the following individuals who each completed a declaration that is submitted with this Application:

- Raquel Avalos, an office clerk (5 RR 107–35; *see* Avalos Decl. [Appx 43]);
- Jennie S. Johnson, a university professor (10 RR 12–36; *see* Johnson Decl. [Appx 44]);
- Rosalva Miller, a retired courier (3 RR 123–46; *see* Miller Decl. [Appx 45]);
- Frank Steve Peterson, an account representative for a utility company (13 RR 125–65; *see* Peterson Decl. [Appx 46]); and

- Ernie Quintanilla, a drill instructor for an alternative "boot camp" schooling program (3 RR 38–51; *see* Quintanilla Decl. [Appx 47]).

The jury was sworn in on October 16, 2008. (14 RR 8–9)

D. Trial—Culpability Phase.

After the jury was empaneled and given preliminary instructions, the trial began with opening statements by counsel.

1. Opening statements.

a. The State's opening.

Special Prosecutor Saenz's opening statement for the State presented a straightforward (but misleading) story of Angel's short life, giving the impression that he had lived, happy and healthy, with his two parents (Acela Moreno and Juan Chavez) for the first eight months of his life. (14 RR 18–19) Saenz told the jury that Chavez "leaves the household" in July 2005, without mentioning that Chavez was jailed for attacking and raping Moreno. (14 RR 19) He then claimed that Manuel and Acela began a relationship but had no place to live, so stayed with friends and relatives—"[c]ouple of weeks with one friend, couple of days with a relative," until Manuel left the state in September "supposedly to go look for a job." (*Id*. at 19) According to Saenz, Manuel and Acela never had their own place to live until Manuel returned to Brownsville and they moved into the house on Vermont Circle on October 18, 2005. (*Id*. at 20)[14]

Using that timeline, Saenz focused on the State's central allegation that all of the injuries suffered by the child were inflicted in his last days of life:

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[14] On direct appeal, the State realized its error and acknowledged that Velez and Moreno did not live with friends and family and that they lived in their own apartment across the street from Moreno's sister, Magnolia Medrano. Nonetheless, the State continued to assert that Velez had no opportunity to harm the victim during this time period before he left for Memphis because they were living under the "watchful eye" of Ms. Medrano. (*See* State's App. Br. at 4)

> On October 18 they move into the house on Vermont Circle. So October 18 is baby Angel's first day living at this house on Vermont Circle. October 31 is baby Angel's last day to live at that house because 13 days, 13 days after moving in with the defendant, baby Angel is dead. Baby Angel is brain dead.

(*Id*. at 20) The crux of Saenz's theory was that Angel was perfectly healthy when he arrived at the Vermont Circle house on October 18, and over the next thirteen days suffered a series of injuries, including external and internal head injuries that led inexorably to his death on October 31. (*Id*.) After describing the events of October 31 as recounted by Acela, and emphasizing that their neighbor, not Manuel, made the 911 call, Saenz briefly summarized Angel's medical treatment by emergency responders and hospital personnel, culminating in the declaration of his death on November 2. He then previewed the testimony of the medical personnel that Angel "was beat up, suffered bruises, cuts, burns, abrasions," as well as Dr. Farley's conclusion "that it is not what she found on the outside that killed this baby, but it's what she found on the inside [head injuries] that caused baby Angel's death." (*Id*. at 25) Saenz concluded by promising the jury that "the evidence will show that the perpetrator to [sic] those injuries . . . who caused Angel Moreno's death was Manuel Velez." (*Id*. at 25–26) Saenz did not reveal what evidence would support such a conclusion, and never fulfilled his promise to the jury.

b. Defense counsel's opening.

Villarreal's opening statement did not present a straightforward, coherent theory of the defense to the charges leveled against Manuel by the State. (14 RR 26–35) Villarreal seemed intent on focusing attention on himself, rather than his client or the evidence (a trait that continued throughout the trial). He essentially conceded the State's medical theory of the cause of death, insisting "it's not really a technical case," lauding Dr. Farley's credentials, and saying she "is going to be instrumental." (*Id*. at 28–35)

According to Villarreal, "what it all boils down to is who done it, who had the opportunity, who had the means, who had the drug problem." (*Id*. at 28) Continuing in this vein, after summarizing the anticipated testimony of skull fractures and subdural hematoma, Villarreal told the jury:

> The evidence is going to show that basically there was a blunt enough force somewhere sometime. The question then becomes who had access to the child during that timeframe, that time line.

(*Id*. at 29) Villarreal's opening pointed to Acela Moreno as the answer to "who done it," by accusing her of using illegal drugs (which he never backed up with evidence) and mentioning that she "accepted responsibility" and "pled out . . . to a lesser included offense . . . [of] injury to a child." (*Id*. at 30)

Thus, Villarreal set forth his theory of the case—that Acela harmed the child while Manuel was away. Villarreal did not, however, challenge the October 18-31 timeframe posited by the State, did not suggest that the older more head serious injuries occurred while Mr. Velez was working in Memphis during the several weeks prior to the October 18-31 timeframe, and did not give the jury any reason to believe that the evidence would not establish Mr. Velez as the "perpetrator," as Saenz had predicted. Villarreal also failed completely to mention the extensive evidence of Acela's abuse of her own children, including Angel, or the specific crime to which she pled guilty. Instead, he asked the jury to sympathize with her for the abusive interrogation by the police—which was clearly focused on placing blame on Velez. (*Id*. at 32–33)

Villarreal concluded his opening with a lengthy discussion of the issue of Velez's ability to read and understand English (*id*. at 32–34), which was relevant only to the jury's decision whether Velez had knowingly waived his *Miranda* rights and voluntarily given one or both of the two "statements of the accused" the court had previously determined were admissible

evidence. Villarreal did not suggest to the jury that the statements, or Velez's proficiency in English, had any bearing on whether he was guilty of the crime for which he was being tried.

2. State's case-in-chief.

The witnesses in the State's case-in-chief were Acela Moreno and her sister Magnolia Medrano, Angel's father, Juan Chavez, the pediatrician, Dr. Asim Zamir, the neighbor who called 911, paramedics and emergency medical technicians who were at the scene of the crime and who transported the victim, law enforcement officers, including one of the officers who interrogated Velez, doctors who cared for the victim until his death, the pathologist who performed the autopsy of the victim, and another doctor who reviewed the autopsy report and medical records. Thus, seven of the State's witnesses were medical personnel.

As discussed above, Dr. Zamir testified that Angel was apparently healthy on October 18, 2005, although he did not actually examine the child that day. (*See supra* at 28–29; 15 RR 77–80) Also discussed above is the testimony of Dr. Maria Camacho, including her reliance on CT scans showing bilateral chronic subdural hematomas. (*See supra* at 199; 15 RR 15–16, 33–35; 10/31/05 and 11/1/05 VBMC CT Scan Reports [Appx 54])

The State presented autopsy results and opinions concerning cause of death and timing of the fatal injuries through two largely duplicative witnesses—the local medical examiner (Dr. Norma Farley) who had performed the autopsy, and a second forensic pathologist (Dr. Vincent DiMaio) who had reviewed the autopsy report. They testified that the injuries to the child fell into two episodes. (17 RR 31:3–10, 124:19–21) The first episode consisted of most of the injuries to the victim, including an "organizing" subdural hemorrhage and two "healing" skull fractures that were (according to the State's doctors) inflicted approximately two weeks prior to death. (17 RR 26, 28) The second episode involved only one injury that they said

required a violent event and occurred on October 31, the day the child was rendered unconscious. (17 RR 31–35) Detailed discussions of this critical testimony follows.

a. Dr. Norma Jean Farley.

Dr. Farley, the forensic pathologist who performed the autopsy on Angel, estimated that the healing skull fractures were "probably seven days to maybe two weeks old." (17 RR 29) Saenz emphasized and repeated this timeframe over and over with the witness on the stand, so that it became a more definitive assertion: "Two skull fractures about two weeks old." (17 RR 31) Although Dr. Farley also described an "older organizing subdural hemorrhage" (17 RR 26), she was not asked—by the State or the defense—to opine on the age of that lesion. Dr. Farley's autopsy report was not admitted in evidence, but is included in the Appendix to this Application. (11/3/05 Autopsy Report of Angel Moreno [Appx 58])

Dr. Farley noted that after incurring a head trauma sufficient to cause subdural bleeding or skull fractures, a child would likely be "tired or . . . lethargic," and may "act a little bit . . . slower. . . . [H]e may sleep more, he may be acting not himself, . . . not be eating as much as he usually did, maybe crying." (17 RR 27–29, 32) She was not asked about reports that Angel had exhibited such symptoms in the summer of 2005.

In addition to her testimony about the older injuries, Dr. Farley testified that she discovered fresh bleeding between the child's brain and skull that mainly covered the left side of the brain, but also appeared at the base of the brain. (17 RR 26) The actual cause of death, Dr. Farley testified, was blunt force trauma—"beat about the head or slammed"—that combined with the earlier head injuries to kill the child. (17 RR 33–35)

Dr. Farley also described several injuries that were not life-threatening, but she believed were signs of abuse. (17 RR 19) Specifically, she found a circular scar on the bottom of Angel's left foot that resembled a cigarette burn, and another burn on the posterior and lateral part of his

left thigh that she thought resembled the top of a disposable lighter. (17 RR 14–15) Dr. Farley also noted two curvilinear brownish contusions on the torso and two more on the left thigh that resembled bite marks, but none of these marks had teeth impressions. (17 RR 15–17) Dr. Farley noted that these marks were "just scar tissue" by the time she performed the autopsy, so she was unable to date the injuries. (17 RR 17) On the left abdomen, Dr. Farley noted a very large contusion with a green discoloration on the lateral left chest that "look[ed] older than the other injuries." (17 RR 17–18) On the head, Dr. Farley discovered several contusions in the mid-forehead area, the left scalp line, and the right frontal scalp. (17 RR 18) Dr. Farley also described separate contusions on the left parietal scalp and crusted abrasions that were scabbed over. (17 RR 18) In addition, Dr. Farley noted an abrasion on the top of the left ear, and two contusions and some abrasions on the back. (17 RR 18–19)

On cross-examination, Villarreal did not question Dr. Farley about the 7-14 day time period during which she had estimated the skull fractures and the "organizing" subdural hematoma were likely sustained, although the timing of those injuries was critical to the State's theory of the case and to the defense theory that Acela had harmed the child while Manuel was in Memphis. Dr. Farley was not confronted, for example, with Dr. Camacho's findings of *chronic* subdural hematomas, indicating injuries several weeks, if not months before Angel's death (*see supra* at 95–100). Nor was she asked about the sudden increase in Angel's head circumference recorded in late July 2005.

The report of Dr. Daniel Brown, the neuropathologist who autopsied Angel's brain at Farley's request, was included as part of Dr. Farley's autopsy report and she twice quoted the neuropathology report in the autopsy report itself. (11/3/05 Autopsy Report of Angel Moreno at 3, 5 [Appx 58]) Dr. Farley was not asked whether the "organizing subdural hematoma membrane . . . with dense fibrovascular connective tissue" described by Dr. Brown in his report

(Neuropathology Autopsy Report of Dr. Brown at 7 [Appx 2]) would have been observed within two weeks of the injury. As noted above, Dr. Brown has indicated those terms indicate the hematoma was at least two weeks and perhaps several months old. (Brown Aff. ¶ 13 [Appx 2])

Villarreal also did not ask Dr. Farley about Angel's pediatric records showing a sick baby with a dramatic increase in head circumference from June to July 2005. Other medical principles and ways to challenge the State's theory of the case not addressed in Villarreal's cross-examination of Dr. Farley are discussed *infra* at Part One II.B.1.

Dr. Farley testified in response to Villarreal's questions that the child's fatal injuries were consistent with his being "struck, thrown against a surface or beat about the head, with hands or feet or against a surface unknown." (17 RR 42–43) The injuries, she stated, were consistent with a person having admitted to beating, slamming, swinging, throwing the child, or drumming him against a hard surface. (17 RR 43–45) Villarreal did not, however, offer evidence detailing Acela's guilty plea to striking the child with an object or against a hard surface. Rather, Villarreal merely confirmed that Dr. Farley could not "tell the jury who inflicted those blows to . . . baby Angel." (17 RR 38)

b. Dr. Vincent DiMaio.

The prosecutor elicited the identical timeline of the injuries from the State's second pathology expert, Dr. Vincent DiMaio, and the prosecutor again emphasized the timeline repeatedly. (17 RR 124—"Essentially what you have is two clusters of injuries which are separated by a time span of one to two weeks."); (17 RR 125—"the injury is somewhere between one and two weeks of age"); (17 RR 126—"And, again, this is consistent with the one to two weeks of the skull fractures."); (17 RR 128—"we know the child survived one to two weeks").

Dr. DiMaio had not examined Angel, but reviewed documents provided by the State. He agreed with Dr. Farley's conclusion that Angel had two skull fractures that showed evidence of

healing indicating they occurred one to two weeks earlier, and a fresh hemorrhage (bleeding) on the left side of the brain indicating more recent trauma. (17 RR 127–128, 135) Dr. DiMaio insisted that Angel's injury (without specifying which injury) was due to severe impact and could not have happened from falling off the sofa. (17 RR 136–38) Dr. DiMaio testified that the evidence of fresh bleeding "indicate[d] there has been [an] incident of severe trauma within minutes *or a few hours* of the child being found unconscious" on October 31. (17 RR 135, emphasis added) He opined that Angel died of blunt force injury to the brain caused by the combination of the old injury and the new impact. (17 RR 137) Dr. DiMaio concluded that the most likely explanation for Angel's injury was that someone had thrown him against something like a floor or a wall, rather than someone striking him with their fists. (17 RR 137–38) Dr. DiMaio's written report (State's Ex. 65) was admitted without objection. (17 RR 140)

On cross-examination, Villarreal confirmed that Dr. DiMaio agreed with Dr. Farley's autopsy report, that he believed Angel's death was caused by someone throwing or slamming Angel against a wall rather than by shaking, and that he did not have an opinion on who "committed the foul deed" and caused Angel's death. (17 RR 140–44) Villarreal did not otherwise cross-examine Dr. DiMaio. He did not, for example, ask Dr. DiMaio about the reference in his own report to chronic subdural hematomas. (State's Ex. 65 at 1) Nor was he asked to confirm the definition of "chronic" in his textbook as manifesting "more than three weeks after injury." DiMaio, FORENSIC PATHOLOGY at 167.

3. Defense case-in-chief.

Villarreal called three witnesses in the defense case-in-chief: Dr. Michael Rabin (a forensic psychologist), Maria Hernandez (Velez's former common-law wife), and Robert Chavez (Velez's fellow inmate at the Cameron County jail). No medical evidence was offered, nor any evidence of Moreno's neglect and abuse of her children, including Angel.

a. Dr. Michael Rabin.

Villarreal called Dr. Michael Rabin as the first defense witness at trial. Dr. Rabin, a forensic psychologist specializing in criminal matters, had previously testified during the pretrial hearing on Velez's motion to suppress his statements. (*See supra* at 48–49) At trial, Dr. Rabin testified regarding his experience, training, and qualifications, emphasizing his focus on Miranda warnings and the importance of a defendant understanding the rights being waived. (17 RR 154–56) Dr. Rabin testified that he had been appointed by the Court and recognized by Judge Limas as an expert witness at an earlier stage of the proceedings. (*Id.* at 160)

Defense counsel's direct examination of Dr. Rabin focused on the materials Dr. Rabin reviewed, the tests he performed on Mr. Velez, and the issues he was testing for, including organic brain injury, executive functioning deficits, intelligence level or IQ, memory functioning, personality problems, malingering, and understanding and waiving *Miranda* rights. (17 RR 162–81) Dr. Rabin testified that Velez was not malingering, or faking, but was honest in performing the tests Dr. Rabin gave him. (17 RR 166) Regarding intelligence level, Dr. Rabin testified that Velez was mentally retarded when tested in English and borderline mentally retarded—between below average and mental retardation—when tested in Spanish. (*Id.* at 168–69, 180) According to Dr. Rabin, Velez had problems with all levels of comprehension because Velez cannot learn and recall new information. (*Id.* at 168–69)

Dr. Rabin testified that Velez's ability to read Spanish was at the kindergarten level and his ability to understand Spanish was at the fourth grade level while his ability to read English was at the second grade level and his ability to understand English was at the kindergarten to first grade level. (17 RR 169–70) Dr. Rabin further testified, based on the findings of Dr. Arredondo, that to understand the statements Velez allegedly made to the police (State's Exhibit 64 and Defense Exhibits 2 and 4), Velez would need to read at the level of a sophomore

in high school. (*Id.* at 171–72) In Dr. Rabin's opinion, Velez could not read and understand the statements he allegedly made. (*Id.* at 173–74) Dr. Rabin testified about what Miranda concepts Velez could and could not understand, concluding that Velez could not knowingly have waived those rights. (*Id.* at 175–77, 180–81)

On cross-examination, although Dr. Rabin's report shows that Mr. Velez is mentally retarded in English and borderline mentally retarded in Spanish, the State got Dr. Rabin to acknowledge that, based on his testing, Mr. Velez was not mentally retarded. (17 RR 181–82) The prosecutor then emphasized that all the information Dr. Rabin received during the actual testing necessarily came from Velez, and walked through some of Velez's answers on which Dr. Rabin relied to reach an opinion as to whether Velez could understand and waive his *Miranda* rights. (*Id.* at 184–90) The State ultimately established that Velez understood certain concepts pertaining to some rights under the administered tests. (*Id.*) The State highlighted language in Dr. Rabin's report suggesting that because Velez does not comprehend complex situations, he may act impulsively. (*Id.* at 192–94) The State also established that Velez understands reality and knows right from wrong. (*Id.* at 195)

On redirect examination, Villarreal offered Dr. Rabin's full report as Defense Exhibit 6, suggesting that the prosecutor had selectively read portions of the report to "trip you up" Dr. Rabin. (17 RR 199) The prosecutor's objection to Villarreal's comment was sustained, but the report was admitted. Villarreal established that all of Dr. Rabin's conclusions and the basis for those conclusions were contained in the report and that, if the jury wanted to take the report into deliberations with them, they could get the full context of the opinion. Villarreal did not, however, identify portions of the report the jury should consider or otherwise highlight any of the conclusions in Dr. Rabin's report that were helpful to the defense case. Interestingly, defense counsel then buttressed the State's line of questions establishing that just because Velez

functions at the retarded level in English does not mean he is retarded. (17 RR 201–02) In conclusion, Dr. Rabin testified about the "Grisso" protocol for appreciating *Miranda* rights that was administered to Velez, explained how the test is scored and that it is standardized, and explained that the tests he administered to Velez are administered by the majority of experts in the field. (*Id.* at 202–04)

b. Maria Hernandez.

As summarized above, Maria Hernandez, with whom Mr. Velez had lived for about five years until they separated in 2004, testified that Mr. Velez had never struck any of the children, including three she had before their relationship began. (18 RR 10–11; *see supra* at 12) Other than this fact and her agreement that Velez was "just not that kind of person to hurt a kid" (*id*. at 16), she was not asked, and thus did not provide, any details about Velez's care for or relationship with children, as discussed *supra* at 12–13. Nor did Villarreal ask her any questions about Acela's treatment of children, including Velez' s son Jose Manuel. (*See supra* at I.A.2)

Cross-examination by the State focused on portions of Velez's statements mentioning that he "did bite the baby Angel Moreno on the cheek and on his buttocks three days ago" and that the child "maybe sustained bruises along his ribs while I played with him by squeezing hard along his rib area." (18 RR 16–17, partially quoting State Ex. 64) Villarreal did not object to Saenz's misquoting of the statement or taking words out of context; nor did he ask to have additional portions read to the witness. (*Id*.) Saenz showed Ms. Hernandez three photographs depicting different parts of Angel's body (State's Exs. 32–34), and—referring specifically to bruises on Angel's torso shown in Ex. 34—said, "According to Manuel, he caused that." (18 RR 18) Villarreal's objection was sustained, but the jury was not asked to disregard Saenz's unsupported assertion. (*Id*.) Saenz went on to ask Ms. Hernandez "what happened to that baby?" (*Id*.) Villarreal's objection was again sustained. (*Id*. at 18–19) Finally, after a

confusing exchange about when Ms. Hernandez and Velez got together (*id*. at 19–21), Saenz elicited the information that when they separated in 2004, her children (not fathered by Velez) were eight, seven, and three years old (*id*. at 22). Villarreal asked no questions on redirect.

c. Robert Chavez.

Robert Chavez had been a cell mate of Velez for approximately four months in 2008. (18 RR 34) Mr. Chavez testified that he sometimes had difficulty communicating with Velez because they spoke different languages, that he never saw Velez read a newspaper or magazine or write a letter, and that Velez could not "hold a conversation" in English. (*Id*. at 34–35)

On cross examination by the State, Chavez admitted that he spoke Spanish, but said it was "mediocre" and needed someone to translate certain words. (*Id*. at 37) He and Velez were able to communicate by teaching each other words they didn't normally use. (*Id*. at 37–40) After one clarifying question on redirect, Chavez was excused, and the defense rested. (*Id*. at 40–41)

4. State's rebuttal witnesses.

The State called two former inmates to rebut the defense's evidence that Manuel could not read English at a level sufficient to comprehend the nature of *Miranda* rights and thus did not knowingly waive those rights. These were the same witnesses who testified for the State at the suppression hearing, Brian Martin and David Bradshaw.

a. Brian Martin.

Brian Martin testified he had been incarcerated with Manuel from December 5, 2006 to mid-March of 2007. (18 RR 52) Martin testified that he did not speak Spanish, but he spoke with Manuel in English on a daily basis and had no trouble communicating with Manuel. (18 RR 52–53) According to Martin, Manuel read portions of the *Valley Morning Star* to other inmates that did not speak English. (18 RR 54) Manuel asked Martin to write a letter for him

and, after Martin did so, Manuel read the letter and discussed its contents with him. (18 RR 55–56) Martin also testified (without objection) that Manuel did not "appear" to be mentally retarded. (15 RR 52–53, 54–57) On cross-examination, the only question Villarreal asked Martin is whether he had "ever told a lie before." (18 RR 58) Villarreal did not ask any questions about the plea bargain Martin had struck with the State in exchange for testifying against Velez. (The State's breach of its duties under *Brady v. Washington* by withholding material impeaching evidence is discussed in Part One IV.D.3, *infra*, at 215.)

b. David Bradshaw.

David Bradshaw testified he had been incarcerated with Manuel at the county jail for four months during the fall of 2007. (18 RR 43–44) Bradshaw stated he is fluent in Spanish and English, and routinely spoke with Manuel in both languages. (18 RR 45–46) Bradshaw stated he believed Manuel understood English because they used to read and discuss newspaper articles that were written in English. (18 RR 46–47) Bradshaw also testified (without objection) that Manuel did not "appear" to be mentally retarded. (18 RR 48) On cross-examination, the only question Villarreal asked Bradshaw is "when did you get your degree, your doctorate degree in forensic psychology?" (18 RR 49) After re-direct, Villarreal asked Bradshaw whether he had "any evidence to contradict what a 30 year forensic psychologist concluded in his testing?" (18 RR 51) (The State breached its *Brady* obligations concerning Bradshaw, as discussed *infra* at 220)

5. Closing arguments.

After the Court read the Charge to the jury,[15] the case proceeded to closing arguments. (18 RR 82–97) The themes articulated by counsel in closing arguments echoed the approaches taken by the State and the defense in their opening statements and the presentation of evidence.

a. Initial remarks by two prosecutors.

The State's closing argument was presented by three prosecutors—two 10-minute statements, and (following Villarreal's closing for the defense) a 20-minute rebuttal by Special Prosecutor Saenz. First, Assistant District Attorney Steven Eckert told the jury, "Manuel Velez is the epitome of cruelty and cowardness [sic]." (18 RR 97) Eckert sought to show that Velez "intentionally and knowingly" killed Angel by striking his head by reminding the jury of evidence that the child had "burn marks" that might have been caused by a cigarette and a lighter, as well as other bruises. (*Id*. at 98–99) He also summarized the medical testimony concerning Angel's head injuries—caused by striking, not "shaken baby." (*Id*. at 100–01)

Eckert then discussed Velez's statement, and said it "corroborates Acela's story" and shows Velez was "in control" of the scene and "decides when he is ready to go wake her up to go get help." Eckert boldly proclaimed Velez's "second statement . . . that the defense entered . . . [is] a fraud . . . a fraudulent document." (*Id*. at 100–01) After noting some discrepancies between the two versions of the statement, Eckert suggested that the two-page version "is a document that somebody with a copy machine can come back and just a little bit of effort can go back and try to forge a document." (*Id*. at 101–02) Villarreal did not object to the complete absence of evidence supporting Eckert's accusation.

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[15] Trial counsel's failures concerning the Court's Charge are identified *infra* at 170.

Eckert next focused on an isolated paragraph in Dr. Rabin's report, in which he summarized a report of Velez's criminal history, including a conviction for felony forgery involving a government check—which Eckert used to insinuate that Velez himself might have created the second statement (while in prison?). (*Id*. at 102) Finally, Eckert accused Velez of "putting on an act" by using headphones to listen to the court-provided translator at trial—based on Eckert's assertion that pictures of the home showed "an English newspaper." (*Id*. at 103)[16]

Eckert was followed by another Assistant District Attorney, Gabriella Garcia, who started by claiming: "Now, the defendant wants you to give him a break. I didn't do it. But if I did do it I didn't mean to do it." (18 RR 104) Villarreal objected immediately to Garcia's criticism of the Court's Charge, and Judge Limas instructed Garcia to "stay within the law and within the record."

Garcia went on to cite certain "admissions" in Velez's statement, and began to comment, "The only thing that the defendant didn't want to talk about in his statement—. . ." when Villarreal interrupted with an objection "to the comment on [his] client's fifth amendment rights." (*Id*. at 105) Judge Limas removed the jury, heard argument from counsel, overruled the defense objections, and denied a defense motion for mistrial. (*Id*. at 105–10)

After the interruption, Garcia continued by discussing references in Velez's statement to playfully biting the baby or throwing him up "with force because he was trying to get it to laugh." (*Id*. at 111) Garcia insisted "we all know" such actions are "unacceptable" and "can harm a baby." (*Id*.) She suggested this proved Velez "knew exactly what he was doing. He wanted to hurt that baby . . . he wanted to kill that baby." (*Id*.) According to Garcia, when

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[16] *See* State's Ex. 45–46. No testimony identified the nature or source of the depicted document, which may be a bulk mail item.

Angel "would see that defendant, he would cringe and he would cry. He'd hold on to his mother because he was looking for her to protect him . . . from that defendant." (*Id*. at 112) This assertion provided a segue to a discussion of Moreno's testimony of the nature of her guilty plea:

> [Angel's] mother let him down. His mother did not protect him. His mother did not call the police. His mother only told the defendant don't do it. . . . She let him down just like many other women that protect the aggressors because that aggressor is the one who pays the rent, is the one who pays the light bill, is the one that's going to take me to the doctor with a baby. She made bad choices and because of those choices that she made, she is doing her time. She accepted responsibility for her inaction.

(*Id*.) After invoking a mother's presumed care and empathy for her own child's pain, Garcia responded to Villarreal's repeated question "Do you know who did it?" by noting there were only "two adults in that house on October 31st, 2005" and asserting: "Acela admitted to you that she has taken responsibility for not protecting her child from the defendant. She's also telling you that she knows the defendant Manuel Velez is the one that killed her baby." (*Id*. at 113) Garcia concluded by asserting that Velez "inflicted blows so hard to that baby that didn't even give him a chance to cry but those blows put baby Angel out of his misery." (*Id*. at 114)

b. Defense closing.

Villarreal's closing argument for the defense had no coherent theme. He began by urging the jury, "Try to recall what I told you [in opening] was going to happen in this trial and see if I have not been a man of my word." (18 RR 114–15) But rather than review the evidence and show how it supported a not-guilty verdict, Villarreal kept the focus on himself—his 30 years of experience, the work he and his "team" had supposedly done, his love of his children, and how his "heart goes out to baby Angel." (*Id*. at 115–16)

After being interrupted by a fire alarm test and repeated objections by Saenz, Villarreal rambled with no apparent purpose for several minutes, touching briefly on bits and pieces of the

evidence, including Moreno's "deal," the State's "seven to 14 days" timeline (which he accepted and highlighted), the lack of any noise or blood at the scene, the paramedic's hearsay statement that he "heard the husband threw the baby into the wall," the autopsy photos, the "unknown surface" referenced in the indictment, the lack of "diffuse axonal injury," and Dr. Rabin's testimony that Velez could not read or understand the statements he signed. (*Id*. at 127–35) He concluded with a plea for the jury to find reasonable doubt and "send a message" to the State by finding Velez not guilty on all counts. (*Id*. at 132–33)

c. Rebuttal by the State.

In Saenz's summation at the close of the culpability phase of the trial, he repeated the argument that the two-page version of Velez's "statement is a fraud" introduced by the defense. (*Id*. at 138–39) In an effort to suggest motive for Velez to kill Angel, Saenz quoted Dr. Rabin's comment that Velez "will act impulsively." (*Id*. at 139) Saenz also claimed, "Angel didn't like [Velez] and he knew that. . . . Angel would cry when he would get close and hold him." (*Id*. at 140)

Saenz then stated the crux of the State's case against Velez:

> October 18 of '05, very significant. Why? Because baby Angel is with Dr. Zamir, and . . . he sees no injuries. . . . But what else happens October 18? . . . They move into the house. . . . Prior to this time they've been living . . . at different places . . . with somebody else. . . . The defendant leaves on September 10th comes back around 14th of October. . . . So the baby is fine on October 18. He's a healthy little baby, 70 percentile. So what happens on October 18? . . . The defendant is in the picture and they move on October 18 to the house. Now he is by himself with the baby. . . .
>
> [T]he very next day, this defendant breaks his skull. . . . How do we know? Because there's an autopsy done . . . and the doctor says from the 2nd when he was alive these fractures are two weeks old. . . . So you go back from November 2nd two weeks boom, October 19. The very next day . . . after they are in the house when nobody can see, he breaks his skull.

(*Id*. at 141–44)

Saenz continued to emphasize the timeline and bolstered the medical evidence that supposedly showed that the injuries could only have occurred during the two weeks before the child's death when Velez was in Brownsville living with the child at Vermont Circle:

> Ladies and Gentlemen, please look at all the evidence, look at the exhibits, look at this. Remember this calendar here the 19th, I submit to you those are when—that's not me, it's the doctor saying they're two weeks old. Two weeks old on the day of the autopsy saying from the date that he is still alive. You go back two weeks, the 19th. Who is in the picture on the 19th? Manuel Velez. Who was not there before the 18th? Manuel Velez. Over here when the baby is not injured? Who's not in the picture? Manuel Velez is not there. We start getting injuries, who is in the picture? Manuel Velez.

(*Id*. at 150–51) ("How awful for a child two weeks before he turned one to suffer the injuries that you see before you."); (*id*. at 141–44) (reviewing timeline); (*id*. at 148–49) ("We're talking about thirteen days. Thirteen days. Every other day this baby was getting an injury. . . . This is thirteen days of hell. Thirteen days of hell in the hands of this man until finally, till finally God stepped in and said you know what, no more. No more."); (*id*. at 141) (relying on his calendar to write dates on a board for the jury).

Saenz also emphasized Moreno's false testimony about her guilty plea, claiming that her only failure "was not [to] advise people, not [to] call the police and for that you get 10 years maximum and that's what she got." (*Id*. at 148–49; *see also id*. at 112 (similar)) Saenz concluded by challenging the credibility of the defense and urging the jury to "step up" and "do something about" crime in society. (*Id*. at 151–52)

6. Jury questions & verdict.

During deliberations on October 23, 2008, the jury sent handwritten notes to Judge Limas asking to review certain evidence and witness transcripts. (10/23/08 Jury Notes; 3 CR 399–400)

The jury requested the following evidence: Dr. Rabin's report, both of Manuel Velez's statements, and Acela Moreno's video and accompanying transcript. (*Id*.) The jury requested the testimony transcripts of Dr. Rabin, Dr. Farley, and "Dr. Tamayo." (*Id*.)

Judge Limas furnished Dr. Rabin's report and Mr. Velez's statements to the jury. (19 RR 12–13) The court explicitly refused to give the jury the requested transcripts or Acela's video and accompanying transcript. (*Id*. at 13) In regard to Acela's video and transcript, Judge Limas stated "that's like a transcript in the court's opinion," thereby refusing to provide the transcript without a more specific request. (*Id*. at 15) After some discussion, Judge Limas realized that Acela's video and transcript were not testimony; instead, they were evidence. (*Id*. at 16) Despite this realization, the court still failed to provide the jury with Acela's video and transcript. (*Id*. at 21–23)

Later that day, the second note arrived. The jury requested to review the diagram of the house and Acela's transcript where she states "that Manuel harmed her child."[17] (10/23/08 Jury Note; 3 CR 400) The jury received the sketch of the house as requested. (19 RR 23) But the court never provided the jury with Acela's video and transcript. (*Id*. at 16, 21–22) Without ever receiving the evidence it had requested through two separate notes, the jury reached a verdict and convicted Mr. Velez of capital murder. (19 RR 23–25)

E. Trial—Punishment Phase.

Judge Limas, with no objection by defense counsel, attempted to begin the punishment phase twenty minutes after the guilty verdict was read. It was only due to a dispute over the proper role of alternate jurors that the punishment phase began the next morning. (19 RR 24–41)

[17] While Acela also testified at trial (16 RR 68–110), the court interpreted this second note to refer to the video and accompanying transcript. (*See* 19 RR 17–18)

The punishment phase of Mr. Velez's trial was a perfunctory proceeding conducted on October 24, 2008. The presentation of evidence was concluded by lunch time, and after hearing closing arguments limited by Judge Limas to 15 minutes per side (20 RR 134, 151–52), the jury returned its verdict and Judge Limas sentenced Mr. Velez to death. The punishment phase proceedings are described in further detail in Part Two of this Application, *infra* at 242–44.

F. Post-Judgment Proceedings and Events.

1. A successor judge, who did not preside at the suppression hearing, entered findings of fact and conclusions of law over two years after the hearing.

As discussed above, trial counsel argued at a hearing on October 6, 2008 to have Velez's alleged voluntary statements suppressed for trial. (1 SCR5 155) The motion was denied, but Judge Limas did not enter Findings of Fact and Conclusions of Law as required by Texas Code of Criminal Procedure art. 38.22 § 6, despite counsel's request. (12 RR 58)

The lack of the required findings and conclusions was brought to the attention of the Texas Court of Criminal Appeals in 2010. On February 24, 2010, the Court of Criminal Appeals ordered this Court to prepare the missing Findings of Fact and Conclusions of Law. (2/24/2010 Order [Appx 128]) Thereafter, on May 4, 2010, this Court (Judge Lopez) wrote a letter to the Court of Criminal Appeals stating, "I am unable to comply with such court order as I did not preside over this case. . . . Since I did not try this case, I could only simply recite that which the court already knows from the docket sheets, the pleadings, and the record." (5/4/2010 Letter from Judge Lopez to the Court of Criminal Appeals [Appx 129])

At a subsequent hearing, Judge Lopez reiterated this concern. (1 SRR4 8) The Court asked the State and direct appeal counsel for Velez to submit proposed findings of fact and conclusions of law and informed the parties that the Court would request the Presiding Judge of

the Fifth Judicial Region to assign Judge Limas to prepare the findings. (*Id*. at 9) Judge Limas was not appointed, and did not prepare such findings.[18]

On December 17, 2010, Judge Lopez entered Findings of Fact and Conclusions of Law, concluding that the written statement "was freely and voluntarily made, without any coercion, threats, force, or intimidation; and therefore, said statement is admissible at trial." (1 SCR5 155–59) The Court specifically found that Mr. Velez read through his written statement, was able to communicate in the English language, and could read and understand English sufficiently to understand his statement and the waiver of his *Miranda* rights. (*Id.*) In the accompanying letter to the Court of Criminal Appeals, Judge Lopez reminded the Court that she "was not the judge who presided over the above referenced case" as she submitted her Findings of Fact and Conclusions of Law. (1 SCR5 160)

Despite the fact that two different statements were the subject of the hearing on the Motion to Suppress and both were utilized at trial, nothing in the Findings of Fact and Conclusions of Law addresses the two conflicting statements.

On January 3, 2011, Mr. Velez's direct appeal counsel objected to the Court's issuance of the Findings of Fact and Conclusions of Law (on the grounds that it was improper for a judge who was not present at the hearing to enter findings)[19] and requested a *de novo* hearing on the Motion to Suppress. (SCR8 9–13) On January 19, 2011, this Court granted the request for a hearing, rescinding the Findings of Fact and Conclusions of Law entered on December 17, 2010. (SCR8 15)

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[18] A few months later, Judge Limas was indicted for corruption and racketeering. (*See infra* at 74, 234–36)

[19] When a hearing is held under art. 38.22 § 6, the findings and conclusions must be made *by the same judge* who conducted the hearing because it requires assessments of credibility and demeanor which can only be performed by the judge who conducted the hearing. *Garcia v. State*, 15 S.W.3d 533, 536 (Tex. Crim. App. 2000).

On February 14, 2011, the State filed a Petition for Writ of Mandamus, seeking to compel this Court to vacate its January 19, 2011 order. (2/14/11 Petition [Appx 130]) On February 16, 2011, the Court of Criminal Appeals entered an order finding that this Court had no authority to rescind its Findings of Fact and Conclusions of Law and that this Court had no authority to grant a *de novo* hearing on the Motion to Suppress, making the Petition for Writ of Mandamus moot. (2/16/11 Per Curiam Order No. AP–76,051 [Appx 131]) The Court of Criminal Appeals accepted the December 17, 2010 Findings of Fact and Conclusions of Law, which constitute the official record of this matter.

2. Judge Limas's corruption was finally exposed.

The Brownsville office of the Federal Bureau of Investigation began its investigation of Judge Abel Limas for corruption and bribery in May 2007. Limas was indicted on March 29, 2011. (Judge Limas Indictment [Appx 117]) Two days later, he pled guilty to racketeering by soliciting, extorting, and accepting bribes. Limas was indicted on eight counts of racketeering involving numerous wrongful acts in which he accepted money in exchange for favorable rulings and appointments in judicial proceedings. Limas admitted to each of those charges and admitted to receiving approximately $257,300 in bribes and extortion. (*See* 4/14/11 Plea Packet Memo [Appx 118]) Several of Limas's associates have also been indicted in connection with his criminal conduct and many more are under investigation. In fact, a former bailiff of Judge Limas who was an investigator with the Cameron County District Attorney's Office and worked on the *Velez* case was indicted. (*See* 2/13/11 Press Release of U.S. Attorney's Office [Appx 108]) Details of the specific incidents supporting Limas's conviction and the indictment of his former bailiff who worked as an investigator on this case for the District Attorney's office are described *infra* at Part One V.A.1.

3. New medical evidence discovered after trial negates the State's theory that all of Angel's injuries occurred in a two-week period.

As detailed above, the State relied on medical testimony estimating that Angel's head injuries were incurred no more than two weeks before his death. (*See supra* at 51–58, citing testimony of Drs. Norma Farley and Vincent DiMaio) Numerous medical experts disagree with such testimony and have concluded that Angel's older injuries were inflicted more than two weeks prior to his death.

a. The older subdural hematoma and the skull fractures were inflicted at least 18 days, and perhaps longer, before Angel's death.

Dr. Daniel Brown—the neuropathologist who autopsied the victim's brain for the State and whose report was included in evidence in this matter—has recently explained that it was his opinion **at the time of his report** in 2006 that the injuries were more than two weeks old and that the language used in his report expressed this conclusion. (Brown Aff. ¶ 13 [Appx 2] ("It was my conclusion then that the 'organizing subdural hematoma' referred to in my report reflected injuries that occurred anywhere from two weeks to six months before death.")

Because Dr. Brown had never been asked to date the older hematoma, habeas counsel asked Dr. Brown to perform an additional analysis of the pertinent slides of Angel's brain. (*Id*. ¶ 14) Dr. Brown's recent analysis "indicates that the histologic changes in the portion of dura and membrane sample represent an organizing subdural hematoma that was approximately **18 days to 36 days old** as of the date of death." (*Id*. ¶ 15, emphasis added) Dr. Brown thus opines "from the tissue analysis that the older injuries in the brain of Angel Moreno were **older than two weeks**." (*Id*. ¶ 16)

This conclusion is supported by the findings and opinions of Drs. Ophoven, Spitz, and Uscinski that the older subdural hematoma occurred more than two weeks prior to death. (Uscinski Aff. ¶¶ 8–9 [Appx 4]; Ophoven Aff. ¶¶ 18–21 [Appx 3]; Spitz Aff. ¶ 9 [Appx 5]; *see*

also Rose Aff. ¶¶ 8, 13 [Appx 8]) In addition, Drs. Ophoven, Spitz, and Uscinski examined the medical evidence–including the slides of the skull fractures–and have all independently concluded that Angel's skull fractures were inflicted more than two weeks, possibly months, prior to death. (Uscinski Aff. ¶ 12; Ophoven Aff. ¶¶ 15–17, 21; Spitz Aff. ¶¶ 9–10; *see also* Sirotnak Aff. ¶ 17; Rose Aff. ¶¶ 8, 13) New medical evidence developed in this case (based on contemporary records and analysis of preserved tissue slides) thus demonstrates that the older subdural hematoma and the skull fractures were inflicted more than two weeks prior to Angel's death.

b. Angel's pediatric records show he suffered severe head trauma prior to late July 2005.

Mr. Velez's trial counsel never sent Angel's pediatric records to a pediatrician or any other doctor for review. (Flores Aff. ¶ 16) Those records have now been reviewed by several doctors, including one certified in Child Abuse Pediatrics and another specializing in Pediatric Forensic Pathology. Those doctors have opined that, because there is no evidence of a brain tumor or hydrocephalus, **"the only explanation"** for the dramatic increase in the circumference of the victim's head from June to late July 2005 is violent trauma to the victim's head that occurred at some time before the increase was recorded. (Sirotnak Aff. ¶ 13; Ophoven Aff. ¶ 25; Uscinski Aff. ¶ 13; *see also* Lukefahr Aff. ¶¶ 10–11) New medical evidence developed in this case (based on contemporary records not reviewed by other doctors at the time) thus demonstrates that Angel must have suffered violent trauma to the head prior to late July 2005—completely contradicting the State's entire theory on which Mr. Velez was convicted.

Accordingly, and as set forth below in detail, new medical evidence **from five different experts** conclusively shows that several older injuries to the victim, particularly the most serious head injuries, were inflicted at a time well outside the two-week period posited by the State.

ARGUMENTS AND AUTHORITIES

PART ONE
ERRORS JUSTIFYING RELIEF—PRETRIAL AND CULPABILITY PHASE

The facts detailed above reveal countless errors of constitutional magnitude—committed by the trial judge, the State, and defense counsel—which, individually or collectively, mandate that Manuel Velez be awarded a new trial to be conducted in accordance with constitutional standards. Alternatively, because the evidence conclusively establishes his actual innocence of the crime for which he was convicted, that conviction should be vacated and Mr. Velez should be released from his confinement.

I. NEW EVIDENCE ESTABLISHES THAT MANUEL VELEZ IS INNOCENT OF THE CAPITAL MURDER CHARGE FOR WHICH HE WAS CONVICTED.

As shown above, the State's case against Manuel Velez, admittedly entirely circumstantial, was premised on two fundamental assertions:

(1) Fourteen days before his death Angel Moreno was a healthy uninjured child, and

(2) All of the injuries suffered by Angel that ultimately resulted in his death were inflicted in the last fourteen days of his life.

According to the prosecution, two weeks before Angel died, Mr. Velez returned from Tennessee, where he undisputedly had been working for approximately 5 weeks, and for the first time had the opportunity and began to abuse Angel by inflicting all the injuries he was later found to have suffered. The State's brief on direct appeal confirms that Velez's conviction is predicated on the State's theory that Angel showed "no signs of abuse" between June 2005 and October 18, 2005, and that all of the child's injuries occurred after that date. (State's App. Br. at 4; *see also id*. at 35 (arguing that "first episode of significant head trauma . . . occurred on October 19, 2005")) The prosecution insisted that Velez had no opportunity to inflict injuries on Angel before he and

Moreno moved to the house on Vermont Circle on October 18, because they were always living with other people, or in a neighborhood where any abuse would have been observed by friends or family members. (14 RR 19–20; 18 RR 142–43; *see also* State's App. Br. at 3–4, 31 (speculating that the "watchful eye" of Acela's sister Magnolia Medrano prevented abuse)) Relying on the testimony of Dr. Farley and Dr. DiMaio (described *supra* at 55–58), the State convinced the jury that Angel suffered two incidents of blunt force head trauma, the first of which occurred no more than fourteen days before he died, *i.e.*, no earlier than October 19, 2005. (17 RR 26, 28–29) This is the factual theory on which Velez's conviction was founded, and the judgment must stand or fall on the strength or weakness of the State's theory.

Both of the State's core propositions are demonstrably false and ignore significant evidence, some of which the prosecution was aware at the time. Had they heard all the evidence, including the new evidence discovered by habeas counsel, the only conclusion a reasonable juror could have reached is that the State had failed to prove beyond a reasonable doubt that Mr. Velez is guilty of the murder of Angel Moreno.

A. The Law of Actual Innocence.

Texas law establishes that an actual innocence claim may be raised in a habeas petition. *Ex Parte Elizondo*, 947 S.W. 2d 202, 205 (Tex. Crim. App. 1996); *Robbins v. State of Texas*, No. AP-76,464, 2011 Tex. Crim. App. LEXIS 910 (Tex. Crim. App. June 29, 2011). There are two types of actual innocence claim that may be raised. One is a "bare innocence" claim, *i.e.*, a substantive claim in which innocence is argued based on newly discovered evidence that was not introduced at trial. The second is a procedural claim that is accompanied by constitutional error in the underlying trial and serves as a "gateway" to consider claims that otherwise would be

barred or deemed waived. *Elizondo*, 947 S.W.2d at 208 (citing *Herrera v. Collins*, 506 U.S. 390 (1993)); *Schlup v. Delo*, 513 U.S. 298 (1995)). Both types of claim are asserted here.

A claim of actual innocence must be recognized so that a "fundamentally unjust incarceration" may be corrected, *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002), where the evidence upon which the claim is based creates a doubt as to the efficacy of the verdict that undermines confidence in it. *Elizondo*, 947 S.W.2d at 206. In a bare innocence claim the petitioner must show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. *Id*. at 209. With a *Schlup* type claim, however, the petitioner need only show that it is more likely than not that no reasonable juror would have convicted and the court must then consider the underlying claims of error, whether waived at trial or not. In the *Schlup* circumstance it must be presumed that a reasonable juror would consider fairly all of the evidence presented and would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt. *Schlup*, 513 U.S. 298 at 837. Considering all the evidence, including new evidence described herein, and in light of the constitutional errors described in this application, there can be no doubt that a jury would not have found Manuel Velez guilty beyond a reasonable doubt. His conviction and death sentence therefore violate the due process clause of the Fourteenth Amendment to the United States Constitution.

B. New Evidence.

The new evidence discovered by habeas counsel (*see supra* at 78–82) proves that Angel Moreno was not a healthy and uninjured child as of October 18, 2005, contrary to the assertions of the prosecution and the testimony of Dr. Zamir. And the injuries inflicted on him that resulted in his death were not all inflicted in the last 14 days of his life, contrary to the testimony of

Drs. Farley and DiMaio. Though the prosecution claimed that it was Manuel alone who abused the baby, it is clear that Acela abused Angel and her other children, and that she or the abusive Juan Chavez likely inflicted the injuries that caused death.

1. Angel was not a healthy, uninjured baby on October 18, 2005.

As described in the Statement of Facts, the prosecution, defense counsel, and Dr. Zamir's office all completely missed the significant change in head circumference in July 2005, over three months before Angel's death, a change explained only as caused by violent head trauma. The affidavits of Dr. Andrew Sirotnak and Dr. James Lukefahr, both heads of major child abuse centers, establish that a change in head circumference (sometimes denoted as "FOC" for frontal occipital circumference) in less than 30 days from the 50th percentile to nearly the 100th percentile could only have occurred here as the result of a violent head trauma, since the autopsy results rule out other possible explanations such as hydrocephalus or brain tumor. (Sirotnak Aff. ¶ 13 [Appx 7]; Lukefahr Aff. ¶ 10 [Appx 6])

As explained by Drs. Sirotnak and Lukefahr, a pediatrician should regularly record the FOC in children and should likewise plot the changes in FOC to note any significant increase. (Sirotnak Aff. ¶ 14; Lukefahr ¶ 11) While Zamir's office recorded the head circumference, they did not regularly plot the change and thus missed the "red flag" that occurred in June-July 2005. As Dr. Sirotnak notes, had the change been noted, a competent pediatrician's office would have ordered a CT scan or MRI to determine the cause for the alarming change. (Sirotnak Aff. ¶ 14) This was never done because Dr. Zamir's office missed the "red flag." And even though the pediatric records were provided to both Dr. Farley and Dr. DiMaio (9/12/08 Letter from Steven Eckert to Dr. Farley [Appx 97]; 2/27/08 Letter from Steven Eckert to Dr. DiMaio [Appx 95]), the increase was never recognized and the prosecution's portrayal at trial of a perfectly healthy

child fourteen days before death was false. This falsehood was not exposed at trial because Villarreal presented no medical evidence and did not ask Dr. Zamir a single question.

In addition, the medical records show that, between June 11, 2005 and September 2, 2005, Angel visited a doctor or was admitted to the hospital at least ten times with various symptoms including severe and repeated vomiting, fever, stomach and respiratory infections, pink eye, chest congestion, asthma, coughing, constipation and fecal impaction, and dehydration. (*See* Facts I.A.5., *supra* at 22–25) He also suffered from very low protein and albumin levels. (Ophoven Aff. ¶ 45 [Appx 3]) This is a sign of poor nutrition and a lack of protein over time. (*Id*.)

Thus, in direct contradiction to the State's theory of the case and the testimony of Dr. Zamir, Angel was not a healthy uninjured baby on October 18, 2005.

2. Angel's older head injuries were inflicted more than two weeks before his death.

An even more shocking falsity was presented by the prosecutor through the testimony of the State's pathologists. The prosecution called Dr. Norma Farley, the medical examiner who performed the autopsy, and Dr. Vincent DiMaio, who reviewed the records and echoed Dr. Farley's conclusions. Both doctors testified that the head injuries suffered by Angel were inflicted in the last 14 days of his life. Dr. Farley estimated that the skull fractures were, as she put it, "probably seven days to maybe two weeks" old and "not more than 14 days" old. (17 RR 29–30) Dr. DiMaio, who never examined Angel but only reviewed medical records, concurred with Dr. Farley that the fractures were 1-2 weeks old. He testified that the cause of death was blunt force trauma by "combination of the old impact with injury to the brain and the new impact." (17 RR 137:19–21) Dr. DiMaio described the symptoms of these type of injuries as "vomiting, would be kind of sleepy all the time, dopey, you know" (*id*. at 128; *see also* 17 RR

27–28, 32 (Dr. Farley's similar list of symptoms))—exactly the description of Angel Moreno's symptoms in the summer of 2005, although these critical facts were not brought to the jury's attention. (*See supra* at 106–13) And recall that in June 2005, Angel suffered a violent vomiting incident that continued for several days and required two days of hospitalization. All of this occurred a few weeks before the increase in Angel's head circumference became manifest.

Dr. DiMaio's report acknowledges that Angel had a "chronic" subdural hematoma. (State's Ex. 65 at 1) He failed to mention, and defense counsel never elicited the fact, that Dr. DiMaio's own textbook defines a chronic subdural hematoma as one that manifests "more than 3 weeks after injury." FORENSIC PATHOLOGY (2d ed. 2001) at 167.

Neither Dr. Farley nor Dr. DiMaio mentioned in their testimony the report of Dr. Daniel Brown, the neuropathologist who was asked by Dr. Farley to autopsy Angel's brain. Dr. Brown's report was included in Dr. Farley's autopsy report, and Dr. Farley quotes sections of Dr. Brown's report in making her autopsy findings. (11/3/05 Autopsy Report at 3, 5 [Appx 58]) Dr. Brown was the only medical expert to actually examine brain tissue and analyze it. He identified several injuries, including an "organizing" subdural hematoma that he described as a "well-developed subdural membrane with dense fibrovascular connective tissue." (*Id*. at 6–7) No one—not Dr. Farley, not the prosecution, and not defense counsel—asked Dr. Brown for his opinion of the age of the organizing hematoma. Thus, at trial no evidence was presented to the jury to contradict the impression that the brain injuries were all inflicted within 7-14 days.

In fact, as shown in the December 2011 affidavit of Dr. Brown, he believed at the time he issued the report in 2006 that the hematoma was 2 weeks to 6 months old! (Brown Aff. ¶ 13 [Appx 2]) Moreover, that view should have been clear to any doctor reading his opinion. Dr. Brown notes in his affidavit that he used "common" terms to describe the age of the brain injuries and that "acute" denotes 2-3 days, "sub-acute" denotes less than 2 weeks, and

"organizing" indicates two weeks to 6 months. (*Id*.) There can be no question that Dr. Brown in his 2006 report was describing injuries older than 14 days, perhaps much older. And now, as a result of finally being asked to examine the tissue slides, he has concluded that the subdural hematoma was **18 days to 36 days old** (*id*. ¶ 15)—a time period when Manuel Velez undisputedly was in Memphis, Tennessee.

Why did neither Dr. Farley nor the prosecution bother to ask Dr. Brown about the age of the subdural hematoma? Because the State presented a story of Manuel Velez returning from Memphis two weeks before Angel's death, a story of a "healthy little baby" on October 18, who died just 13 days later at the hands of Manuel Velez who had returned from Memphis to immediately begin abusing this child. How did it come to pass that Dr. Farley focused on 7 to 14 days for the age of the brain injuries? Because the prosecutor met with her at least twice (Saenz Letter to Villalobos [Appx 96]), and sent her documents indicating that Velez had been gone more than 14 days before death and of course could not have inflicted injuries older than 14 days. (9/12/08 Letter from Steven Eckert to Dr. Farley [Appx 97]; 10/31/05 Voluntary Statement of Accused, Acela Moreno [Appx 86]) As the prosecutor put it, "you go back from November 2nd two weeks, boom, October 19. The very next day . . . after they are in the house when nobody can see, he breaks his skull." (18 RR 144) This fiction conveniently ignored the analysis reflected in Dr. Brown's report and was further invented by ignoring, or being completely unaware of, the head circumference change as well.

3. Other new evidence supports the medical evidence that Angel had incurred significant head trauma well before October 18.

The prosecution's story also runs afoul of other important new evidence. Witnesses have since stated that Angel's head was disproportionately large and "getting bigger" in the summer of 2005, that he was slow, rarely moved, and his eyes never blinked or only very slowly. (*See*

supra at 25–28; G. Salazar Aff. ¶ 8 [Appx 27]; Y. Salazar Aff. ¶ 8 [Appx 29]; M. Velez Aff. ¶ 15 [Appx 38]; C. Velez Aff. ¶ 5 [Appx 31]) In addition, as mentioned above, medical records show a severe, prolonged vomiting incident requiring hospitalization in June 2005, while Acela was living with the abusive Juan Chavez. (*See supra* at 22–25)

Other direct evidence not available to the defense at trial implicates Moreno. Reports from the Texas Department of Family & Protective Services state that Moreno's other children told their counselors that Acela had harmed Angel. Emily "constantly thinks about her mother in jail and what her mother did to her little brother." (2/7/07 South Texas Family Counseling Report at 1 [Appx 92]) "[W]ith their mother [Emily and Alexis] constantly remember what she did to their brother and they are afraid of her." (*Id*. at 2)[20]

The story told by the prosecution, shaped to fit the small window of time they identified as the only opportunity Manuel Velez had to abuse Angel, ignored important evidence that was inconsistent with the only story the police or prosecutor ever considered. Instead of actually **investigating** the event, within hours the police leapt to their judgment, the prosecutor embraced it, and defense counsel, in a display of gross incompetence, never adequately challenged it. If the new evidence described above were presented to rational jurors there can be no question, under any standard of review, that an acquittal would have resulted.

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[20] These records were requested but not provided to defense. (*See* 9/3/08 Defense Subpoenas [Appx 74]) Villarreal once asked for the court to rule on his request for a subpoena of TDFPS, but he never pressed for a ruling and thus never got the documents. He had in his possession however some documents from TDFPS that Ortega has been able to obtain via subpoena. Thus, Villarreal knew that the court had previously granted the defense's motion for a subpoena of TDFPS; nonetheless, he failed to press the court for a ruling on his request. The documents were, however, in the District Attorney's files. (Habeas Counsel's Certification of Documents Contained in District Attorney's Files [Appx 83])

C. Actual Innocence Analysis.

When new evidence supports an assertion of actual innocence, the court must "assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole . . . [weighing] such exculpatory evidence against the evidence of guilt adduced at trial." *Elizondo*, 947 S.W.2d at 206. Yet, as the prosecution admits, the entire case against Mr. Velez was circumstantial and includes relying on such desperate arguments as the claim that Velez's behavior in not knowing how to call 911 supported an inference of guilt. (Assistant D.A. Rabb, Oral Arg. Tr. at 7–8 [Appx 133]) To the point, the prosecution case rests on nothing more than the fact that Manuel was living with Acela at the time Angel died.

Even the testimony of Acela Moreno, the only witness who could implicate Manuel Velez, rested on a description of the events of October 31 suggesting Mr. Velez may have had the *opportunity* to inflict injuries to Angel. But her testimony and all the other evidence failed completely to show that Mr. Velez had in fact abused the baby. Indeed, Acela herself had the identical opportunity to abuse Angel on October 31, and as shown above she alone had the opportunity to abuse Angel at times when Manuel was not in the picture but when the older injuries were inflicted. This is confirmed not only by the State's expert Dr. Brown, the neuropathologist who examined Angel's brain, but also by four other medical experts—two pediatric forensic pathologists who are board certified in Child Abuse Pediatrics, one neurological surgeon, and a forensic pathologist and medical examiner.

"[I]f the criminal justice system—even when its procedures were fairly followed—reaches a patently inaccurate result which has caused an innocent person to be wrongly imprisoned for a crime he did not commit, the judicial system has an obligation to set things straight." *Ex Parte Thompson*, 153 S.W.3d 416, 421 (Tex. Crim. App. 2005) (Cochran, J., concurring). Here the trial procedures were not fairly followed, as will be shown in the other

parts of this Application. But it is clear that the conviction here is "patently inaccurate" and that the other sparse to non-existent circumstantial evidence cannot support a verdict in the face of substantial error in the medical evidence, itself circumstantial as to Manuel, that supported the verdict. Although the Court of Criminal Appeals has affirmed convictions when the newly discovered evidence was characterized as "twigs of apparently exculpatory evidence . . . [in the face of] the veritable forest of inculpatory evidence," *Ex Parte Swearingen*, 2009 WL 249778, *1 (Tex. Crim. App. 2009), here the exculpatory evidence is a giant oak tree in a meadow virtually barren of inculpatory evidence.

In *Ex parte Elizondo*, 947 S.W.2d at 210, the Court of Criminal Appeals ordered habeas relief where the primary prosecution witness recanted his testimony. The Court noted that "we cannot know beyond all doubt" whether the explanation for the false trial testimony was true but further noted that the new testimony "is not implausible on its face" and that "given the complete lack of any other inculpatory evidence in the case" another jury hearing the case would view the new evidence as the "more credible and would acquit" the petitioner. In *Robbins*, 2011 Tex. Crim. App. LEXIS 910 at *34–35, the Court rejected an actual innocence claim only after weighing the significant and powerful inculpatory evidence against the new exculpatory evidence. No such inculpatory evidence is present in this case and any reasonable jury hearing this case would view the new evidence as the "more credible." The new evidence is "not implausible on its face" and "given the complete lack of any other inculpatory evidence in the case," another jury hearing the case would view the new evidence as the "more credible and would acquit" Mr. Velez. *Elizondo,* 947 S.W.2d at 210. In the face of a complete repudiation of the prosecution theory of the case, a lack of any credible circumstantial evidence of guilt (circumstantial or otherwise), and as will be shown below, gross violations of the defendant's constitutional rights, Mr. Velez must be granted relief.

In any event, under the lesser *Schlup* standard the constitutional claims asserted in the following parts of this Application must all be addressed and viewed in the light of the evidence of innocence set forth here. There can be no question of the prejudicial harm of the many trial errors committed by the prosecutor, the court, and defense counsel when viewed in conjunction with the evidence described above.

II. MR. VELEZ WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE CULPABILITY PHASE OF TRIAL.

In an egregious failure by trial counsel, the State's medical evidence was entirely untested at trial. Villarreal failed to present medical evidence showing that the most serious injuries occurred during a period when Mr. Velez was not living with and had no access to the victim, and showing that the State's theory that the victim was perfectly healthy and uninjured two weeks before his death was untenable. In addition, Villarreal did not present evidence of Angel's dramatic and rapid increase in head circumference in less than a month (from June 28 to July 25, 2005), which can only be explained by severe head trauma inflicted prior to the increase. The jury never learned any of this and, as a result, the State's theory—that Angel was a healthy uninjured baby on October 18 and that all of his injuries were inflicted in the last two weeks of his life—remained unchallenged. In fact, **Mr. Velez's trial counsel presented no medical evidence whatsoever in this case.**

In addition, although the central defense theory was that Angel's mother, Acela Moreno, caused Angel's injuries, Mr. Velez's trial counsel presented no evidence in support of that theory. Moreno **admitted to harming her children, including Angel,** and has a history of abusing her children that was not investigated or presented at trial. Moreno's trial testimony contradicted her jailhouse interview and plea agreement with the State in which **she admitted to "striking the victim" on or about the day in question, October 31, 2005.** Villarreal never

asked her about these astounding admissions or about the evidence of her harming her children, including Angel. Trial counsel did not interview Moreno and did not sufficiently cross-examine Moreno on any of these critical issues and evidence.

In a circumstantial case where there was no direct evidence of the culpability of Mr. Velez—and the only circumstantial evidence was the testimony of the timing of the injuries by the State's medical experts and the ambiguous "accomplice" testimony of Moreno—this insufficient performance by trial counsel undermines confidence in the outcome of the trial. The State, on direct appeal, has identified no fewer than 13 separate failures by Velez's counsel to properly object to errors during the guilt/innocence phase of trial. There is certainly a reasonable probability that but for trial counsel's failures at least one juror would have refused to return a verdict of guilty. This probability is strengthened by numerous other failures by trial counsel, including deficient cross-examination of several witnesses, bungling the "two statement" problem created by the State, and jury charge omissions, detailed in the following sections. These gross constitutional failures—resulting in the conviction and death sentence of **an innocent man**—cannot be allowed to stand.

A. The Constitutional Right to Counsel Requires Defense Attorneys to Conduct a Thorough Investigation and Provide Effective Representation at Trial.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel:

> [A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.

Strickland v. Washington, 466 U.S. 668, 685 (1984) (internal citations and quotation marks omitted). The right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic v. United States*, 466 U.S. 648, 656 (1984). Ineffective assistance of counsel occurs when (1) counsel's performance was deficient, falling below an "objective standard of reasonableness," and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

Initially, constitutionally adequate performance requires an attorney representing a criminal defendant to conduct "an independent investigation of the facts of the case." *McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996). In reviewing trial counsel's investigation or lack thereof, the Court must "look at what might have been, not [] judge the performance of trial counsel by failures of strategic decisions reasonable when made, but [] meaningfully examine whether counsels' failure to investigate was based on a 'reasonable decision' that made such an investigation 'unnecessary.'" *Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir. 2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). The "court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Soffar v. Dretke*, 368 F.3d 441, 476 (5th Cir. 2004) (quoting *Wiggins v. Smith*, 539 U.S. 510 (2003)).

At trial, the Sixth Amendment guarantees the accused "the guiding hand of counsel at every step in the proceedings against him." *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). And while the courts apply a presumption that counsel employed "sound trial strategy," *Dannhaus v. State*, 928 S.W.2d 81, 82 (Tex. Crim. App. 1996) (citing *Strickland*, 466 U.S. at 689), performance that cannot be defended as a reasonable trial strategy constitutes ineffective assistance of counsel. Thus, "when no reasonable trial strategy could justify the trial

counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as she did." *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). While deferring to reasonable strategic choices, courts are "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999); *Lockett v. Anderson*, 230 F.3d 695, 715 (5th Cir. 2000) (assertions of strategy may be rejected when counsel has not made an informed decision).

In sum, defense counsel "has a duty to bring to bear such skill and knowledge as will render the trial a 'reliable adversarial testing process.'" *Strickland*, 466 U.S. at 688. As shown in the following sections, Velez's trial counsel wholly failed to fulfill these constitutional obligations.

B. Failure To Investigate And Present Any Challenge to the State's Medical Evidence Constitutes Unreasonable Performance And Prejudiced Mr. Velez's Defense.

1. Failure to cross-examine the State's medical experts and to investigate and present medical evidence regarding the age of the victim's injuries was unreasonable performance.

As outlined above, the State's central allegation was that all of the injuries suffered by the child were inflicted in his last days of life:

> On October 18 they move into the house on Vermont Circle. So October 18 is baby Angel's first day living at this house on Vermont Circle. October 31 is baby Angel's last day to live at that house because 13 days, 13 days after moving in with the defendant, baby Angel is dead. Baby Angel is brain dead.

(14 RR 20:17–24)

The State sought to support this theory by the testimony of two pathologists, Dr. Norma Farley and Dr. Vincent DiMaio, who testified that the injuries to the child fell into two episodes. (17 RR 31:3–10, 124:19–21) The first episode consisted of most of the injuries to the victim, including an "organizing" subdural hemorrhage and two "healing" skull fractures that were (according to the State's doctors) inflicted approximately two weeks prior to death. (17 RR 26:15-21, 28:20–29:9) The second episode involved only one injury that the State's experts said required a violent event and occurred on October 31, the day the child was rendered unconscious. (17 RR 31:3–10, 32:14–35:17) The State leaned heavily on these experts, telling the jury that the State's case was built on "science:"

> [F]or you to find him not guilty, Ladies and Gentlemen, you're going to have to go against science. Because what he tells you and if you believe him it's not the way—it's not scientific.

(18 RR 146:2–6)

In closing arguments, the State again emphasized this timeline:

> Ladies and Gentlemen, please look at all the evidence, look at the exhibits, look at this. Remember this calendar here the 19th, I submit to you those are when–that's not me, it's the doctor saying they're two weeks old. Two weeks old on the day of the autopsy saying from the date that he is still alive. You go back two weeks, the 19th. Who is in the picture on the 19th? Manuel Velez. Who was not there before the 18th? Manuel Velez. Over here when the baby is not injured? Who's not in the picture? Manuel Velez is not there. We start getting injuries, who is in the picture? Manuel Velez.

(18 RR 150:25–151:12)

a. The State's neuropathologist dates Angel's subdural hematoma at 18-36 days prior to death.

Dr. Daniel Brown[21] performed a neuropathology analysis of the victim's brain at the request of Dr. Norma Farley, the State's central medical witness who performed the autopsy on the victim. (Brown Aff. ¶ 6 [Appx 2]) Dr. Farley later asked him to perform a test for diffuse axonal injury. (*Id*. ¶ 8) Dr. Brown performed the evaluation and issued his final report on January 25, 2006. (*Id*. ¶ 7, attached Neuropathology [Appx 2]) Autopsy Report [Appx 58]) Dr. Farley incorporated Dr. Brown's report into the autopsy report. (Autopsy Report at 3, 5, 6–7 [Appx 58])

Dr. Brown concluded in 2006 that "the brain tissue evidenced an acute subdural hematoma, an organizing subdural hematoma membrane, an acute subarachnoid hemorrhage, and superficial paranchymal hemorrhage consistent with contusional injury." (Brown Aff. ¶ 11; *see also* 11/3/05 Autopsy Report of Angel Moreno at 6–7 [Appx. 58]) Dr. Brown further concluded that diffuse axonal injury was not present, and that the result of the stain employed was consistent with contusional injury. (*Id*. ¶ 11)

Dr. Brown was not asked by Dr. Farley, the State, or the defense to opine on the age of the older injuries. (*Id*. ¶¶ 9, 12) When asked by habeas counsel in 2011 to comment on the age of the older injuries referred to in his report, Dr. Brown explained that it was his opinion **at the time of his report** in 2006 that the injuries were more than two weeks old—and that the language used in his report expressed this conclusion:

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[21] Dr. Daniel Brown is the Medical Director of Health Network Laboratories in Allentown, Pennsylvania. Dr. Brown completed a residency in anatomic pathology and neuropathology at the University of Texas, Southwestern Medical Center at Dallas, Texas, in 1999 and is board certified in both Anatomic Pathology and Neuropathology. He did post-graduate work at the University of Massachusetts and received an MBA in 20l1. (*See* Brown Aff. ¶¶ 1–5 [Appx. 2])

> **It was my conclusion then that the "organizing subdural hematoma" referred to in my report reflected injuries that occurred anywhere from two weeks to six months before death.** There are common terms that I use to describe the age of brain injuries, namely, "acute" indicating an injury within 2-3 days, "sub-acute" indicating an injury less than two weeks old, "organizing" indicating injury ranging from two weeks to six months and "chronic" indicating injury older than six months. The language used in my report, describing the older injuries as "organizing" and "well-developed," expressed my conclusion that the older injuries were more than two weeks old, and possibly as old as six months at the time of death. This conclusion was supported, as described in my report, by the finding of "a well-developed subdural membrane with dense fibrovascular connective tissue and a few scattered hemosiderin-laden macrophages." These are signs that the hematoma was in the process of healing. At the time of my report, I was not asked to narrow the range of the estimated age of the organizing subdural hematoma, although I could have done so through further analysis of the tissue block slides.

(Brown Aff. ¶ 13, emphasis added [Appx 2]; Dr. Brown's 2006 report thus makes clear that the injuries were quite old; nonetheless, Villarreal failed to ask Dr. Brown about his conclusions. (*See* Autopsy Report at 6–7 [Appx 58]; *see also* Uscinski Aff. ¶ 11 (citing language from Dr. Brown Report as indicating the injuries occurred more than two weeks prior to death)

Because Dr. Brown had never been asked to date the older hematoma, habeas counsel asked Dr. Brown to perform an additional analysis of the pertinent slides of the child's brain in an attempt to narrow the time frame of the age of the older injuries. (Brown Aff. ¶ 14) He conducted this analysis following a standard procedure, "viewing the pertinent slides under a microscope and comparing the histologic findings to a commonly used reference table which is an authoritative source." (*Id*.) Dr. Brown's recent analysis "indicates that the histologic changes in the portion of dura and membrane sample represent an organizing subdural hematoma that was approximately **18 days to 36 days old** as of the date of death." (*Id*. ¶ 15, emphasis added)

Dr. Brown thus opines "from the tissue analysis that the older injuries in the brain of Angel Moreno were older than two weeks." (*Id*. ¶ 16)

Even though his report is cited throughout the autopsy report and is relied on by Drs. Farley and DiMaio, none of Mr. Velez's trial counsel ever contacted Dr. Brown. (*Id*. ¶ 9; Flores Aff. ¶ 17 [Appx 14]) Accordingly, Dr. Brown's conclusion at the time he issued the Neuropathology Autopsy Report, that the older subdural hematoma occurred more than two weeks prior to death (which has now been confirmed by his further analysis of the brain tissue), was never presented to the jury. Had Dr. Brown been contacted at the time, he would have been willing to provide these opinions or testify at Mr. Velez's trial. (*Id*. ¶ 17)

b. Other doctors agree with Dr. Brown that the subdural hematoma occurred more than two weeks prior to death and they date the skull fractures as more than two weeks old.

Dr. Brown's conclusion that the subdural hematoma occurred more than two weeks prior to death has been confirmed by several other medical experts. In addition, those experts further conclude that the skull fractures occurred more than two weeks prior to the death. Thus, as set forth in the affidavits of doctors included in the Appendix to this Application, **the medical evidence is clear that the older injuries to the child—the older subdural hematoma and the two skull fractures—occurred more than two weeks before Angel died**:

- Dr. Ronald Uscinski:[22]
    - "My review of the CT scan confirms that there were older fractures in the skull of Angel Moreno as well as a well-developed chronic subdural hematoma. The

[22] Ronald H. Uscinski, M.D. is a neurological surgeon in Chevy Chase, Maryland. Dr. Uscinski has held the position as Senior Surgeon at the U.S. Public Health Service, the National Institute of Neurological and Communicative Disorders and Stroke in Bethesda, Maryland. He has also served as an instructor and clinical professor in the Department of Surgery (Neurosurgery) at Georgetown University School of Medicine. Dr. Uscinski is certified by the American Board of Neurological Surgery and am a member of the Congress of Neurological Surgeons, the American Association of Neurological Surgeons and the American College of Surgeons. Attached as Exhibit A to his Affidavit is Dr. Uscinski's complete *curriculum vitae.*

Valley Baptist Hospital CT scan, at images nos. 20-26 (of 30), Series 102/4 of axial views, shows two different shades of blood pooling, a darker and lighter shade which reflect two different ages of blood. **The darker colors reflect a much older injury that could range from more than two weeks old to several months.**" (Uscinski Aff. ¶ 12, emphasis added [Appx 4])

- "In addition to the difference in shade of blood pooling as depicted in the CT scan, other scan images located at Nos. 24-27 show the skull fractures without swelling. This is further evidence that bleeding from the fracture that occurred at the time the fractures were sustained had been reabsorbed and **is further evidence that the skull fractures are more than two weeks old and perhaps several months old**. No blood was present in the older fracture at time of death." (*Id*. ¶ 14, emphasis added)

- Dr. Daniel Spitz:[23]
  - "**The older injuries, including the skull fractures and the subdural hematoma, are anywhere from several weeks old to several months old at the time of death, but certainly more than two weeks old.** In addition, other injuries on the body of Angel Moreno, including scarring and other healing bruises, appear to be more than two weeks old." (Spitz Aff. ¶ 9, emphasis added [Appx 5])
  - "After reviewing the skull fracture tissue slides, **there is no question, in my opinion, that the skull fractures were more than two weeks old** based on the existence of new bone growth, dense fibrosis with vascularity, and the fact that there was no residual hemorrhage or inflammation at the fractures sites." (*Id*. ¶ 10, emphasis added)

- Dr. Janice Ophoven:[24]
  - "Skull fractures are notoriously difficult to date, as any radiologist will attest. A skull fracture may be visible on an x-ray in a young child for weeks to months after the injury. There is no special method for determining age on an x-ray for a skull fracture. The skull bone does not deposit cartilage in the healing process as is typical in long bones such as humerus or femur. The skull simply fills in the

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[23] Daniel Spitz, M.D. is the Chief Medical Examiner for Macomb County and St. Clair County, Michigan. He is a Clinical Assistant Professor at Wayne State University School of Medicine and is a Staff Physician in the Department of Pathology at Port Huron Hospital in Port Huron, Michigan. Dr. Spitz is Board Certified by the American Board of Pathology in Anatomic and Clinical Pathology and in Forensic Pathology. His full resume is attached to his Affidavit.

[24] Janice Ophoven, M.D. is a pediatric forensic pathologist in Woodbury, Minnesota. She has served as Director and Associate Director of St. Paul Children's Hospital Laboratories and as the Medical Director of Quality Management. She was a Deputy Medical Examiner in the Hennepin County Medical Examiner's office and a forensic pathologist and assistant coroner with Midwest Forensic Pathology. From 2003 until 2010, she served as a forensic pathologist, medical examiner, and assistant coroner for the St. Louis County Medical Examiner's Office. Dr. Ophoven is Board Certified by the American Board of Pathology, the American Board of Forensic Pathology, and the American Board of Quality Assurance and Utilization Review. Dr. Ophoven's full *curriculum vitae* is attached to her Affidavit as Exhibit A.

defect with scar tissue and new bone [called endochondral bone formation]. There is no exact timetable for this process and it varies from person to person depending on too many factors to consider. **What can be said about the bone here is the defect is showing advanced healing indicating weeks or months** even though the gap was still visible on CT scan." (Ophoven Aff. ¶ 16, emphasis added [Appx 3])

- "It is also clear from the CT scan that there is no swelling over the skull fractures. This indicates that any pooling of the blood in the tissues over the fractures at the time the injuries were inflicted was reabsorbed. In a recent fracture the scalp over the fracture is typically swollen and then the swelling subsides over time. . . . I further note that here at the time of death the older fracture contained ossifying bone and no fresh blood in the tissues around or in the fracture. The evidence in this case shows bone deposits in the fracture site, absent swelling over the fracture in the scalp and a mature scar in the subdural space. . . . **These findings are consistent with aged fractures**." (*Id*. ¶ 17, emphasis added)
- "When there is an injury or damage to the subdural space, the tissue begins to react to the blood and lays down cells to form a scar. . . . When the scar tissue is thick, with relatively low cellularity and has the appearance of a mature scare the subdural membrane is known to be old – **weeks to months old**." (*Id*. ¶ 19, emphasis added)
- "In this case, as depicted in Exhibit C [to the Ophoven Aff.], the membrane appears as thick as the dura itself; hypocellular and sclerotic. In addition, this scar tissue creates its own small blood vessels over time. At the beginning these blood vessels (very small capillaries) are few and far between and over time the vessels become larger with the capacity to bleed if disrupted. Large vessels are present in the membrane of the victim **indicting an aged injury much older than two weeks**." (*Id*. ¶¶ 19–20, emphasis added)
- "Based on my review of the CT scan and the two sets of slides of the older subdural hematoma and the two skull fractures, **these injuries occurred more than two weeks prior to death**." (*Id*. ¶ 21, emphasis added [Appx 3])

In addition, Dr. Andrew Sirotnak[25] noted, "The presence of the older skull fracture with microscopic evidence of healing also raises concern for the timing of the pattern of this child's abuse injuries." (Sirotnak Aff. ¶ 17 [Appx 7])

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[25] Andrew Sirotnak, M.D. is a Professor of Pediatrics at the University of Colorado School of Medicine and is the Director of the Child Protection Team at Children's Hospital Colorado and the Kempe Center for Prevention and Treatment of Child Abuse and Neglect in Aurora, Colorado. Dr. Sirotnak is Board Certified in Pediatrics, diplomat certified in Child Abuse Pediatrics and has served on the faculty of the University of Colorado, School of Medicine since 1996. Attached to his Affidavit is his full resume listing professional appointments, organizations, publications and lectures.

Because the injuries to the child were more than two weeks old, the medical evidence negates the State's theory that Angel was a healthy, uninjured baby on October 18, 2005. (*See* Spitz Aff. ¶ 13 ("In my opinion, any claim that Angel Moreno was a completely healthy baby two weeks before his death is erroneous and not supported by the medical evidence."); Ophoven Aff. ¶ 11; Uscinski ¶ 8) Even though the opinions of Drs. Brown, Uscinski, Spitz, Ophoven, and Sirotnak directly undermine the testimony of Drs. Farley and DiMaio, Villarreal did not present any of this evidence—or any other medical evidence—to the jury and never challenged the testimony of Drs. Farley and DiMaio that all Angel's injuries to the victim occurred within two weeks of his death.

c. Failure to sufficiently cross examine the State's medical experts was unreasonable performance.

Villarreal's failure to call any medical experts for the defense was compounded by his grossly ineffective cross-examination of the State's witnesses. In his opening statement, after telling the jury that "it's not really a technical case" (14 RR 27:14–15), Villarreal pointed out that the State's medical expert Dr. Farley was an "excellent pathologist" and that her testimony would be "instrumental:"

> The evidence is going to show you that there was some blunt trauma, blunt force trauma. And Dr. Farley is an excellent pathologist and she will come, her credentials, there's no doubt, you know, and you're not going to get a whole lot of argument there. . . . Dr. Farley is going to be instrumental.

(14 RR 28:6–29:17–18)

In spite of this representation to the jury that Dr. Farley would be instrumental in the case, **Villarreal cross-examined the State's two medical experts a total of fewer than ten pages of transcript.** (17 RR 38:10–45:5 (Dr. Farley), 140:21–143:6 (Dr. DiMaio)) Villarreal's cross-examination of Dr. Farley did not inquire into the age of the older injuries and did not ask

her about the language used in her autopsy report or the language used in the report of the neuropathologist, Dr. Daniel Brown, indicating older injuries. Instead, inexplicably and to the detriment of Mr. Velez, trial counsel posed a hypothetical based on the child being fine with no injuries four days prior to death and then allowed Dr. Farley to repeat her opinion, without any challenge or follow up, that the skull fractures occurred within fourteen days of death:

> Q. In a hypothetical situation, Doctor, if the mother of the child says there was no bruising, no markings on the body, no bleeding four days before the child's death, that be consistent with your findings?
>
> A. Four days before the child's death?
>
> Q. Four days.
>
> A. It could be. That green contusion is a little bit older, but children will heal faster than us. It's possible.
>
> Q. So when we are talking about—we're talking about two skull fractures; is that correct?
>
> A. Right.
>
> Q. Neither of which were caused on October 31st; is that correct?
>
> A. No. They did not occur that day.
>
> . . . .
>
> Q. So any skull fractures that would have occurred would have been done prior to that; is that correct?
>
> A. Yes. I—I estimate about seven to—one to two weeks.
>
> Q. Okay. And if the mama says there was [sic] no marks or bruises on the child as early as four days.
>
> [Objection by the State]
>
> . . . .

(17 RR 40:1–16; 22–41:4; 42:14–18) Villarreal was clearly focusing on the wrong timeline. Four days before death had no significance in this matter. Even the judge did not understand this

reference.[26] Trial counsel's cross-examination accentuated and supported the State's two-week timeline for the skull fractures, rather than challenging it. (17 RR 40:14–41:1, 42:14–18)

Villarreal engaged Dr. Farley in a line of questioning regarding "somebody [who] had already pled guilty and admitted that they had injured the child" (17 RR 44:18–19), but Villarreal never said that person was Moreno, never introduced evidence of her plea or informed the jury that she pled to "striking the victim" on or about October 31, 2005, and never cross-examined Moreno about her admissions to injuring the child or the basis for her plea. Thus, this line of questioning by Villarreal was entirely ineffective.

For his final questioning of Dr. Farley (for one page of his seven page cross-examination of her), Villarreal bizarrely engaged her in questioning about whether she knew who Manuel Velez was and whether she knew Villarreal's sister Linda, a doctor in Hidalgo County. (17 RR 43:23–44:16)

Villarreal failed to ask questions of Dr. Farley and accentuate themes with her that were required for meaningful adversarial testing and that could have prompted reasonable doubt in the minds of the jurors. Even a minimally competent cross-examination would have included questions such as these:

- Dr. Farley, you said that your opinion on the age of the skull fractures as seven to "maybe" fourteen days was an "estimate," right? Because that is an estimate, the injuries could have been fifteen days old, right? Or twenty days old? Longer?

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[26] The State objected asserting this was a mischaracterization of Moreno's testimony. The objection was overruled. (17 RR 41:5–18) The judge, when ruling on the State's objection, asked trial counsel "I remember [the mother's] testimony, but what's the specific four days? Where did that come from?" (17 RR 41:11–13) Villarreal responded that the four days was from Moreno's testimony. Review of Villarreal's cross examination of Moreno shows that it was Villarreal who brought up (out of nowhere) that the bruising was four days old. (16 RR 102:15–20 ("Q. Were you aware of the fact that the bruising on the ribs were four days old? A. Yes. Q. So somebody had to have done that at least four days earlier; is that correct? A. Yes.")) Although Moreno agreed with it, there had been no testimony that the bruises were four days old. This was an invention by Villarreal that only served to vouch for the State's timeline and only helped the State to show that the bruises allegedly occurred after Velez had returned from Memphis.

- Dr. Farley, how did you select fourteen days as the marker for the outer edge of your timeline for the skull fractures? Why was it not fifteen days or nineteen days?

- In describing the skull fractures, you state in your report that there is "new bone formation," osteoclastic activity and no swelling, correct? Aren't these signs of injuries that could have been healing for more than 14 days?

- Mr. Saenz didn't ask you about the age of the "older organizing subdural hematoma." It was older than two weeks, wasn't it?

- Dr. Camacho described the older subdural hematoma as "chronic," based on two CT scans taken at the hospital, didn't she? "Chronic" means older than two weeks, doesn't it? Perhaps even several months old?

- Are you aware that Dr. DiMaio's textbook on Forensic Pathology says a chronic subdural hematoma is seen three weeks after a head trauma?

- Do you disagree with Dr. Camacho or Dr. DiMaio?

- You did not ask Dr. Brown to opine on the age of the organizing subdural hematoma, did you?

- When you saw the references in Dr. Brown's report to an "organizing subdural hematoma" and "a well-developed subdural membrane with dense fibrovascular connective tissue and a few scattered hemosiderin-laden macrophages," didn't that tell you that the subdural hematoma was older than two weeks?

- Did you review the pediatric records of the victim? Did the District Attorney provide them to you?

- Are you aware that the pediatric records of Angel show that the size of his head increased from 45 cm to 48 cm in June to July 2005?

- This is a rapid increase in head circumference for a 7-month old child, isn't it?

- Such an increase in head circumference could only be caused by a brain tumor, hydrocephalus, or trauma to the head, correct?

- In your findings and in the autopsy report, you did not find any evidence of a brain tumor or hydrocephalus, right?

- So the only explanation for Angel's increase in head circumference is severe head trauma, right?

- And the trauma would necessarily had to have occurred prior to the increase in the size of Angel's head, right?

- If you had reviewed the pediatric records and seen an increase in the head circumference of the child from the 50th percentile to the 95th percentile in a one-month period, would that have affected your opinion?

- Did you know Mr. Velez was out of town until approximately fourteen days before the death of the child? Who told you? When?[27]

- Did you know about Moreno's abuse of her children?

- Did you know of Moreno's admission that she intentionally struck the child and caused bodily injury on or about October 31?

- Could Moreno striking the child on or about October 31 have caused the new injury to the child that caused his death?

This is only a sampling of the questions that should have been asked of Dr. Farley to ensure that the State's medical evidence was meaningfully challenged and tested.

In Villarreal's **two-and-a-half page** cross-examination of Dr. DiMaio, Villarreal again failed to ask any of these critical questions or challenge Dr. DiMaio's testimony in any way. (17 RR 140:21–143:6) Villarreal did not confront him with the pediatric records[28] and the fact that Dr. DiMaio's opinion on Angel's injuries and the cause of death did not take into account Angel's dramatic increase in head circumference three months prior to death. Villarreal had not even obtained a copy of Dr. DiMaio's text, FORENSIC PATHOLOGY (2d ed. 2001) (Flores Aff. ¶ 17 [Appx 14]), and did not confront him with statements made in that text that could have fostered reasonable doubt about the opinions he expressed at trial. For example, DiMaio's report refers to the CT scan finding of a "chronic" subdural hematoma and notes the "well-developed subdural membrane with dense fibro-vascular connective tissue and hemosiderin laden

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[27] Dr. Farley received a package of documents from the District Attorney's office a few weeks before trial, which included Moreno's sworn statement noting that Mr. Velez was in Memphis from September 10 to around October 14, 2005. (9/12/08 Letter from Steven Eckert to Dr. Farley [Appx 97]; 10/31/05 Voluntary Statement of Accused, Acela Moreno [Appx 86]) Special Prosecutor Saenz met with Dr. Farley at least twice before trial. (Saenz Letter to Villalobos [Appx 96])

[28] Dr. DiMaio's file indicates that he received a copy of the pediatric records from the State. (2/27/08 Letter from Steven Eckert to Dr, DiMaio [Appx. 95])

macrophages." (State's Ex. 65 at 1–2) According to DiMaio's text, chronic subdural hematomas manifest themselves "more than 3 weeks after injury." FORENSIC PATHOLOGY (2d ed. 2001) at 167. Questions about the contradictions in his testimony and report would have been helpful to cast doubt on the opinion that Angel's older injuries occurred within fourteen days of death.

Trial counsel did not attempt to contact Drs. Farley or DiMaio before trial. (Flores Aff. ¶ 17 [Appx 14]) Nor did they attempt to contact Dr. Daniel Brown, the neuropathologist who examined the victim's brain and whose report was quoted in Dr. Farley's autopsy report. (*Id*.; 11/3/05 Autopsy Report of Angel Moreno at 3, 5 [Appx 58]) Counsel has "a duty . . . to investigate all witnesses who allegedly possessed knowledge concerning [the defendant's] guilt or innocence." *Bryant v. Scott*, 28 F.3d 1411, 1419 (5th Cir. 1994) (quoting *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991)); *see also Gray v. Lucas*, 677 F.2d 1086, 1093 n. 5 (5th Cir. 1982) (attorney's failure to investigate crucial witness may constitute inadequate performance).

Additional and more effective cross-examination of Drs. Farley and DiMaio on the timing and cause of the injuries would have created substantial reason for doubt in the minds of the jurors as to Mr. Velez's opportunity to commit the crime. And when coupled with the medical testimony on the age of the injuries presented by Drs. Brown, Ophoven, Uscinski, and Spitz, the State's case would have been destroyed, leaving the jury no choice but to acquit Mr. Velez.

d. Defense counsel's failures at trial resulted in part from inadequate investigation concerning the age of injuries.

An obvious defense theory to pursue and investigate in this case was that many of the injuries occurred while Velez was out of town and Angel was with Moreno, his abusive mother.

Villarreal tried to articulate such a theory in opening and closing arguments. However, he failed to investigate and present any evidence in support of the theory, and thus, the State's timeline theory—that the injuries were inflicted within fourteen days of the child's death—went entirely unchallenged.

Velez's first set of attorneys, Gary Ortega and Larry Warner, consulted with two medical experts and specifically asked them to opine on the age of the injuries and whether they could have been inflicted while Velez was out of state. Velez's second set of attorneys, trial counsel Hector Villarreal and Rene Flores, were aware of Ortega's efforts: their file contained a copy of Ortega's file including Ortega's correspondence with both experts relating to the age of the injuries. (*See* Flores Aff. ¶¶ 7, 13–14 [Appx 14])

Trial counsel's files indicate that they consulted with one of the experts Ortega had retained and they retained a pediatrician to assist with the case. As set forth below, both of the experts opined that the injuries could be more than fourteen days old and at least one expert specifically recommended that they retain a forensic pathologist to date the injuries. Trial counsel did not follow the advice of their experts—they did not retain a forensic pathologist; did not investigate the age of the injuries to the victim; did not challenge the opinion of the State's experts that the injuries occurred within fourteen days of death; and did not present to the jury any evidence or medical testimony on the injuries to the victim.

i. Former counsel's consultation with Dr. Sridhar Natarajan.

In August 2006, Ortega retained forensic pathologist Dr. Sridhar Natarajan. (4/30/07 Letter from Gary Ortega to Dr. Natarajan [Appx 67]) In April 2007, Ortega sent a letter to Dr. Natarajan asking for the doctor's findings on the following, including the age of the injuries:

> (1) **Did the injuries occur while my client was out of state between 9/1/05 and 10/15/05**; (2) did his playing with the child and throwing it up in the air cause its death, *i.e.* shaken baby

> syndrome (3) **How old are the fractures**; (4) Are the bite marks those of an adult?

(*Id*.) In addition, Ortega's notes from a telephone conference with the doctor refer to the "timing of death and bruises over a period of time" in a section entitled "cross of Dr. Farley." (Gary Ortega Notes of Conversation with Dr. Natarajan [Appx 70])

These documents were part of the files given to Villarreal by Ortega. (*See* Flores Aff. ¶ 7 [Appx 14]; *see also* Habeas Counsel Certification of files received from trial counsel [Appx 48]) After unsuccessfully trying to contact Dr. Natarajan to discuss the case, Villarreal did not contact another forensic pathologist to assist with Mr. Velez's defense or to opine directly on the age of injuries. (Flores Aff. ¶ 13)

ii. Consultation with Dr. J. Keith Rose.

In July 2006, Gilda Bowen, a mitigation specialist retained by Ortega, sent Ortega the resume of Dr. J. Keith Rose for use as a possible expert. (7/27/06 Memorandum from Gilda Bowen to Gary Ortega [Appx 64]) In the cover letter, Ms. Bowen stated that she believed the autopsy evidence would show the injuries were caused by Moreno while Mr. Velez was out of town:

> [I]t is early for me to say at this point, but I believe that the evidence on the autopsy will reveal that the chronic injuries sustained by the child victim cannot implicate Mr. Velez due to the time frame of events and his involvement with child's mother.

(*Id*.)

In August 2006, Ortega provided Dr. Rose with the victim's medical records and sent a letter asking the doctor to opine on the age of injuries:

> My client is accused of Capital Murder by abuse of an infant. He has denied the charges. Our client is the boyfriend of the Codefendant mother. **It is our theory that the husband and the mother committed the skull fractures and severe hemorrhaging prior to 08/01/05 when our client met the**

> **mother or between 09/01/05 and 10/15/05 when our client was out of state.** We believe another child made the bite marks. Our client lived with the mother from 08/01/05 to 09/01/05 and 10/15/05 to 10/31/05 when the baby died. The husband lived with the mother and baby from its birth 11/01/04 to 08/01/05. The husband was convicted of family violence and arrested for sexual assault. The mother is a cocaine addict. The baby suffered from abuse and severe head trauma including skull fracture and hemorrhaging. . . . **We need your best estimate as to the date of the injuries for the skull fractures, bruises and hemorrhaging. Could the child have died from hemorrhaging committed prior to 08/01/05? Could other injuries have occurred between 09/01/05 and 10/15/05? when our client was out of state?** Are these severe injuries consistent with his statement or not? Can shaken baby syndrome be ruled out against my client?

(8/3/06 Letter from Gary Ortega to Dr. J. Keith Rose [Appx 65], emphasis added)

The date of trial was then moved and in April 2007, Ortega again wrote to Dr. Rose asking for the doctor's findings on the following, again inquiring about the age of the injuries:

> (1) **Did the injuries occur while my client was out of state between 9/1/05 and 10/15/05?** (2) did his playing with the child and throwing it up in the air cause its death, i.e. shaken baby syndrome? (3) **How old are the fractures?** (4) Are the bite marks those of an adult?

(4/30/07 Letter from Gary Ortega to Dr. Rose [Appx 66], (emphasis added); *see* Rose Aff. ¶ 5; *see also* 10/4/06 Letter from Gary Ortega to Dr. Rose [Appx 63]; 11/20/06 email from Gilda Bowen to Norma Lopez [Appx 63]; 5/3/07 Letter from Gilda Bowen to Ortega [Appx 63]; 5/18/07 Letter from Gilda Bowen to Ortega [Appx 63])

After Ortega was removed from the case in September 2007 (8 SRR1 5–12), Flores contacted Dr. Rose. (*See* Flores Aff. ¶ 14 [Appx 14]) Dr. Rose consulted with Flores and Villarreal. (Rose Aff. ¶ 8 [Appx 8]) Dr. Rose advised Villarreal to retain a forensic pathologist to review the evidence and assist in developing a "time line of the various injuries and other significant events" in support of the theory that the injuries occurred more than two weeks prior to the child's death:

> In my consultations with Mr. Velez's attorneys, I understood that there were questions about whether some of the child's head injuries may have occurred more than two weeks before his death, during a period I understand Mr. Velez was out of town. I noted references in the autopsy report and other medical records to "chronic" or "organizing" subdural hematomas (hemorrhage) and "healing" skull fractures, and **recommended that Mr. Velez's attorneys retain a forensic pathologist** to assess the age of those injuries.
>
> . . . .
>
> I also recommended they develop **a time line of the various injuries** and other significant events, **to support the theory that many, if not all, of the most significant injuries had occurred more than two weeks before the child's death** on November 1, 2005.

(Rose Aff. ¶¶ 8–9 [Appx 8]) (emphasis added)

Contrary to the recommendation of Dr. Rose and abandoning the reasonable path begun by previous counsel, however, Villarreal did not contact another forensic pathologist (after they were unable to speak with Dr. Natarajan) to review the medical records and assist with defense of the case. (*See* Flores Aff. ¶ 13) As explained by Villarreal's co-counsel, Rene Flores, this was not a strategic decision:

> I understood Ortega had communicated with a forensic pathologist named Sridhar Natarajan, and there had been delays in getting information and payment to that doctor. I tried to discuss the case with Dr. Natarajan, but he refused to talk to me or have anything to do with the case. We did not contact another forensic pathologist to assist with the defense or testify at trial. This was not a strategic decision but rather **something we simply did not do**.

(*Id*., emphasis added)

iii. Consultation with Dr. James L. Lukefahr.

In February 2008, trial counsel retained a pediatrician, Dr. James L. Lukefahr. The doctor reviewed the autopsy report and various records from the victim's admission to the hospital on October 31, 2005; however, the doctor was not provided with the victim's pediatric

records. (Flores Aff. ¶ 16 [Appx 14]) Dr. Lukefahr specifically informed Villarreal that the injuries to the victim could be more than fourteen days old:

> I recall that I noted in my review of the records that there were older fractures and an older subdural hematoma and that these injuries could be more than 14 days old.

(Lukefahr Aff. ¶ 9) Villarreal did not ask Dr. Lukefahr to testify at trial, and as noted above did not retain a pathologist to determine the age of the injuries. (Flores Aff. ¶¶ 8–9, 15 [Appx 14])

iv. The consequences of trial counsel's inadequate investigation into the age of the injuries.

Accordingly, in spite of his own theory of the case, Villarreal never investigated the timing of the injuries and the theory that the skull fractures occurred while Mr. Velez was out of state. At trial, Villarreal presented no medical evidence whatsoever—he presented no evidence on the age of injuries or the child's rapid expansion in head size, and he failed to cross-examine the State's medical experts on this point.

Trial counsel's decision not to pursue investigation into the age or timing of the injuries was not reasonable or supported by information known to trial counsel at the time and in fact directly contradicted the advice they had received from Drs. Lukefahr and Rose. Trial counsel had Ortega's files in which Ortega had clearly set forth their defense theory that the injuries occurred when Velez was out of state or not living with the victim. And Ortega repeatedly asked the medical experts to opine on the age of the injuries. Drs. Lukefahr and Rose advised trial counsel that the injuries were old and perhaps occurred while Velez was out of state. (Lukefahr Aff. ¶¶ 9, 12–13 [Appx 6]; Rose Aff. ¶¶ 8–9 [Appx 8]) Dr. Rose urged trial counsel to investigate further, retain a forensic pathologist, and develop a timeline to show that they occurred while Velez was out of state. (Rose Aff. ¶¶ 8–9)

Rather than follow the doctors' advice or prior counsel's reasonable course, trial counsel elected to do nothing to investigate the timeline theory or to rebut the State's medical evidence. A number of doctors would have been willing to review Angel's medical records and rebut the State's theory of the case, but trial counsel never bothered to seek their opinion. (*See* Uscinski Aff. ¶ 19 [Appx 4] ("Had I been asked to review these records and to testify at the trial of Mr. Velez, I would have testified as stated in this Affidavit and would have been available and willing to so testify."); Ophoven Aff. ¶ 46 [Appx 3] (same); Sirotnak Aff. ¶ 18 [Appx 7] (same); Spitz Aff. ¶ 15 [Appx 5] (same))

Trial counsel could not make a strategic decision about whether to challenge the State's central theory of the case or to present medical testimony because counsel had not conducted an adequate investigation. Based on their own theory of the case, and considering the recommendations from the two doctors they consulted with and the other information they knew at the time, no reasonable counsel could have failed to further investigate the age of injuries.

2. Failure to investigate and present medical evidence and testimony challenging the State's theory that Angel was in good health on October 18, 2005 was unreasonable performance.

The State's theory of the case depended entirely on all injuries to the victim having occurred within the two weeks before his death. The State based this theory on the faulty premise that the child was well with no signs of injury on October 18, 2005, when he last visited his pediatrician, Dr. Asim Zamir. Although a nurse practitioner, and not Dr. Zamir, examined the child on October 18, 2005, Dr. Zamir testified at trial that the child was a healthy baby with no signs of injury as of that day. An objective review of the medical and testimonial evidence, however, reveals a very sick child—who visited the doctor repeatedly in the span of a few months, as described in detail *supra* at 22–29. In addition to the medical evidence discussed above showing that the child's injuries occurred more than two weeks before death, Angel's

pediatric records reveal that he suffered severe head trauma in late June or early July 2005, before Velez lived with Moreno and the child. None of this evidence was elicited at trial despite the fact that the defense case was premised on Moreno being the cause of the child's death. In fact, **Villarreal did not ask a single question of Dr. Zamir at trial.** Such lack of diligence and failure to elicit highly exculpatory evidence renders defense counsel's assistance utterly and constitutionally ineffective.

a. Failure to investigate and present evidence of the victim's prior head trauma.

Trial counsel failed to provide Angel's pediatric medical records to a doctor for review. As a result, he failed to investigate and present evidence on Angel's health and the cause of the child's injuries. Additionally, he failed to cross examine Dr. Zamir on this critical evidence.

No medical records exist to show that the victim saw a doctor or other medical professional after he was born in November 2004 until June 2005. The existing medical records reveal that in less than three months, between June 11, 2005 and September 2, 2005, Angel visited a doctor or was admitted to the hospital **at least ten times** with various symptoms including severe and repeated vomiting, fever, stomach and respiratory infections, pink eye, chest congestion, asthma, coughing, constipation and fecal impaction, and dehydration. (*See* Facts I.A.4.a, *supra* at 22–29) Villarreal did not present any direct evidence concerning these severe and repeated episodes of vomiting and other symptoms during the summer of 2005, and he did not ask Dr. Zamir any questions about them despite Dr. Zamir's testimony glossing over these issues.

Further, Angel's medical records reveal a dramatic, medically significant increase in the baby's head circumference over a period of less than 30 days. On June 11 at one clinic and again on June 28 at another clinic, Angel's head circumference measured 45 cm, which placed him in

approximately the 50th percentile. (6/11/05 Brownsville Children's Clinic Records [Appx 51]; (2–6 Month Tex. Dep't of Health Child Record Preventative Health Visit [Appx 53]); Boys: Birth to 36 months CDC U.S. Growth Chart [Appx 53]; *see also* Sirotnak Aff. ¶ 12 [Appx 7]; Ophoven Aff. ¶ 24 [Appx 3]) As of July 25, 2005, however, Angel's head circumference had increased to 48 cm, a full 3 cm larger than the measurements taken less than a month before, which placed him in approximately the 95th percentile. (7–12 Month Tex. Dep't of Health Child Health Record [Appx 51]; Sirotnak Aff. ¶ 12 [Appx 7]; Ophoven Aff. ¶ 24) This evidence of Angel's rapid increase in head size was not presented by Villarreal at trial and he did not ask Dr. Zamir about it.

b. The only explanation for the rapid increase in head circumference is prior head trauma.

Dr. Sirotnak, the Director of the Child Protection Team at Children's Hospital Colorado and the Kempe Center for Prevention and Treatment of Child Abuse and Neglect in Aurora, Colorado, considers such an increase in head circumference (an increase in less than a month from approximately the 50th percentile to the 95th percentile for the child's age) a "red flag" and concludes that the only explanation in this case for the dramatic and rapid increase is a violent head trauma:

> **An increase from the 50th to the 95th percentile in about one month is remarkable, a "red flag,"** and suggests, absent other explanation, that a violent head trauma may have occurred some time prior to the change. The autopsy results rule out any explanation such as brain tumor or hydrocephalus and make **the only explanation for this change in head circumference [is] a violent head trauma.**

(Sirotnak Aff. ¶ 13, emphasis added [Appx 7])

Dr. Ophoven, a pediatric forensic pathologist in Woodbury, Minnesota, agrees:

> Based on the autopsy report, specifically where no alternative condition to chronic subdural and increased intracranial pressure

> such as brain tumor or evidence of obstructive hydrocephalus was found, **the increase in head circumference of the victim can only be explained by the occurrence of a significant head injury some time prior to late July 2005**.

(Ophoven Aff. ¶¶ 4–25, emphasis added [Appx 3])

In addition to the pediatric abuse specialists, other doctors have opined that the increase in head circumference could have only been caused by violent trauma to the head. (*See* Spitz Aff. ¶ 12 [Appx 5] (The increase in head circumference is "especially noteworthy and, in light of the absence of any indication of brain tumor or hydrocephalus, can reasonably be explained only as the result of a violent head trauma having occurred some time prior to July 28, 2005."; *see also* Lukefahr Aff. ¶¶ 10–11 [Appx 6] (likely explanation for increase in head circumference in the victim is "major head trauma")) Dr. Uscinski noted, "This medically significant increase in head circumference is a 'red flag' that should have been investigated by a CT scan or MRI at the time, and is likely explained only by the occurrence of a violent head trauma some time prior to late July 2005." (Uscinski Aff. ¶ 13 [Appx 4])

Dr. DiMaio, one of the State's medical experts who testified at trial, notes in his text, FORENSIC PATHOLOGY, (2d ed. 2001): "In infants, chronic subdural hematomas may result in enlargement of the head." (*Id*. at 169) Trial counsel did not ask Dr. DiMaio or any of the witnesses about the victim's increase in head circumference and thus they missed the opportunity to confront Dr. DiMaio on this point. And since they had not obtained a copy of Dr. DiMaio's book (Flores Aff. ¶ 17), they were not prepared to ask about the statement in his book that chronic subdural hematomas can cause enlargement of the head.

The autopsy results rule out any explanation such as a brain tumor or hydrocephalus, making the *only* explanation for this change in head circumference *a violent head trauma*. (Sirotnak Aff. ¶ 13; Ophoven Aff. ¶ 23) This violent head trauma must have occurred long

enough before July 25, 2005 for the expansion to manifest. Remarkably, and indefensibly, trial counsel did not present any of this evidence to the jury, and did not cross examine Dr. Zamir on the evidence to counter his assertion that Angel was perfectly healthy on October 18.

According to Drs. Sirotnak, Ophoven, and Lukefahr, standard pediatric protocol requires that a pediatric office would plot the head circumference measurements on each visit so that any change in the percentile would be noted, but the medical records reveal that Angel's measurements were not consistently plotted. (Sirotnak Aff. ¶ 14, Ophoven Aff. ¶ 24; Lukefahr Aff. ¶ 11) According to Dr. Sirotnak and Dr. Lukefahr, if a change from the 50th percentile to the 95th percentile in such a short span of time were noted in a pediatrician's office, the pediatrician should immediately investigate the reasons for such an increase, including ordering a CT scan or an MRI. (Sirotnak Aff. ¶ 14; Lukefahr Aff. ¶ 11) Villarreal did not confront Dr. Zamir with his faulty plotting of the circumference of Angel's head or with his failure to order a CT scan or MRI to determine the cause for the rapid increase. And more importantly, he did not confront Dr. Zamir with the medical evidence showing that Angel suffered severe head trauma prior to late July 2005—well before the time period in which the State insisted all of Angel's injuries were inflicted.

c. Trial counsel's failure to investigate and present evidence of Angel's dramatic increase in head circumference was unreasonable performance.

Rather than investigate and present this evidence that a violent head trauma occurred to the child prior to late July 2005 resulting in the dramatic expansion of the size of the child's head, **Villarreal did not talk to Dr. Zamir before trial and did not provide Angel's pediatric records to any expert for review**. (Flores Aff. ¶ 16) In a case such as this, failing to provide the victim's pediatric records to an expert for review cannot constitute reasonable performance. Because of trial counsel's failure to provide the records to a doctor for review, trial counsel

failed to present evidence to the jury of the dramatic increase in Angel's head circumference and failed entirely to challenge the medical evidence that the victim was in good health on October 18, 2005 presented by the State. (Flores Aff. ¶ 16 ("I was not aware of any issue concerning a significant increase in the child's head circumference until it was brought to my attention by habeas counsel in November 2011."))

Also, as mentioned, Villarreal also did not ask a single question of Dr. Zamir, Angel's pediatrician (15 RR 81:8–9) and did not confront Drs. Farley or DiMaio with Angel's pediatric records. Review of Angel's medical records show that he was not in good health on October 18, 2005, that Dr. Zamir's office failed to properly plot the child's head circumference, and that the child had suffered severe head trauma causing a dramatic increase in head size. (2/27/08 Letter from Steven Eckert to Dr. DiMaio [Appx 95]; 9/12/08 Letter from Steven Eckert to Dr. Farley [Appx 97]) Nonetheless, Villarreal had no questions for Dr. Zamir and no questions on the prior health of Angel or his pediatric records for Drs. Farley and DiMaio.

Accordingly, the jury never learned of the increase in the size of Angel's head and they never learned of the medical evidence showing that, because there is no evidence of a brain tumor or hydrocephalus, "the only explanation for this change in head circumference [is] a violent head trauma" that occurred at some time prior to the time the increase was recorded in late July 2005. (Sirotnak Aff. ¶ 13) As a result, the State's theory that Angel was a healthy baby on October 18, 2005 went entirely untested.

d. Failure to investigate and present evidence of the victim's abnormal behavior and events during the summer of 2005.

The fact that the victim suffered severe head trauma sometime in late June or early July 2005 also is consistent with the observations of several witnesses regarding the child's conduct and appearance during the summer of 2005, including Ivonne, Yaritza, and Gina Salazar, and

Elmita and Marisol Velez. A number of these witnesses observed Angel as having a disproportionately large head that seemed to continue to increase in size over time. Angel was described as extremely inactive, slow, and vegetable-like. Angel did not respond when prompted to eat and blinked very slowly, if at all. Angel frequently fell from the sofa or bed, was dropped or thrown, and was found lying on a sofa or chair, unattended. These observations are described in detail in Facts I.A.3 and I.A.4.b, *supra* at 15–22.

Mr. Velez's trial counsel never contacted Yaritza or Gina Salazar, who were willing and able to testify and who could have testified regarding Angel's behavior to lend support to the possibility that Angel had suffered a severe head trauma before Velez ever met him. (Y. Salazar Aff. ¶¶ 12–13 [Appx 29]; G. Salazar Aff. ¶¶ 11–12 [Appx 27]; I. Salazar Aff. ¶ 21 [Appx 28]) Although Manuel's trial counsel contacted Ivonne Salazar, they did not ask her to testify at Velez's trial despite her willingness to do so. (I. Salazar Aff. ¶ 20) Trial counsel met with Manuel's sister, Elmita Velez, only once. (E. Velez Aff. ¶ 33 [Appx 33]) Although Elmita attended most of the trial and sentencing, defense counsel never asked her to testify about Angel's abnormal behavior or any other topic. (*Id*. ¶ 33–34) Similarly, trial counsel did not ask Marisol Velez to testify about her observations of the child. (M. Velez Aff. ¶ 25 [Appx 37])

These witnesses and their testimony would have supported the evidence in the medical records indicating that Angel suffered a severe head trauma in late June or early July 2005. Defense counsel failed to investigate this evidence, and failed to present it at trial. Such failure constitutes unreasonable performance.

e. Failure to investigate and present evidence of the victim's other injuries.

Trial counsel also failed to confront Dr. Zamir with injuries to Angel that must have been evident during the visits Angel made to the clinic. Despite Angel's symptoms, and his dramatic

increase in head size in less than a month, Dr. Zamir said nothing in the medical records suggest any signs of abuse. (15 RR 77–78) Given the clear evidence discussed *supra* in Facts I.A.3 that Moreno badly abused her children, including Angel, and the evidence that Angel had suffered severe head injuries before October 18, including head trauma before July 25, it is unbelievable that Villarreal could not ask Dr. Zamir about signs of abuse during Angel's visits to Dr. Zamir's office. Dr. Sirotnak reviewed the autopsy photos for Angel Moreno and stated that it appeared "that several of the contusions and markings on the body, as noted in the photographs and in the autopsy report were more than two weeks old at the time of death." (Sirotnak Aff. ¶ 15 [Appx 7]) In support thereof, he stated: "My opinion is based on the appearance of the injury and my training in child abuse pediatrics. There is also no acute inflammatory cell response seen by the pathologist's microscopic staining of the injury which may indicate that this mark did not occur within the last two weeks of the child's life" (*Id.*)

Villarreal should have attacked the veracity and reliability of Dr. Zamir's Clinic and its medical records. He should further have attacked the veracity and reliability of Dr. Zamir's conclusion that Angel was perfectly healthy through October 18, 2005, by questioning Zamir about his failure to see these injuries on the child, and his obligation to report abuse and the consequences of his failing to do so, which could create bias in his testimony. For example, at trial Dr. Zamir testified he had never before seen the injuries, referred to at trial as various burns, bites, and bruises, that riddled victim's body on October 31, 2005. (15 RR 66–80) The police, firefighters, and paramedics all noticed aging or "old" injuries on Angel's body the day of the incident, October 31, 2005. (14 RR 105–07, 121–25, 141–45; 16 RR 27) It seems that some of these injuries would have been detected by Dr. Zamir and his staff at the doctor's visit less than two weeks before. Yet Villarreal did not confront Dr. Zamir with any of this evidence. In addition and as set forth in detail below, Acela herself admitted to injuring Angel and several

witnesses had seen her abuse Angel. (State's Ex. 49A at 13–14, 41–42; G. Salazar Aff. ¶ 5 [Appx 27]; C. Velez Aff. ¶ 7 [Appx 31]) Again, however, Villarreal did not confront Dr. Zamir about failing to notice signs of abuse.

Dr. Zamir clearly did not know Angel's full medical picture. Cross examination and direct evidence fed by routine investigation would have discredited Dr. Zamir's testimony that Angel was a normal and healthy baby two weeks before the incident. But Villarreal failed to conduct such an investigation. He thus never confronted Dr. Zamir with evidence of Angel's other injuries, Angel's severe prior head trauma, or Acela's abuse of Angel. In fact, Villarreal did not have a single question for Dr. Zamir. This failure amounts to unreasonable performance by Mr. Velez's trial counsel.

3. Failure to investigate and present medical evidence challenging the State's evidence that a severe traumatic blow to the head was required on October 31, 2005 was unreasonable performance.

The State's medical expert, Dr. DiMaio, and the doctors retained by Velez's habeas counsel agree—Angel died due to a combination of the older severe injuries with a newer injury. (17 RR 138 (DiMaio: "the combination of the old impact with injury to the brain and the new impact" caused the child's death)) Contrary to the testimony of Drs. Farley and DiMaio, however, the medical evidence shows that the newer injury did not have to severe. Because of the pressure in Angel's head due to the older skull fractures and hematoma, a relatively minor injury on October 31, 2005 could have caused the child to go into cardiac arrest.

In other words, and as set forth in the Attached affidavits of Drs. Uscinski, Ophoven and Spitz, a severe traumatic injury was not required on October 31, 2005 to cause the death of Angel Moreno:

- Dr. Uscinski:
    - "The existence of the chronic subdural hematoma must be considered a significant factor in any analysis of the ultimate cause or mechanism of the child's death. While the child's body was working on healing the skull fractures and chronic subdural hematoma, **the injured area, particularly the hematoma, would have been susceptible to additional internal bleeding as a result of relatively minor trauma, such as falls, contusions, or other events.** This is due to the known phenomenon of **fresh spontaneous bleeding that can occur weeks or months after the initial injury.** Indeed, this condition could have caused unconsciousness, distress, or even death, without obvious additional external injuries. This is due to the physiologic effects of blood irritating the brain which may result in seizures, convulsions, respiratory depression or vomiting with airway compromise culminating with oxygen deprivation to the brain." (Uscinski Aff. ¶ 16 [Appx 4])
- Dr. Spitz:
    - "It also is apparent that the older injuries, namely the skull fractures and the subdural hematoma, were more severe, than the injuries which occurred at the time of Angel Moreno's death. The existence of the older injuries would have **made Angel Moreno more susceptible to less severe injuries resulting in death**." (Spitz Aff. ¶ 11 [Appx 5])
- Dr. Ophoven:
    - While the postmortem findings show new blood and thus a more recent injury, they cannot determine whether the secondary deterioration [the more recent injury] was precipitated by anything but a simple fall. . . . As explained below, in a child with such derangement of intracranial physiology [due to the earlier injuries], **a simple fall could be catastrophic.**" (Ophoven Aff. ¶ 33 [Appx 3])
    - What can be determined from the evidence is that a significant blunt force injury occurred some weeks or more prior, which left damage to the victim's head and brain. **This left him at serious risk for even a minor subsequent injury.** (*Id*. ¶ 34)
    - Because of the extreme pressure in the child's skull caused by the skull fractures and the older subdural hematoma, **the newer injury could have been inflicted by a relatively minor event on or near October 31, 2005**. This is supported by the fact that there is no evidence in the record of external injury to the child that would have been caused contemporaneously with these newer injuries. In the presence of a very delicate balance as was the case here, **a minor fall can result in a catastrophic deterioration as the result of lost intracranial equilibrium.** This consideration was not a part of the information presented to the jury from my review of the materials. Without such consideration, incorrect conclusions could and in my opinion were made. (*Id*. ¶ 43)

Accordingly, highly qualified medical experts who have reviewed the medical records and preserved tissue slides in this case disagree with Dr. Farley's testimony that the injuries on October 31, 2005 were "just not consistent with an accident. This is significant blunt force head trauma. Very few children ever die from accidental falls at a one-year old age and less than four and a half feet" (17 RR 35) and with Dr. DiMaio's testimony that these injuries required "another incident of severe trauma within minutes or a few hours of the child being found unconscious." (17 RR 136) (Ophoven Aff. ¶ 34 [Appx 3]; Uscinski Aff. ¶¶ 17–18 [Appx 4])

Dr. Ophoven further explained the delicate balance of fluids in the head of a child with brain injury:

> Drs. Farley and DiMaio did not take into consideration the obvious risk for sudden rebleed or deterioration from secondary alterations in perfusion and volume in this seriously damaged baby. What is well recognized in the neurophysiology literature and as noted in my experience with a variety of circumstances with alterations in intracranial physiology is the delicate balance between the necessary perfusion pressures needed for successful brain circulation and even minor changes in intracranial volume especially in the presence of chronic increased pressure. *See, e.g.*, Jan E. Leestma, M.D., M.A., FORENSIC NEUROPATHOLOGY, 2d ed., Taylor & Francis Group (2009) (Chapter 5, *Forensic Aspects of Intracranial Equilibria*, pp. 343–98).

(Ophoven Aff. ¶ 36)

As explained by Dr. Ophoven: "Because of the state of distress of the child's brain caused by the earlier trauma to the head, the final injury to the child causing his death could have been a relatively minor incident, such as falling from the bed the night before." (Ophoven Aff. ¶ 35) In fact, "the predominant view now" is that short falls can in some cases be fatal. (*Id*. ¶ 42 (quoting Goudge, Steven T., *Report of the Inquiry into Pediatric Forensic Pathology in Ontario*, October 1, 2008, at 528))

Trial counsel did not challenge the violent portrayal of the final injury that killed Angel and presented no evidence that the final injury to Angel could have been caused by a relatively minor impact such as falling from the bed or could have been caused by rebleeding of the older subdural hematoma. Evidence was available that Angel had fallen from the bed the night prior and hit his head hard on the floor. (State's Ex. 49A at 8; State's Ex. 51 at 2; State's Ex. 64; Def. Ex. 2; Arredondo Decl. ¶ 4 (Moreno told Dr. Arredondo that when Angel fell off the bed twice the night before, she "heard his head hit hard on the floor and he began crying.")) In fact, in her statement to police, Moreno stated that the child fell from the bed the night before. (State's Ex. 49A [English transcript of Moreno interview] at 8) Villarreal never asked about this incident or the impact on the child, and never attempted to challenge the State's testimony that a violent event was required on October 31 to kill Angel.

4. Failure to investigate and present medical evidence and testimony challenging the State's evidence that the bite marks on the victim were caused by Mr. Velez was unreasonable performance.

The State repeatedly introduced and emphasized evidence that Angel had several bite marks on his body at the time he died, and sought to attribute those marks to Velez. Villarreal breached the "standard of objective reasonableness," *Washington*, 466 U.S. at 687, by failing to take even modest steps to meaningfully challenge the State's theory that the contusions found on Angel were bite marks inflicted by Velez.

a. Failure to Raise Doubt about Whether Contusions Were Bite Marks.

Where, as here, there is a contusion that is labeled a bite mark but that has no teeth imprints, there is often a serious question about whether the contusion is a bite mark at all. *See, e.g.*, *Czapleski v. Woodward*, 1991 WL 639360 (N.D. Cal. Aug. 30, 1991) (dentist's initial report concluded that "bite" marks found on child were consistent with dental impressions of mother; several experts later established that the marks on child's body were postmortem abrasion marks

and not bite marks); *Kinney v. State*, 868 S.W.2d 463 (Ark. 1994) (disagreement that marks were human bite marks). The uncertainty inherent in determining whether a contusion without teeth impression is a bite mark was apparent in Dr. Farley's initial characterization of the contusions as merely "suspicious" for bite marks and her continued equivocation at trial about whether the contusions "look[ed] just like" bite marks or were, in fact, bite marks. (17 RR 14–15)

Villarreal did not ask Dr. Farley a single question about her bite-mark testimony, failing to raise any questions about the basis for Farley's conclusion that the contusions were bite marks or to inquire about other possible explanations for the contusions. Villarreal also failed to cross-examine Dr. DiMaio or any other witnesses about the so-called bite marks.

Villarreal did not follow the advice he received from Dr. Keith Rose, to retain an expert on bite marks "to challenge the State's suggestion that some of the contusions on the child's body were 'bite marks.'" (Rose Aff. ¶ 9 [Appx 8]) Dr. Andrew Sirotnak, a pediatrician retained by habeas counsel who works with abused children, has confirmed that the records provide "no basis . . . for a conclusion that these contusions are bite marks rather than some other form of contusion. As noted in the autopsy report, no teeth marks are present; it is simply not possible to determine what caused the contusions." (Sirotnak Aff. ¶ 16 [Appx 7]; *see also* Rose Aff. ¶ 9 [Appx 9] ("no teeth impressions were identified that could support . . . a conclusion . . . [that the contusions were bite marks]"))

Given the importance of this issue and the record's indication that such witnesses were available to Villarreal, failure to explore and develop this testimony was unreasonable. *Cf. Wilhoit v. State*, 816 P.2d 545 (Okla. Crim. App. 1991) (overturning defendant's conviction and death sentence because defense counsel inexplicably failed to use a bite mark expert hired by defendant's family).

b. Failure to Raise Doubt about Whether Velez Caused Any Bite Marks that Were Found on Angel.

Villarreal also failed to provide the jury anything to suggest that, if the contusions were bite marks, they may have been caused by someone other than Velez. Despite the fact that the central defense theory was that Angel's injuries were caused by Acela Moreno, Villarreal failed to make any meaningful effort to connect any bite marks to her. The State's first witness—Acela's sister Magnolia Medrano—testified at trial that once when Acela brought Angel over to Medrano's house, the baby had a bite mark on his cheek with visible teeth impressions. Medrano said that, when she asked Acela what happened, Acela told her that she had bit Angel on the cheek. (14 RR 48) For no apparent reason, Villarreal asked Medrano no questions about the incident on cross-examination, did not confront Acela with Medrano's statement, and did not mention the biting incident in his closing statement. (14 RR 49–52; 16 RR 99–110; 18 RR 115–38) Notably, Villarreal made no effort to establish that Medrano had seen the bite mark on Angel's cheek while Velez was out of town. Medrano indicated in her sworn statement to police that she saw the bite mark *after* Velez left for Memphis (11/1/05 M. Medrano Statement for Police at 1 [Appx 60]), but on the stand claimed not to recall where Velez had been when she observed the bite mark. (14 RR 47) Establishing this timing would have prevented the State from implying that Moreno was merely covering for Velez who actually caused the bite mark. Villarreal inexplicably failed to present the readily available evidence that any bite marks on Angel may have been caused by Moreno.

Similarly, Villarreal also failed to develop evidence regarding the possibility that Angel's brother, Alexis, was the cause of any bite marks. Villarreal should have been aware that this was a potentially viable theory. Ortega's notes, which Villarreal had in his possession, note the "possibility of Alexis the biter" (Gary Ortega's Notes of Conversation with Dr. Natarajan [Appx

70]), and indicate that the defense should "Look at Alexis profile. He is a biter." (Tex. Dep't of Family and Protective Services Records [Appx 72])[29] Villarreal took no steps to pursue this theory. Villarreal's failure to present evidence about either Acela's or Alexis's history left the State's proffered link between Velez and the alleged bite marks virtually unchallenged.

Villarreal's failure to provide any meaningful response to the State's evidence regarding the alleged bite marks was unreasonable. The bite-mark evidence was central to the State's picture of Velez as child abuser and, ultimately, murderer. Therefore, counsel's failure to take even modest steps to challenge the bite-mark evidence constituted deficient performance and prejudiced Mr. Velez.[30]

5. Mr. Velez was prejudiced by trial counsel's failure to challenge the State's medical evidence and theory of the case.

Villarreal failed to meaningfully challenge the State's theory of the case as required by the right to the effective assistance of counsel. *See Cronic v. United States*, 466 U.S. at 656. The State's evidence on matters critical to the case was not questioned and the State's central theory of the case—that Angel was healthy and unharmed on October 18 and the injuries occurred in the last two weeks of his life after Mr. Velez had returned from Memphis—went entirely untested.

Villarreal's failures began with his failures to investigate the age of Angel's injuries and to provide Angel's pediatric records to any doctors for review. Such failures cannot be overcome by demurring to trial strategy. No strategy excuses this conduct. Instead, these investigative failures are entirely inconsistent with Villarreal's central theory of defense—that

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[29] Further evidence to support this theory was contained in TDFPS files withheld by the State in violation of *Brady v. Maryland*. (*See infra* at 217–19; 9/22/08 Letter from Steven Eckert to Petra Cruz [Appx 98])

[30] Several of the interviewed jurors indicated they would have considered testimony about the source of the bite marks relevant. (Quintanilla Decl. ¶ 5 [Appx 47]; Avalos Decl. ¶ 6 [Appx 43]; Miller Decl. ¶ 6 [Appx 45])

the injuries were inflicted by Moreno. *See Soffar v. Dretke*, 368 F.3d at 473 ("The scope of a defense counsel's pretrial investigation necessarily follows from the decision as to what the theory of defense will be.").

Moreover, these failures could not have been an informed strategic decision because trial counsel had been alerted to the need for further investigation into the age of the injuries by two different medical experts. Nevertheless, Villarreal failed to follow through, and instead abandoned this line of inquiry. *See Soffar v. Dretke*, 368 F.3d 476 (quoting *Wiggins v. Smith*, 539 U.S. at 527) (The "court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further"); *see also Draughon*, 427 F.3d at 296 (affirming trial court determination that trial counsel rendered ineffective assistance by failing to obtain forensic examination of a ballistics expert and stating that "failure to investigate the forensics of the fatal bullet deprived Draughon of a substantial argument, and set up an unchallenged factual predicate for the State's main argument that Draughon intended to kill"); *Loyd v. Whitley*, 977 F.2d 149, 157 (5th Cir. 1992) ("defense counsel's failure to pursue a crucial line of investigation in a capital murder case was not professionally reasonable").

The failure of Mr. Velez's trial counsel to obtain and present any evidence or testimony challenging the State's theory "deprived [Velez] of a substantial argument and set up an unchallenged factual predicate for the State's main argument" that Angel was healthy on October 18 and the injuries occurred within fourteen days of his death. *Draughon*, 427 F.3d at 296. As a result, Villarreal failed in his duty to ensure that the trial was a "reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

Had Villarreal performed reasonably, presented the available medical evidence, and challenged the State's medical experts, it is likely that he would have raised reasonable doubt in

the mind of at least one juror as to when the injuries occurred and who inflicted those injuries. (*See* Johnson Decl. ¶¶ 4–5 [Appx 44] ("In my view, the most important evidence was the medical evidence, including the testimony of the state's witnesses that the injuries to the baby had to have happened 7-14 days earlier."); Avalos Decl. ¶ 3 [Appx 43]; Miller Decl. ¶ 3 [Appx 45]; Quintanilla Decl. ¶ 6 [Appx 47]) Unfortunately, the jurors never heard this evidence. As a result, Velez was prejudiced by trial counsel's unreasonable performance. Because there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, Mr. Velez is entitled to habeas relief.

C. Failure To Take the Steps Necessary to Support the Defense Theory That Moreno Inflicted Angel's Injuries Was Unreasonable Performance That Prejudiced Mr. Velez.

Although Villarreal told the jury Acela Moreno was responsible for Angel's death, he did not support this claim with the substantial evidence that could have been presented. This failure was the product of insufficient investigation, inadequate cross-examination of Moreno and other witnesses, and failure to present available evidence.

1. Defense counsel's theory of the case presented to the jury focused on the culpability of Ms. Moreno.

As discussed above, Villarreal's theory of the case was that Acela Moreno inflicted the injuries that caused the victim's death. Villarreal's opening statement focused on this theory:

> **[W]hat it all boils down to is who done it, who had the opportunity, who had the means, who had the drug problem.** Evidence versus nonevidence.
>
> . . . .
>
> **The question then becomes who had access to the child during that timeframe, that time line. If you weren't around, you weren't around, it couldn't have been you. If there was somebody else available, the evidence is going to show that Ms. Moreno was available, that Ms. Moreno was let's say, had a**

> **little drug problem,** the evidence is also going to show that she was a nomad going from house to house to house, whoever would take her in and also indulge in the use of illegal drugs.

(14 RR 28:11–30:6, emphasis added)

In his closing, Villarreal again focused on Moreno's culpability (aka "Chiquis"):

- This young baby here and there's only been one person who has been proven to do any harm to this child and her name is Chiquis.

(18 RR 124:7–10)

- **This is a real victim but not of Manuel Velez, of Chiquis**. From house to house to house to house looking for somebody to take care of her, not working, drinking and just doing what she wanted to do regardless of who it affected. She paid—I'm sorry. **He paid the price for Chiquis** and now she wants—the State wants for this man to pay the price when it should be her and a lot more.

(18 RR 133:20–134:2, emphasis added)

Thus, as set forth in Villarreal's opening and closing arguments, his central theory of the case was that Moreno harmed the child. Unfortunately, as set forth in detail below, Villarreal put on **no evidence** in support of this theory. The jurors noticed that Villarreal "promised to show evidence he did not end up showing the jury" and that he did not prove Moreno's abuse of her children. (Quintanilla Decl. ¶ 3 [Appx 47]; *see also* Avalos Decl. ¶ 4 [Appx 43]; Miller Decl. ¶ 4 [Appx 45]) And in his opening and closing statements, Villarreal confusingly tried to challenge Moreno's credibility while at the same time portraying her as a victim of police harassment. He never confronted Moreno that she was telling the truth to police on November 1, 2005, but not at trial when she changed her story to inculpate Velez. Furthermore, Villarreal repeatedly mentioned Moreno's "deal," but he never presented the actual basis of her plea—that she pled to intentionally or knowingly causing bodily injury by "striking the victim . . . on or about October 31, 2005." Instead, Villarreal referred to the plea in his closing as a "sin by omission," thus vouching for Moreno's false testimony that she pled to failing to protect her son from Velez.

2. Mr. Velez's trial counsel failed to investigate and present evidence on the culpability of Moreno and the innocence of Mr. Velez and failed to confront Moreno with such evidence, including her own admissions.

As outlined above, trial counsel's central theory of the case was that Moreno committed the injuries that killed the child. Villarreal failed, however, to present any evidence of Moreno's abuse of the victim and her other children. In addition, in his very brief cross-examination of Moreno consisting of only eleven pages of transcript (16 RR 98–109), trial counsel failed to confront Moreno about the evidence of her abuse of her children, including Angel. Villarreal's co-counsel, Rene Flores, acknowledges, "It obviously was not effective for Hector [Villarreal] to promise the jury he would provide evidence to support his statements about Moreno and then fail to offer such evidence." (Flores Aff. ¶ 10 [Appx 14])

This evidence was readily available to trial counsel from a number of sources. The evidence of Moreno's abuse of her children that was never presented to the jury includes (a) the terms her plea agreement in which she pled guilty to causing bodily injury by "striking the victim . . . on or about October 31, 2005"; (b) her admitted abuse of Angel and her other children; and (c) the extensive evidence showing she abused her children.

a. Trial counsel failed to present evidence of and confront Moreno with Moreno's own admissions that she struck Angel on or about October 31, 2005.

Remarkably, Villarreal failed to ask Moreno about or present evidence of Moreno's plea agreement in which she pled guilty to intentionally or knowingly causing bodily injury to the victim by "striking the victim . . . on or about October 31, 2005." And astoundingly, trial counsel failed to object when the State elicited false testimony from Moreno that she pled guilty to not reporting Manuel for abusing her child.

i. Moreno pled to striking Angel on or about October 31, 2005.

On May 18, 2007, Moreno pled guilty as follows:

> Acela Rosalba Moreno . . . on or about the 31st day of October, 2005 . . . did then and there intentionally or knowingly cause serious bodily injury to Angel Moreno, a child 14 years of age or younger, 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 (Count III of the Indictment, May 18, 2007, Case No. 06-CR-83-G) (emphasis added); 6 SRR1 5–8) In her plea papers, someone wrote "State Abandons 'serious bodily injury'—Defendant will plea to 'bodily injury."' (1 SRR2, State's Ex. 1 at 3)

At the hearing, Moreno affirmed that the allegations in Count III of the Indictment were true:

> Judge: The state is alleging in Count III that on or about the 31st of October of the year 2005 here in Cameron County, you did commit the offense of injury to a child causing bodily injury here in Cameron County. Is that allegation true and correct?
>
> Moreno: Yes.

(6 SRRI 6) Similarly, in the written plea, Moreno affirmed "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 4)

The judge confirmed that Moreno was pleading guilty because she was, in fact, guilty as charged:

> Judge: And are you pleading guilty because you are guilty?
>
> Moreno: Yes.
>
> Judge: You are guilty?
>
> Moreno: Yes.

(6 SRRI 8) "Based on the evidence submitted," the court found Moreno guilty. (6 SRRI 12)

ii. *Villarreal failed to present evidence of Moreno's plea, failed to confront her with the basis for her plea, and failed to object to or correct Moreno's false testimony about her plea.*

The jury never learned the crime to which Moreno actually pled guilty. After emphasizing her "deal" in his opening and closing statements (although never stating that Moreno pled to striking the child on or about October 31, 2005), Villarreal allowed Moreno to testify that she pled to not reporting Manuel for harming her son; he never presented evidence of the factual basis for the plea; and he never confronted Moreno about her plea.

The State elicited false testimony from Moreno regarding her plea—yet Villarreal did not object:

> Q. [BY PROSECUTOR SAENZ] And what is your understanding as to how many years you're going to serve?
>
> A. Ten years.
>
> Q. And what is your understanding as to why you're going to be serving 10 years?
>
> A. Because I am guilty of not having reported to the police that Manuel was hurting my child.

(16 RR 95:16–22) Thus, Villarreal permitted Moreno to testify that she pled to not reporting Manuel's abuse of her child to the police without objection. Saenz also questioned Moreno in detail about exactly what occurred on October 31, 2005, but throughout her testimony Moreno never mentioned the fact that she struck the victim that day. (16 RR 83–92) Villarreal never corrected Moreno or the record in the case and he never presented the evidence of the basis for her plea or discussed her plea with any other witness. Thus, her false testimony went entirely unchallenged.

Villarreal's failures do not stop there. In spite of his theory of the case and his focus on Moreno's plea in his opening statement, all Villarreal did in his cross examination of Moreno was ask her six inconsequential and mundane questions about her plea:

Q. [BY VILLARREAL] Okay. And you entered a plea of guilty in May of 2007, isn't . . . that true?

A. Yes.

. . . .

Q. You said in that plea bargain—you did make a deal didn't you?

A. No.

Q. Well, it says right here that you affirmed the court that there is no plea agreement except as follows: 10 years TDC. Defendant to testify for the state in 07-CR-721, this case, and you're entering a plea to Count III, and the other two counts were dismissed; isn't that right?

A. Yes.

Q. So instead of you facing the death penalty like Mr. Velez is, you made a deal to the maximum of a third degree felony, isn't that true?

A. Yes.

Q. Which carries a maximum punishment of 10 years which you agreed to?

A. Yes.

Q. All right. You told this jury that everything you said in that videotape is true back in 2005. And you didn't make this deal until May of 2007, isn't that true?

A. True.

(16 RR 103:21–104:22) **Villarreal never asked Moreno about the fact that she pled guilty to "striking the victim . . . on or about October 31, 2005."** Villarreal did not confront Moreno about her plea and did not present any evidence of Moreno's plea. As a result, the jury never learned of Moreno's admission to striking the child on the day he became unconscious and was rushed to the hospital.

The State's closing statement to the jury took full advantage of Villarreal's ineptitude. The State repeated and again emphasized Moreno's false testimony: "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." (18 RR 148:24–149:2; *see also* 18 RR 112:8–19 ("His mother let him down. His mother did not protect him. His mother did not call the police. . . . She accepted responsibility for her inaction.")) Villarreal did not say a word—he did not object, he did not correct the record, and he failed again to perform reasonably on behalf of his client.[31]

b. Trial counsel failed to present evidence of and confront Moreno with Moreno's own admissions that she abused her children including Angel.

In addition to failing to ask Moreno about or present evidence of her admission and plea to striking Angel on the day in question, Villarreal did not present evidence on or confront Moreno about her admitted abuse of the child, her statement that she probably caused his bruises, her statement that she may have burnt him with a cigarette, and her admission that she caused bruises on her daughter Emily.

According to the notes of a social worker who met with Moreno on November 1, 2005, Moreno stated that Velez never disciplined the children physically and when asked about the bruises on the baby's side, the social worker wrote "Mother states he bruises easily and was probably caused by her picking him up." (11/1/05 Valley Regional Social Services Notes by Maria Perez [Appx 56]) In addition, in her sworn statement to police, Moreno admitted that she had harmed her children, including the victim:

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[31] Jurors who convicted Mr. Velez wanted to know more about Acela's abuse of her children and they were surprised to learn of the basis of the crime she actually pled to—they state that they would have wanted to know and consider what Acela actually pled to. (Peterson Decl. ¶¶ 3–4 [Appx 46]; Quintanilla Decl. ¶ 7 [Appx 47]; Avalos Decl. ¶ 5 [Appx 43]; Johnson Decl. ¶ 8 [Appx 44]; Miller Decl. ¶ 5 [Appx 45])

- "I may have burned Angel's foot when I carried him, but only one time."
- "My daughter Emily has a bruise on her left arm. I pinched her there myself."

(Voluntary Statement of Accused, Acela Rosalba Moreno, Oct. 31, 2005, State's Ex. 51 at 2) And in her videotaped statement with police, Moreno again admitted that she may have burned the baby with her cigarette. (State's Exhibit 49B at 13)

Unbelievably, and in direct contradiction to his own theory of the case, Villarreal never asked Moreno about **any** of these admissions that she harmed her children. (Cross Examination of Moreno: 16 RR 98–109) Nor did he mention Moreno's admissions in his questioning of other witnesses. Trial counsel failed to present evidence of the simplest kind that was readily available to him: Moreno's own admissions of harming her children and causing the bruises on the victim.

c. In addition to Moreno's own admissions, trial counsel failed to investigate and present evidence of and failed to confront Moreno with the extensive additional evidence of Moreno's abuse of Angel and her other children.

In spite of trial counsel's theory of the case—that Moreno abused and killed Angel, Villarreal failed to discover and present evidence of Moreno's abuse of Angel and her other children (in addition to his failure to present evidence of her own admissions of abuse as outlined above). The evidence, which was readily available from many different sources, clearly shows that Moreno abused her children, including Angel.

i. According to Moreno's children Emily and Alexis, Moreno abused them and Angel.

Reports from two counseling and foster care organizations with the Texas Department of Family & Protective Services ("TDFPS") state that Moreno's children were abused by Moreno and that the children told their counselors that Moreno harmed their half-brother, Angel, the victim in this case.

The first report is an Individual Service Plan Review for Moreno's son Alexis (date of birth February 24, 2003). (*See* The Bair Foundation, 11/30/05 Individual Service Plan Review, Alexis Moreno [Appx 89]) It is the first extensive report after Alexis and his sister Emily (date of birth September 6, 2001) had been placed into foster care on November 1, 2005. The review and report were conducted by Beverly Kaupp, M.S., the case manager, and Mari Rodriguez, the caseworker, and listed the following as the "reason for placement" into foster care:

> - "Alexis was being **physically abused by her [sic] biological mother**. He was placed into TDFPS custody with his sister, Emily Moreno. **She was also a target of the mother's abuse and neglect**."

(*Id*. at 1)

Moreno's children were in foster care and counseling throughout 2006 and into 2007. Rosalee Farber, a Licensed Professional Counselor with South Texas Family Counseling, issued a report in February 2007 about her counseling over the previous nine months with both Emily and Alexis. (*See* South Texas Family Counseling, 2/7/07 Report on Emily and Alexis Moreno [Appx 92]) In the report, Ms. Farber recommended that the children no longer be required to visit their mother at the jail. Ms. Farber discussed the "emotional damage" caused by the court-ordered visits. In doing so, Ms. Farber makes clear that the children fear their mother and that the children believe that their mother killed their brother:

> - Emily "constantly thinks about her mother in jail and **what her mother did to her little brother**. **There is never any closure for her – the incident is constantly refreshed every time she sees her mother in jail**."
>
> - "With their mother, **[Emily and Alexis] constantly remember what she did to their brother and they are afraid of her**."

(*Id*. at 2, emphasis added).

These TDFPS records were not a part of Villarreal's file copied for habeas counsel. In September 2008, Villarreal sought to subpoena TDFPS and the Bair Foundation. (9/3/08 Defense Subpoenas [Appx 74]) Judge Limas never ruled on the agencies' objections to the subpoenas (16 RR 40–41) At the start of trial, Villarreal asked the judge about the subpoenas and the judge responded "Not yet." (*Id.*) Villarreal never asked again for a ruling on the subpoenas.

Mr. Velez's prior counsel had received some documents from TDFPS in 2007, but they did not include these records. The documents produced in 2007 reflect that additional reports on the children will be produced and they also show that the children's therapist recommended that they not continue to see their mother in jail. (*See also* 1/16/07 TDFPS-CPS Monthly Statement on the Moreno Children [Appx 72] ("Alexis goes home very aggressive after his visits at the jail with his mother."); 12/06 TDFPS-CPS Monthly Statement on the Moreno Children (indicating that Emily's and Alexis' therapist does not recommend that they continue with visits at the jail to see their mother))

Villarreal did not insist on a ruling on the TDFPS subpoenas and thus he did not have this evidence at trial. He could have used the documents previously produced to show that follow-up was needed—the children's therapist was recommending they no longer visit Moreno and the documents state that a report would be issued. Instead, he did nothing to ensure the defense had the benefit of the TDFPS records. He also failed to confront Moreno with the documents he had indicating the children's therapist had recommended they not visit their mother.

Even though the reports are from two different professionals from two different agencies and span fifteen months, the information contained is consistent: **according to her own children, it was Moreno who harmed the victim and who physically abused the children.** Because trial counsel failed to insist that the court rule on the subpoenas, trial counsel never

discovered the reports, never presented them to the jury, and never confronted Moreno with the reports.[32] This evidence condemning Moreno and indicating that she harmed the victim and caused his death was only part of the evidence of Moreno's abuse of her children that the jury never saw.

ii. In August 2005, Moreno hit her daughter so hard the child's head was bleeding and an ambulance was called.

An ambulance was called on August 27, 2005 to the home of Ivonne Salazar, a neighbor of Manuel and Acela's when they lived on Chilton Street. (*See* 8/27/05 City of Brownsville EMS Ambulance Activity Report [Appx 49]) The ambulance was called when Moreno hit her daughter Emily so hard that the child fell and her head was cut and bleeding. As indicated in the report, Moreno refused the emergency personnel's offer to transport the child to the emergency room three times. (*Id*. at 2)

Ms. Salazar, a close friend of Moreno's, described this event in a statement dated February 8, 2006:

> There was also another incident at my house. Chiquis was there and Leticia and Manuel. They were in the living room talking. I was taking a bath and when I came out of the bathroom, I saw an EMS. I asked Leticia Velez what had happened and she told me that Chiquis had thrown Emily across the room and had cracked opened the girl's head.

(2/8/06 Statement of Ivonne Salazar [Appx 61]; Notes of David Ramirez, Investigator for Villarreal [Appx 62]; *see also* I. Salazar Aff. ¶ 12 [Appx 28]) This sequence of events was confirmed by the statements of Ms. Salazar's daughters, Gina and Yaritza Salazar. (*See* G. Salazar Aff. ¶ 6 [Appx 27] ("Acela pushed Emily, and knocked her down, which caused her to

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[32] Also, as explained in more detail *infra* at 217–19, these two documents (exculpatory as to Mr. Velez and impeaching as to Moreno) were in the possession of the State but the State failed to disclose them to defense counsel in violation of *Brady v. Maryland.*

hit her head on a ceramic figurine, which broke. This caused Emily's head to bleed. Leticia Velez called an ambulance."); Y. Salazar Aff. ¶ 5 [Appx 29] ("Acela pushed the girl, which caused her to fall and cut her head on a ceramic statue."))

Leticia Velez, who was also present at the time, confirms what occurred:

> In August 2005, I was at the home of Ivonne Salazar with Manuel and Acela and Acela's children. Acela became angry with her daughter Emily and grabbed Emily by the arm. She threw Emily so hard that the child fell into a ceramic statue of a tiger, broke the statue, and cut her head. Emily's head was bleeding and the child was crying. I called the EMS. Acela told Emily to tell the EMS that she had fallen. Acela told the EMS the child had fallen. Acela repeatedly refused to permit the EMS to take Emily to the hospital.

(L. Velez Aff. ¶ 6 [Appx 35])

Mr. Velez also relayed the details of the incident to the police during their interrogation of him on October 31, 2005 and it is included in his written statement dated and signed that same day:

> I can say that in one occasion we were at the house of Ivonne Salazar . . . We were there a little over a month ago and at that time she (Rosalva Chavez) grabbed and pushed her little girl (Emily) against a ceramic statute of a panther and split her head open a little. My sister (Leticia Velez) called the ambulance and they attended Emily but she did not require stitches and they left her there.

(State's Ex. 64; Def. Ex. 2)

In addition to his own client's statement, Villarreal had other corroboration of this event. On June 17, 2008, his investigator and mitigation specialist met with Ms. Salazar and recorded notes on the meeting in which Ms. Salazar recounted this event. (Notes of David Ramirez, Investigator for Villarreal [Appx 62]) In addition, the EMS Report, and Ivonne Salazar's February 2006 statement to Ortega's investigator, were in Villarreal's file. (Habeas Counsel's Certificate of Files Received from Trial Counsel [Appx 48])

Villarreal never presented any evidence of this incident to the jury—he did not present the EMS records (although he had them) and did not present testimony of any of the witnesses to the incident. Villarreal also failed to confront Moreno about the incident or the EMS records stating she refused to allow the child to be taken to the hospital three times. He did not even ask the officer who took Velez's statements if he had investigated this incident.

iii. Moreno bit Angel on the face and left a bite mark.

Moreno's sister, Magnolia Medrano, stated in a sworn statement to police taken on November 1, 2005, that while Mr. Velez was in Tennessee, she saw a bite mark on Angel's cheek and the imprint of a tooth. (11/1/05 M. Medrano Statement to Police at 1 [Appx 60]) She asked her sister what happened and Moreno stated that "she bit the baby on the cheek." (*Id*.)

At Mr. Velez's trial, Ms. Medrano was the State's first witness. (14 RR 36–48) On direct examination, the State asked her about this incident and Ms. Medrano repeated that Ms. Moreno told her she bit Angel in the face. (14 RR 48:5–10) Moments later, when Villarreal cross examined Ms. Medrano (for less than four pages of testimony), he never asked her about her statement to police or Moreno's admission that she bit the Angel on the cheek. (14 RR 48:24–52:10) Villarreal also failed to confront Moreno with her sister's statement to police and her sister's testimony that Moreno admitted she bit her son in the face, causing the imprint of a tooth to be visible on the child's face. (16 RR 98:25–109:25) He never asked Moreno about any of the alleged bite marks on the child. *Id*.

iv. Moreno's abuse by Chavez made it more likely that Moreno abused her own children, including Angel.

Studies of women who are abused have determined that abused women are more likely to abuse their children. *See, e.g.*, Straus, M.A. & Gelles, R.J., PHYSICAL VIOLENCE IN AMERICAN FAMILIES. New Brunswick, NJ: Transaction Publishers (1990) (a national survey of over 6,000

American families finding that mothers who were beaten were at least twice as likely to physically abuse their children than were mothers who were not abused); Walker, L.E., The Battered Woman Syndrome, 3d ed., Springer Publishing Company (2009), pp. 248–49 (discussing study of 400 battered women showing that 28% of the mothers physically abused their children); Appel, A.E. & Holden, G.W., *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, JOURNAL OF FAMILY PSYCHOLOGY, 12, 578–599 (1998) (reviewing research literature on the co-occurrence of spouse abuse and physical child abuse and identifying three models of abuse involving forms of women's physical abuse of their children); Edleson, J.L., *Mothers and Children: Understanding the Links between Woman Battering and Child Abuse*. Minnesota Center Against Violence and Abuse, St. Paul, MN (1995); Damant, D. and Lapierre, S., *Women's Abuse of Their Children in the Context of Domestic Violence, et al.* (Sept. 2009) (discussing correlation between abused women and their abuse of their children); *see also* Dr. Lukefahr Aff. ¶ 14 [Appx 6] (noting study that women who are abused by other adults are more likely than other women to abuse their own children and stating "this correlation is consistent with observations from my professional practice").

The Statement of Facts (*supra* at 8–11) details the substantial evidence of Juan Chavez, Angel's biological father, battering and raping Moreno, and of her paralyzing fear of Chavez. (*See* trial testimony by Moreno (16 RR 75–77), Chavez (16 RR 58, 61–62) and Magnolia Medrano (14 RR 51–52); *see also* 7/22/05 Friendship of Women, Inc. Advocate Case Notes [Appx 114] (quoting Moreno: "He [Chavez] hit me with his right back hand and then proceeded by pulling my hair. . . . He forced himself onto me and he raped me."); I. Salazar Aff. ¶ 8 [Appx 28] (stating that Chavez was arrested for beating and raping Moreno and that Ms. Salazar took Moreno to a shelter for battered women); *id*. ¶¶ 6–9 (stating that Juan Chavez was violent and would hit Moreno and that Moreno was scared of Chavez) In addition, there is evidence that

Chavez assaulted Acela in June 2005 as well. (6/1/05 FOW Client Victimization Info. [Appx 114])

When Moreno was facing capital murder and lesser-included charges, she asserted the defense of "battered woman syndrome," and her attorney sought funding in March 2006 for an expert to testify on the defense. (*See* 3/21/06 Motion to Award Funds for Hiring of a Psychologist as an Expert Witness on "Battered Woman Syndrome," 1 SCR3 131–32)[33] Battered woman syndrome is a defense to a criminal act where "otherwise criminal behavior may be excused under narrow circumstances." *United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994). Thus, by presenting such a defense when facing capital charges for the murder of her own son, Moreno was seeking to be excused for that criminal conduct because she had herself been abused.

The abuser upon which Moreno's battered woman defense was based can only have been Juan Chavez, who as noted above was convicted of assaulting her in July 2005 and is otherwise described as violent and abusive. In contrast, there is absolutely **no evidence that Velez ever harmed Moreno**, hit Moreno, or abused her in any way. (State's Exhibit 49A at 12, Transcript of Police Interview of Moreno ("Q: Are you afraid of Manuel? A: No. Q: Does he, does he beat you? A: No. Q: Never has he beaten you? A: He has never beaten me."))

Although Villarreal knew that Moreno had asserted battered woman syndrome as her defense to capital murder, he did not present evidence of that defense or confront her with her own court filings asserting such a defense, which the jury might have considered an implied admission of guilt. Moreover, Villarreal did nothing—through cross examination, expert

[33] The State was preparing for the battered woman defense. As part of its files, the State produced various articles on battered woman syndrome. (Articles Produced by the State on Battered Woman Syndrome [Appx 100])

testimony by someone (like Dr. Lukefahr) experienced in the field of child abuse, or otherwise—to assist the jury in understanding that Chavez's abuse of Moreno made it more likely that Moreno (or Chavez himself) had inflicted the injuries that contributed to Angel's death.

v. Other witnesses saw Moreno abuse her children, including Angel.

As set forth in her statement dated February 8, 2006, Ivonne Salazar stated she saw Moreno (aka "Chiquis") hit her children and endanger them in various ways*:*

- "One time I saw Chiquis coming down the stairs with the baby (Angel) in her arms and she fell down the stairs. Chiquis was drinking and had a cigarette in her hand."
- She often saw Moreno lose her temper, scream at her children, slap them, and spank them. She stated that "at times, [Moreno] would throw things at her small daughter Emily and was always yelling at her kids. She would get very frustrated with her children and will throw things at them and yelled at them too."
- She witnessed Moreno drinking beer and smoking cigarettes excessively, and she often saw Moreno drunk, including during her pregnancy with baby Angel. In addition, she stated "Chiquis would drink a lot and smoke in front of the kids."

(2/8/06 I. Salazar Statement [Appx 61]) In Ms. Salazar's Affidavit included in the Appendix to this Application, Ms. Salazar provides other examples of Moreno's irresponsible behavior and abuse of her children. (*See* I. Salazar Aff. ¶¶ 11–14 [Appx 28])

In addition to many reports about Moreno's depression and frequent despair and her "constant" screaming at her children, other witnesses have reported Moreno's abuse of children, including Angel:

- "I saw Acela hit and slap her daughter Emily." (Yaritza Salazar Aff. ¶ 5 [Appx 29])
- "Acela would hit or spank her son Alexis when he wanted something." (*Id*. ¶ 6)
- "One time, in 2005, our son, Jose Manuel, who was 6 years old at the time, was staying with Manuel and Acela Moreno. Manuel had left the house and while he was gone, Acela locked Jose Manuel in

a closet. Jose Manuel was scared and told me about the incident when he came home."[34] (M. Hernandez Aff. ¶ 3 [Appx 25])

- Acela would hit and spank her son Alexis, and I saw her spank Angel." (G. Salazar Aff. ¶ 4 [Appx 27])
- "One night, Manuel and my mother were outside working on a car. Chiquis and baby Angel were inside. Angel was crying and playing with a shoe. Chiquis got mad at him, picked him up, and threw him about five feet into the couch." (C. Velez Aff. ¶5; *see also id.* ¶ 6 [Appx 31])
- "One night, Chiquis stopped by my house to have a cigarette. When I got into Chiquis' car to smoke with her, I noticed that she was pretty drunk and had her kids in the back. Chiquis told me she had gone out to a bar until late that night and then picked up her kids at a friend's house" (M. Velez Aff. ¶ 19; *see also id.* ¶¶ 12, 17) [Appx 38])

Villarreal did not present any evidence of Moreno's abuse of her children or of Juan Chavez's violent nature. Villarreal failed to present this testimony of Ivonne Salazar, Leticia Velez, Maria Hernandez, Gina Salazar, or Yaritza Salazar—all witnesses who were aware of or saw Moreno's abuse of her children and were willing to so testify. In spite of Villarreal's knowledge that Ms. Hernandez suspected abuse and that Manuel's son had seen Moreno commit physical abuse of her children, Villarreal failed to present any evidence of such abuse and failed to question Ms. Hernandez about this incident when he called her as a witness. (18 RR 9:4–16:9) Unfortunately and contrary to the defense theory of the case, the jury never heard this damning evidence of Moreno's abuse of her children.

[34] Ms. Hernandez told this story to representatives of the TDPFS when they visited her in December 2005 asking about this case. (*Id.* ¶ 4) It also appears that Villarreal may have known of this incident or some other evidence of abuse. Villarreal's handwritten notes from his file state: "Even Maria had suspicions of Acela's physical abuse/neglect: Manuel Jr. sees Chiquis commit some of the physical abuse." (Handwritten Notes of Defense Counsel [Appx 71])

3. Trial counsel failed to sufficiently cross examine other witnesses who could have highlighted the abusive history of Moreno and Chavez.

Villarreal missed other opportunities to focus the jury's attention on Moreno as an abusive mother, or on Juan Chavez, who pled guilty to domestic abuse.

a. Ineffective cross-examination of Juan Chavez.

Trial counsel's failure to investigate and adequately cross-examine Juan Chavez, Angel's father, caused a dearth of testimony and evidence regarding Chavez's abusive relationship with Moreno, his knowledge of Moreno's abuse of her children, and his own criminal history. The jury heard testimony by Chavez that he and Moreno lived together and conceived Angel, that Chavez hit Moreno at least once and spent three months in jail for that assault after a rape charge was dropped, and that Moreno treated Chavez and the children "well." Chavez admitted he "slapped" Moreno but denied a sexual assault. (16 RR 58) On cross-examination, Villarreal asked Chavez only sixteen questions, spending most of his time arguing with the prosecutor over whether the grounds for her objection were proper. (16 RR 61–67)

Villarreal knew (1) Chavez was arrested for the rape and assault of Moreno; (2) Moreno had sought the assistance of Friendship of Women, an organization that works with battered women, as a result of Chavez's abuse; (3) Moreno's good friend, Ivonne Salazar, had stated that both she and Moreno were scared of Juan Chavez; and (4) Salazar was so intimidated by Chavez's phone calls and intimidation that she eventually moved homes and did not attend Angel's funeral as a result of her fear. (I. Salazar Aff. ¶¶ 6–9 [Appx 28]; *see* 2/8/06 Statement of Ivonne Salazar [Appx 61]) The police report on Chavez's rape and beating of Moreno, including Moreno's statement at the time and a later sworn statement, provided graphic details of the violent event that conflicts with the sanitized version presented at the Velez trial. (Moreno

Sworn Statement [Appx 85]) Yet Villarreal failed to adequately put any of this information before the jury.

Villarreal never inquired about any acts of violence against Angel or his siblings by Chavez or by Moreno, even after Chavez testified on direct that Moreno treated her children "well," which contradicted Villarreal's theory of the case that Moreno was responsible for Angel's injuries. (16 RR 54) Instead, Villarreal squandered the majority of his questions attempting to get Chavez to say that he had lied at some point in his life or broken a law of the United States and failed to meaningfully question Chavez on key issues.

b. Ineffective cross-examination of Magnolia Medrano.

Trial counsel's cross examination of Moreno's sister, Magnolia Medrano, was even shorter than that of Juan Chavez and reveals additional inadequacies in both preparation and investigation. Medrano testified on direct that Moreno lived with her for a few months, lived with another sister, Dora, for a time and also lived with Juan Chavez for a year and a half. (14 RR 38–40) Medrano also testified that Moreno and Velez lived across the street from her and were neighbors. Thus, Medrano would have had the opportunity to observe Moreno's abuse of her children, and Chavez's abuse of Moreno.

As noted above, Medrano testified that she had seen a bite mark on Angel and that Moreno had admitted to her that she bit Angel on the cheek and caused the mark. (14 RR 47) Moreno's abuse of Angel was a central issue in Manuel's defense. Yet, Villarreal failed completely to focus the jury on Medrano's damning testimony on direct, failed to obtain additional facts and detail from Medrano despite her willingness to discuss it, and failed to uncover or utilize Medrano's prior statement that would have provided valuable evidence to the jury about Moreno's mistreatment of Angel and to medical experts who could have testified about injuries to Angel.

Instead, trial counsel's 4-page cross examination of Medrano covered a mere 4 topics, included a dozen questions, and failed to elicit any meaningful testimony. (14 RR 48–52) Villarreal spent most of his cross examination ineffectively asking Medrano about Acela's drug and alcohol use. Although Villarreal frequently referred to Moreno's alcohol and drug use during the trial, Villarreal inexplicably focused his questions to Medrano on why Medrano kicked Moreno out of her house and whether it had to do with Moreno's drug and alcohol abuse. (14 RR 49) Villarreal should have known that a close friend of Moreno, Ivonne Salazar, had information about Moreno's excessive alcohol use around her children and should have used this information in his cross examination of Medrano. (I. Salazar Aff. ¶¶ 11–13 [Appx 28])

Trial counsel also failed to adequately cross examine Medrano about her observations of Juan Chavez. Although Villarreal asked Medrano whether Moreno had told her about Chavez beating and raping Moreno, he failed to ask a single question about what Moreno actually said or about what Medrano personally observed regarding Chavez's abuse. Trial counsel did not ask Medrano whether she knew of additional instances of physical, sexual, and psychological abuse by Chavez. Trial counsel never asked Medrano if she saw Chavez hurt any of the children; nor did Villarreal ask if Moreno ever told Medrano that Chavez hurt the children.

4. Trial counsel failed to present evidence of Mr. Velez's innocence when he failed to confront Moreno with Moreno's police interview in which she consistently refused to implicate Mr. Velez.

Villarreal failed to confront Moreno and elicit testimony from her about her repeated insistence in her videotaped interview by police on November 1, 2005 that Velez never tried to hurt the baby, **never hit the child or any of the children**, never hit her, always was "playful" with the baby, never treated the baby with malice, and in fact, loved the baby. Villarreal also failed to elicit testimony from her, consistent with her prior statements, that she **had never left her children alone with Velez.**

a. Moreno's statement to police on November 1, 2005 and her dogged refusal to state that Velez ever hurt Angel intentionally.

In his opening, Villarreal emphasized that Ms. Moreno refused to implicate Velez under extreme pressure to do otherwise in her interview by police officers:

> [The evidence is] going to show the police officers, deputies in charge of that case brutally interrogating [Ms. Moreno], yelling at her, abusing her, accusing her, **trying to get her to say that that man over there killed baby Angel and she wouldn't do it** because he didn't do it. . . .
>
> Further, you're going to hear evidence that the prosecution has sent investigators recently to the penitentiary to interview her, **again trying to get her to in some way put the blame on Manuel and she still wouldn't do it**. That's what you're going to be hearing.

(14 RR 30:13–31:3) (emphasis added)

However, during his cross examination of Moreno, Villarreal merely asked two questions about her videotaped statement. First, he asked her if she had lied "anywhere in that video?" (16 RR 99:17–18) She responded "No." (16 RR 99:19) Later, he asked:

> Q. According to the video that the jury saw, you kept telling the officer that you never saw Mr. Velez shake the baby with force. Do you remember that? Just answer my question, please.
>
> A. No.

(16 RR 102:10–12) Instead of refreshing Moreno's memory and confronting her with the fact that she had repeatedly refused to tell police investigators what they wanted to hear—that Velez intentionally harmed the child or that Velez shook the baby forcefully, Villarreal blithely let her response that "No" she did not remember go unchallenged and went on to a new line of questioning:

> Q. Were you aware of the fact that the bruising on the ribs were four days old?
>
> A. Yes.
>
> Q. So somebody had to have done that at least four days earlier; is that correct?

A. Yes.

(16 RR 102:15–20) Of course, with this new line of questioning, Villarreal only helped the State's case and their timeline by emphasizing that the injuries supposedly occurred during a time that Mr. Velez was in Texas—as discussed in detail above, this was inconsistent with the medical evidence in the case. This new line of questioning endorsed the State's timeline theory of the case and further harmed Velez.

Villarreal, in direct contradiction to what he told the jury in his opening statement, failed to show how Moreno repeatedly refused to indict Velez. In the videotaped interview, Moreno over and over again refused to agree with the police investigators that Manual intentionally or forcefully injured the child. In fact, she used the word "playing" or "playfully" ten times when describing Velez's conduct with the victim. (State's Ex. 49A at 4, 8, 9, 11, 26, 28, 36) And she often corrected the police who were pushing her to agree with their version of events:

> Reyna: What did Manuel do to him?
>
> Moreno: But, it's that Manuel, as I told you last night, I saw that he used to bite him and grab him like this, but playing. I never saw that he did that with malice.

(State's Ex. 49A at 4)

> Reyna: Why did Manuel do it [shake the victim]? Was he angry, because the baby was crying? Why did he do it?
>
> Moreno: No, no, I tell you he did it like playing.

(State's Ex. 49A at 11) Acela stated in the interview that Mr. Velez would toss the baby in the air and bite him on the cheeks, but that he always did so playfully. She repeatedly refused to agree, in spite of significant pressure from the police, that Mr. Velez shook the baby forcefully or intentionally hurt the child in any way:

> Reyna: Rosalba, did you see anything else [other than him tossing and biting the baby playfully] this day, that day?

Moreno: I swear it to you—I did not.

Reyna: You saw something else that day.

Moreno: I did not see anything.

Reyna: Don't cover for him!

Moreno: I'm not covering for him. I care for my child and I'm not covering Manuel. I'm only telling you what happened that day.

. . . .

Reyna: Tell me what happened.

Moreno: I didn't see anything else.

Reyna: Yes, you did see. You saw something else.

Moreno: But.

Reyna: Look, no. There are no "buts" here, Rosalba. Look, this is the last time I'm going to ask you and we're going to end this conversation. OK? Your baby was looking for you as a mother, because he was feeling safe with you. He was looking for your warmth. He recognized you. And he recognized the good and the bad.

Moreno: The bad.

Reyna: A one year old child won't recognize that in you. Your child suffered in this world. He's been suffering till this moment, one year long, due to this man, OK? You have the opportunity right now as Angel's mother to do this, to do this right. Don't do it for me. Don't do it for Carlos. Do it for Angel, Rosalba. What else did you hear? What else did you see?

Moreno: (Sobs) Nothing else.

Reyna: Rosalba, your child is going to die, Rosalba.

Moreno: It was the only thing I saw that day.

Reyna: You child is going to die.

Moreno: I did not see anything else, seriously, I say.

Reyna: Do it for Angel. What else did you see?

Moreno: Nothing else, I did not see anything else.

Reyna: I am sincere with you, Rosalba. This is not a game.

Moreno: I know that is not a game. I did not.

Reyna: I'm not a mother. I'm not a relative of Angel. But, do you know what? It hurts my heart what Angel had suffered. So, I can imagine how you feel. What else did you see that Manuel did to

him? Manuel did something else to him. I know it, but I need you to tell me.

Moreno: (Sobs) But, I don't know

Reyna: What did you see that Manuel did to him?

Moreno: It was the only thing that I saw. That he shook him earlier there in the bed.

Reyna: But everything, like you're showing us, you are showing it with a lot of care, like very quiet. Did he squeeze him more violently than that?

Moreno: That is that according [sic] he was playing.

(State's Ex. 49A at 33–36)

Villarreal failed to meaningfully ask Moreno about her interview with police and make clear to the jury that, unlike her testimony at the trial, Moreno was insistent in her interview with police on November 1, 2005 that Velez had never intentionally harmed the child.

b. Moreno's statement that Mr. Velez was not abusive to her children and had no opportunity to abuse them.

Mr. Velez's first set of trial counsel (Gary Ortega and Larry Warner) sent a retained psychologist, Dr. Kimberly Arredondo, Ph.D., to interview Ms. Moreno. As set forth in the Declaration by Dr. Arredondo, the doctor was able to gather important information from Moreno:

- Moreno stated that the baby fell off the bed during the night. She said she heard his head hit the floor and he began crying.
- Angel was sick in the morning and crying a lot. Moreno gave him Tylenol. (*Id*.)
- Moreno stated that Mr. Velez never touched the children inappropriately, never spanked them, and was not abusive to them. (*Id*. ¶ 5)
- Moreno stated that during their brief relationship, she had never left her children alone with Mr. Velez. (*Id*.)

(Arredondo Decl. ¶ 4 [Appx 11]) Thus, in August 2007, three months after Moreno had pled to injuring the child and agreed to testify for the State in this case, Moreno told Velez's prior defense team that Velez had never been abusive to her children and that she had never left the victim alone with Velez. (*Id*. ¶ 5) Moreno also repeated what she had said to police in her statement on November 1, 2005: that the baby had fallen from the bed the night before and hit his head on the floor. (*Id*. ¶ 4)

Villarreal was aware of these prior statements made by Moreno because Dr. Arredondo reported on her meeting with Moreno to Villarreal.[35] (*Id*. ¶ 6) Nevertheless, Villarreal did not ask Moreno about or confront Moreno with any of these statements. Villarreal never asked Moreno about the fact that the child fell and hit his head on the night before and was feeling sick the morning of the incident. In addition, Moreno made two critical statements to Dr. Arredondo: (1) that Velez was never abusive to the children, including Angel, and (2) that she had never in their brief relationship left the victim alone with Velez. The combination of these two statements made by the State's star witness and the only other adult present when the child was rendered unconscious were admissions central to the defense theory of the case that the jury never heard.

5. Mr. Velez's trial counsel failed to interview Moreno.

Villarreal admitted during trial that he never interviewed Moreno or sent anyone to interview her, even though he knew she had agreed to testify for the state, that she was the only other adult in the home when the child was rendered unconscious on October 31, 2005, and that she had pled guilty to "striking the child" on or about October 31, 2005:

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[35] Dr. Arredondo was retained by Mr. Velez's prior counsel, Gary Ortega, and interviewed Moreno in August 2007 under the direction of Ortega. Villarreal was appointed on September 13, 2007. (2 CR 252) After Villarreal was appointed to the case, Dr. Arredondo reported what she had learned from the interview to him, but Villarreal never asked the doctor to testify. (*Id*. ¶ 6)

Q. (BY MR. VILLARREAL) Before today, have I ever spoken to you?

A. No.

Q. Has my associate, Mr. Flores, ever spoken to you?

A. No.

. . . .

Q. Okay. And you've never even heard of us, have you?

A. No.

Q. Because we didn't send anybody to go see you. . . .

(16 RR 108:4–109:5) As a result, even though the central theory of defense was that Moreno caused the injuries that killed the victim, trial counsel had never spoken to her or seen her in person before briefly cross-examining her at Mr. Velez's trial. Based on what trial counsel knew about Moreno and the facts of the case at the time, their decision not to interview her could not have been strategic. As a result, the failure to interview Moreno constitutes deficient performance.

a. Applicable law.

Counsel has "a duty . . . to investigate all witnesses who allegedly possessed knowledge concerning [the defendant's] guilt or innocence." *Bryant v. Scott*, 28 F.3d at 1419 (quoting *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991)); *Soffar v. Dretke*, 368 F.3d at 472 n. 5. The Fifth Circuit has held that counsel's failure to interview eyewitnesses to a charged crime constitutes constitutionally deficient representation. *Soffar v. Dretke*, 368 F.3d at 473; *Anderson v. Johnson*, 338 F.3d 382, 391 (5th Cir. 2003); *Bryant v. Scott*, 28 F.3d at 1418; *see also Gray v. Lucas*, 677 F.2d 1086, 1093 n. 5 (5th Cir. 1982) (noting that attorney's failure to investigate crucial witness may constitute inadequate performance).

b. Failure to interview Ms. Moreno was unreasonable performance.

Trial counsel failed to interview Moreno, the star prosecution witness. Based on what trial counsel knew or should have known about Moreno and about this case at the time (as described in the previous sections), the decision not to interview her could not have been strategic.

A reasonable lawyer knowing these facts would have made some effort to further investigate her testimony. *See Bryant v. Scott*, 28 F.3d at 1418 ("information relevant to [the] defense might have been obtained through better pretrial investigation of the eyewitnesses, and a reasonable lawyer would have made some effort to investigate the eyewitnesses' testimony"). In addition, Villarreal's failure to interview Moreno certainly was not cured by his grossly inadequate and strikingly brief cross-examination of Moreno. *See Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003); *Bryant v. Scott*, 28 F.3d at 1419 (expressly rejecting the notion that "vigorous" cross-examination of eyewitnesses at trial can "cure" counsel's failure to interview witnesses before trial and even if cross-examination was effective, "that is not to say it could not have been improved by prior investigation").

Accordingly, Villarreal's failure to interview Moreno was deficient representation. *Bryant v. Scott*, 28 F.3d at 1419 (trial counsel's failure to investigate and interview witnesses, including eyewitnesses, "is unprofessional conduct falling below the standard of a reasonably competent attorney practicing under prevailing professional norms"); *Anderson v. Johnson*, 338 F.3d at 392 (trial counsel's failure to interview an eyewitness rose to the level of constitutionally deficient performance, given the gravity of the burglary charge and the fact that there were only two adult eyewitnesses to the crime); *Kemp v. Leggett*, 635 F.2d 453, 454 (5th Cir. 1981) (granting habeas relief where counsel failed to interview the single eyewitness or any character

witnesses); *Gaines v. Hopper*, 575 F.2d 1147, 1149 (5th Cir. 1978) (affirming habeas relief where counsel failed to interview eyewitnesses).

6. Trial counsel's failure to support the defense theory that Moreno was responsible for Angel's injuries undermines confidence in the jury's verdict and prejudiced Mr. Velez.

Villarreal failed to present any evidence of Moreno's abuse of her children, including Angel. He failed to interview, meaningfully cross-examine, and confront Moreno—the State's star witness and a key eyewitness on the day in question—on the following:

- Her plea in which she pled guilty to striking the victim in the head on or about October 31, 2005.[36]
- Her admissions that she abused her children, including Angel.
- The many sources of evidence of her abuse of her children, including Angel.
- Her insistent refusal to indict Velez in her interview with police.
- Her prior statement that Velez had never abused her or her children.
- Her prior statement that in their brief relationship, she had never left the victim alone with Velez.

Villarreal's cross-examination of Moreno and his failure to investigate and discover evidence of her abuse of her children are core elements of the gross ineffective assistance leading to the conviction of Mr. Velez. The opportunities to create reasonable doubt were manifest and were known or should have been known by trial counsel. Evidence of doubt of his client's innocence was everywhere, yet Villarreal failed over and over again to present it to the jury. In a

[36] Jurors who convicted Mr. Velez have stated that they would have wanted to know about Moreno's admission and the substance of her plea and have the opportunity to consider that evidence during the guilt-innocence phase of the trial—some jurors further stated that "it could have changed [their] mind[s] about the conviction of Velez." (*See* Avalos Decl. ¶ 5 [Appx 43]; Miller Decl. ¶ 5 [Appx 45]; Peterson Decl. ¶ 4 [Appx 46] ("Testimony that the mother had pleaded guilty to injuring the baby, instead of failing to report abuse, would have been helpful."); Johnson Decl. ¶ 8 [Appx 44] ("From the way the evidence was presented at trial, I understood that Ms. Moreno has pled guilty and been convicted for neglecting the baby or not protecting the baby from harm. If evidence exists that Ms. Moreno pled guilty to injuring or striking the child herself, I would have expected defense counsel to ask about it and would have wanted to consider that evidence at trial."); Quintanilla Decl. ¶ 7 [Appx 47])

purely circumstantial case with no evidence implicating Mr. Velez, Villarreal did not meaningfully challenge the State's star witness—the only other adult present in the home at the time the child became unconscious. In fact, Moreno's testimony went entirely untested. Further, Villarreal did not present to the jury the vast evidence that Moreno harmed the victim and that Velez was innocent. This travesty has led to the conviction and death sentence of an innocent man. It should not be permitted to stand.

The State has admitted that this is, of course, a case based solely on circumstantial evidence. (Oral Arguments on Direct Appeal, Statements by Assistant D.A. Rabb [Appx 133] ("It's a circumstantial case"); ("there is a lot of circumstantial evidence that we put together"); ("circumstantial evidence . . . that's what was presented"))[37] Yet Villarreal did not confront Moreno or elicit testimony from her about her admission in her plea to "striking the child . . . on or about October 31, 2005." This is especially egregious where the exact acts that Moreno pled guilty to—intentionally or knowing causing bodily injury to her son by striking his head with an object or striking his head against something—are fully consistent with the fatal injuries he suffered. (17 RR 42-43, 138 (medical testimony on fatal injuries)) Villarreal also did not ask Moreno or any witnesses about the evidence of Moreno's abuse of her children, including Angel. Many witnesses to Moreno's abuse were willing to testify about the abuse, but Villarreal never bothered to ask.

Additionally, the jurors have made clear that they wanted to know about any and all evidence that Moreno had abused her children. (*See* Johnson Decl. ¶ 7 [Appx 44] ("I wanted to hear more evidence about the mother of the baby, Acela Moreno, including whether she had a

[37] Jurors who convicted Mr. Velez were concerned about this and the fact that there were no witnesses who saw what happened to the baby. (*See* Avalos Decl. ¶ 2 [Appx 43]; Miller Decl. ¶ 2 [Appx 45])

history of abusing or neglecting Angel or her other children."); Avalos Decl. ¶ 6 [Appx 43] ("If I had heard more evidence at trial regarding the abuse by the mother of the baby, . . . it could have changed my mind about the conviction of Velez."); Peterson Decl. ¶¶ 4–5 [Appx 46] ("It would have also been helpful to hear testimony that the mother had previously injured the baby or her other children. I did not know this, and the other jurors did not know this. Such knowledge may have affected my decision."); Quintanilla Decl. ¶ 5 [Appx 47] ("I remember evidence at trial that the baby had a burn on his foot and bite marks on his body. If evidence exists that Acela Moreno, the baby's mother, admitted to burning the baby or biting the baby, I would have wanted to consider that evidence at trial. If evidence exists that Ms. Moreno had abused her other children . . . I would have wanted to consider that evidence at trial."); Miller Decl. ¶ 6 [Appx 45] ("I would have wanted to consider [evidence of abuse of her children by the mother of the baby] at trial and wish that Mr. Velez's counsel had asked Ms. Moreno about this evidence"))

Villarreal also did not confront Moreno with the fact that she was telling the truth to police on November 1, 2005, but not to the jury during her trial testimony. He did not emphasize or even ask her about her repeated insistence in her videotaped interview by police on November 1, 2005 that Velez never intentionally harmed the baby, never hit the child or any of the children, was always playful with the baby, never treated him with malice, and in fact, loved the baby. Villarreal also failed to elicit testimony from her, consistent with her prior statements, that Velez had never abused the children or hit her and that Moreno had never left her children alone with Velez.

Villarreal further admitted during trial that he never interviewed Moreno or sent anyone to interview her, even though she was the only other adult in the home when the victim became unconscious and trial counsel knew she had agreed to testify for the State. Thus, even though his core theory was that Moreno caused the injuries that killed the victim, Villarreal had never

spoken to her or seen her in person before briefly and weakly cross-examining her at Velez's trial.

The only evidence implicating Mr. Velez was the testimony of Moreno. The medical evidence presented did nothing more than show that Mr. Velez was present when Angel lost consciousness and was rushed to the hospital—but the same could be said for Moreno. In spite of his promises to the jury and his theory of the case—that Moreno killed Angel—Villarreal simply did not investigate, present, or develop the vast available evidence casting doubt on the culpability of Velez and implicating Moreno. What kind of reasonable trial strategy could justify such conduct? None. Villarreal's performance falls below an objective standard of reasonableness as a matter of law. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005).

This evidence is sufficiently strong that the failure to present it for the jury's consideration, in light of the dearth of evidence of the culpability of Velez, undermines confidence in the outcome and thus the trial cannot be relied on as having produced a just result and Mr. Velez has clearly been prejudiced. *Strickland*, 466 U.S. at 694 (Prejudice is established where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). In these circumstances, and evaluating the totality of the evidence—both that adduced at trial, and the evidence adduced in the *habeas* proceedings—the Court must conclude that Mr. Velez's conviction and sentence of death were imposed in violation of the United States Constitution and laws of the State of Texas and the United States and must be vacated.

D. Failure To Competently Rebut the State's False Allegations of Fabrication of Evidence and Failure to Effectively Utilize Favorable Evidence Was Unreasonable Performance.

In this purely circumstantial case, the State introduced into evidence and heavily relied on a "Voluntary Statement of Accused" (State's Ex. 64), which they claim Mr. Velez reviewed and assented to as his personal statement. Defense counsel moved to suppress the statement on the ground that it could not have been provided by Mr. Velez voluntarily because he could not have understood either his *Miranda* rights or the written statement itself. At the pretrial suppression hearing on October 6, 2008, it became clear that multiple versions of the statement existed. (8 RR 139–47) Indeed, there was a two-page statement, admitted at trial as Defense Exhibit 2, and two different versions of the three-page statement, State's Exhibit 64 and Defense Exhibit 4. While the only difference between the two three-page statements is the lack of one of the two witness signatures, there are stark differences between the two-page statement and the three-page statement. The State argued that the two-page statement was a "forged document," and even told the jury that the Court had so ruled, even though no such ruling appears in the record. Villarreal did not object and additionally did nothing to explain to the jury the State's argument was demonstrably wrong. Furthermore, defense counsel utterly failed to use the exculpatory portions of both statements to aid in Mr. Velez's defense.

Defense counsel also failed to ensure Mr. Velez was present during a critical stage of the proceedings, when Judge Limas conducted off the record proceedings in chambers to resolve the motion to suppress. Because of Villarreal's deficiencies, the State was allowed to give the jury the impression that Velez had participated in the fabrication of evidence, even though he was in police custody or jail for the entire time between his interrogation and trial. To the extent the State claimed defense counsel acted alone in "forging" the statement, Villarreal failed to object

to the State's striking at Velez over his counsel's shoulders. In sum, defense counsel's performance was constitutionally deficient as to the treatment of the statements.

1. The existence of multiple statements.

On October 31, 2005, Sergeant Rene Gosser had Velez brought to the Sheriff's office to answer questions. (17 RR 47–51) Sergeant Gosser interviewed Velez for over an hour in a ten-by-ten room and wore his weapon the entire time. (8 RR 108) Sergeant Gosser read Velez his *Miranda* warnings in English, a language in which Velez could only read at a kindergarten level. (16 RR 33; 17 RR 55, 68) During the interview, Sergeant Gosser drafted a document titled "Voluntary Statement of Accused," which acknowledged Miranda warnings and purported to provide Velez's statement to the police. (State's Ex. 64) According to the testimony, Sergeant Gosser would ask questions of Velez in English, Velez would answer, and Gosser would type. (17 RR 68–70) According to the police, the three-page statement admitted as State's Exhibit 64 supposedly reflected Velez's statements to them during the interview. Despite having the ability to do so (*see* 16 RR 35), the police did not video record the interrogation from which they generated the written statement such that the statement could be objectively verified. (16 RR 36; 17 RR 98)

As set forth in Facts II.B.2 of the Statement of Facts (*supra* at 47–50), prior to trial on the merits, Velez's trial counsel moved to suppress the statement. It was at this hearing, apparently, that counsel for both sides became aware that more than one version of the statement existed. (*See* State's Ex. 64; Def. Ex. 2) The State presented the three-page typewritten document as Velez's statement. (State's Ex. 64) Villarreal, however, offered a two-page written statement he

had received from the State. (Def. Ex. 2)[38] According to defense counsel Rene Flores, they had received a copy of the two-page statement from previous counsel Gary Ortega. (Flores Aff. ¶ 8 [Appx 14])

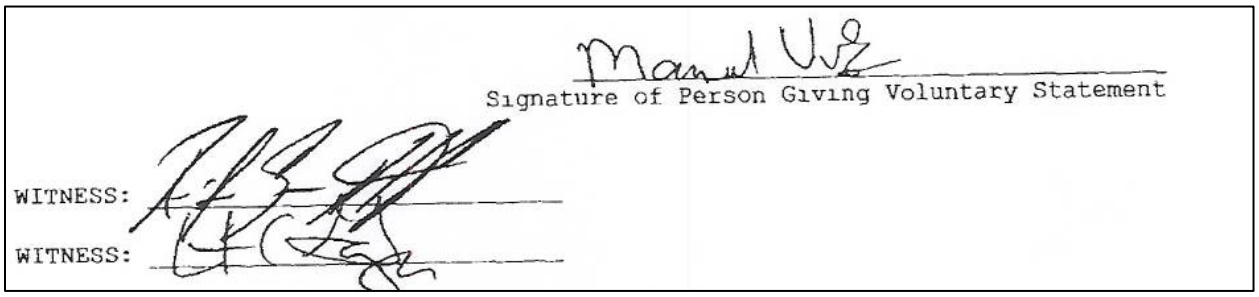
While the statements are similar, there are significant differences, many of which Judge Limas noted during the pretrial suppression hearing (*see* 8 RR 145–49). Most notably, the three-page statement contains one additional paragraph, in which Manuel purportedly said that "the baby did sustain bruises along his ribs while I played with him last week by throwing him up and catching him and squeezing him a little hard along his rib area." (State's Ex. 64 at 3) In the three-page statement, Manuel also allegedly said that he "shook the baby with force [today] . . . because I was trying to get him to laugh because he doesn't smile with me." (*Id.*) The two-page statement contains no reference to throwing, squeezing, bruising, or shaking Angel. (Def. Ex. 2)

This last paragraph of the three-page statement is consistent with the police's predetermined theory of the case—that this was a "shaken baby" case. The video and transcript reflecting the police interrogation of Moreno vividly demonstrates that the police were pursuing Velez on a theory that he killed Angel by shaking him. (*See* State's Ex. 49, 49A) And when Manuel's sister Marisol met with Saenz to discuss retaining Saenz as defense counsel on Manuel's case, before Saenz was appointed special prosecutor, Marisol told Saenz the case was a "baby shake syndrome" case. (7 SRR1 18–19) Of course, the State determined later that its own medical evidence did not support a shaken baby theory (*see* 17 RR 35, 137–38, 141–42), and the

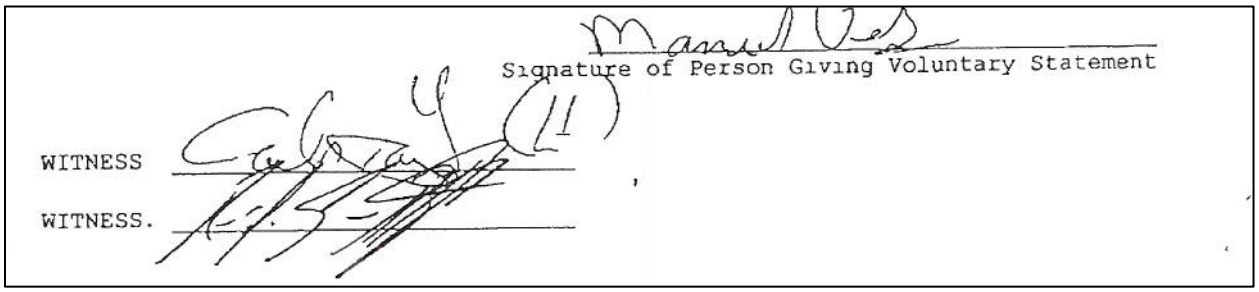
[38] At the suppression hearing, the two-page statement was marked as Defense Exhibit 1, but appears not to have been admitted into evidence. (8 RR 142) The three-page statement was admitted as State's Exhibit 2 at the suppression hearing. (2 SRR 2, State's Ex. 2) Both statements were admitted at trial: the two-page statement became Defense Exhibit 2 and the three-page statement became State's Exhibit 64.

focus of the State's case then became a violent act, such as hitting the baby against a hard surface, which is not supported by either version of Velez's statement.

In addition to this substantive paragraph, the two statements are not replicas, even though the State claimed that the two-page version could be created by "somebody with a copy machine." (18 RR 101) The numerous initials and signatures on the two statements are not exact, but were apparently written by the same hands. (Report of Certified Document Examiner Linda James [Appx 12]) The most obvious distinctions rendering the State's "copy machine" theory false—other than the fact that the signature of "Manuel Velez" is clearly different—are the different signatures of Sergeant Rene Gosser and Lt. Carlos Garza, who purportedly witnessed Velez signing the statement. The three-page statement, State's Exhibit 64, has this signature block:



In contrast, the two-page statement has the witness signatures reversed, and Lt. Carlos Garza signing his name in a different way:



Although each of the three signatures are obviously different, both "Manuel Velez" signatures were signed by the same hand, both "Rene Gosser" signatures were signed by the same hand,

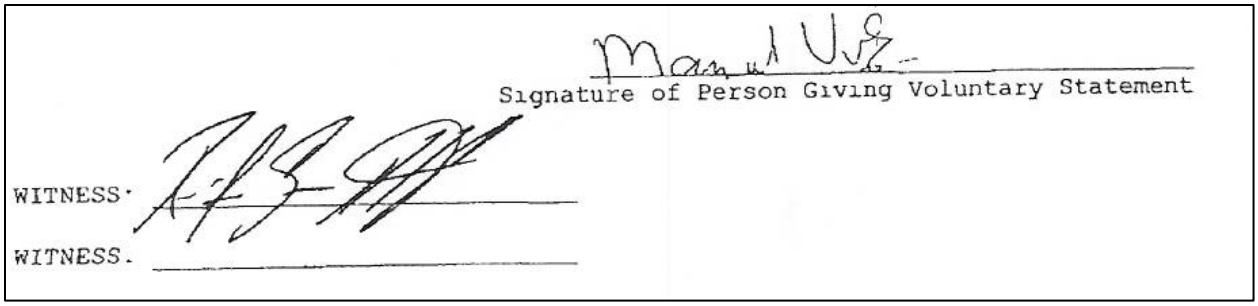
and both "Carlos Garza" signatures were signed by the same hand. (Linda James Report [Appx 12])

Accordingly, the document examiner concludes: "It is highly unlikely that a document created from another document would contain discrepancies of this type and amount." (*Id.*) And the State's assertion to the jury later during the trial that Velez and his defense counsel created the two-page statement from the three-page statement is simply false.

The Court even recognized that there were material differences in the two statements. After examining the two statements presented at the suppression hearing, Judge Limas observed that Velez's two purported signatures were "very different," announced, "[W]e are going to have to go deeper into this," and ordered the State to present witnesses on the issue. (8 RR 149–50) The State called Sergeant Gosser, who testified that the three-page statement was the one taken from Velez, but acknowledged that the two-page statement appeared to be a statement produced by his department. (8 RR 156–58) He acknowledged his signature on the two-page statement and identified the other signature above his on the two-page statement as that of Lieutenant Garza. (*Id*.) The trial court ordered Garza to appear and, when he did, the trial court took Garza, Gosser, and the attorneys into chambers to resolve the issue. (8 RR 228) Velez was not present in chambers during the in-chambers proceeding, and no record was made.

Notably, there is no record of the in-chambers proceedings, and no record of how the court resolved the issue that day. Manuel's trial counsel failed to object to the off-the-record proceedings, and failed to request the Court make a record of the proceedings once the parties returned to the courtroom. (Flores Aff. ¶ 9 [Appx 14])

Further adding to the confusion is the existence of a second version of the three-page statement. Defense Exhibit 4 is a replica of State's Exhibit 64, except the signature block, which is missing the signature of Garza as a witness:



(17 RR 110–11)

2. The only logical explanation is that the Sheriff's department created both statements.

Taken together, the three versions of Mr. Velez's statement provide for only one logical set of facts, which is completely different from the State's "copy machine" theory that served only to cast Velez and his counsel as forgers who fabricated evidence. In reality, the most likely scenario is that all three versions of the statement originated from and were created by the officers charged with interrogating Velez. First, Defendant's Exhibit 2, the two-page statement was made. Then an additional paragraph was added, and thus Defendant's Exhibit 4, a three-page statement emerged, but was witnessed only by Gosser, who signed before it was copied. Later, Garza signed the statement, and State's Exhibit 64 came into existence. Had Gosser and Garza actually witnessed Velez's signature and signed at the same time, there is no conceivable reason for making a copy after Gosser signed, but before Garza.

In contrast to this simple explanation, the State chose to tell the jury that Defendant's Exhibit 2 was a "fraudulent" document fabricated using a "copy machine" by Mr. Velez or his counsel. (17 RR 104; 18 RR 101-02, 138-39) Villarreal did nothing to rebut this accusation other than express indignation. (18 RR 134–35)

3. Judge Limas refused to suppress the statements or resolve the controversy.

Despite evidence presented at the suppression hearing of Velez's inability to read and understand his *Miranda* rights or the written statement he was reported to have signed, and

despite the glaring differences in the proffered written statements, Judge Limas denied the motion to suppress on October 13, 2008, and admitted both statements into evidence. (12 RR 66–67) Defense counsel requested findings of fact and conclusions of law from presiding Judge Limas, and objected when Judge Limas failed to issue them. (12 RR 67–68; 3 CR 466)[39]

4. Villarreal did not effectively deal with the two statements at trial.

Although Villarreal was on notice that both statements would be presented to the jury, he did nothing to prepare to rebut the State's assertion that the two-page statement was a fabrication. Instead, Villarreal replicated his strategy at the suppression hearing: present the testimony of Dr. Rabin only, and never explain why the State's theory of fabrication could not be true.

Accordingly, Dr. Rabin again testified that he had extensively tested Velez and found that Velez could not read and comprehend the written English statement he signed and could not understand the English-language Miranda warnings the police said he validly waived. (17 RR 153–56; 172–78) In the face of this evidence, the State introduced the three-page statement, State's Exhibit 64, to which the defense objected for "lack of a . . . proper predicate" and because "there is no proof offered to this jury as to the understanding and or voluntariness of this statement." (17 RR 74) Judge Limas overruled the objection and admitted the exhibit. In response, the defense introduced the two-page statement, Defense Exhibit 2, to which the State objected, saying in front of the jury, "This is exhibit [sic] that the court at a prior hearing found

[39] As detailed in Facts Section F.1., *infra* at 70–72, in early 2010, years after the suppression hearing took place, Judge Lopez, who succeeded Judge Limas, issued findings and conclusions from the suppression hearing over which she did not preside. Judge Lopez merely adopted the findings and conclusions proposed by the State (*compare* 1 SCR8 2–7 *with* 1 SCR5 155–59), drafted by a prosecutor who did not even attend the suppression hearing (8 RR 2).

to be fraudulent." (17 RR 104) As explained above, the State's assertion is wrong, but defense counsel did not object or rebut the prosecutor's characterization of the exhibit as fraudulent.

Indeed, the prosecutor continued to make the highly prejudicial accusation that Velez or his attorneys somehow "forged" or otherwise manufactured the two-page statement. (18 RR 101–02, 138–39) Even though Sergeant Gosser admitted that the two-page statement appeared to be a document generated at the Sheriff's office and that it appeared to contain his signature (17 RR 93–96), the prosecutor continued to call the two-page statement a "fraud" in front of the jury. (18 RR 139) Defense counsel twice objected, but otherwise let the prosecutor's accusations continue unabated. (18 RR 138–39) The court sustained the first objection but brushed off the second objection, saying "I'll let [the jury] decide." (*Id*.) As set forth in Part One IV.C., *infra* at 213–15, these bald and unfounded accusations were highly prejudicial and amount to prosecutorial misconduct.

Despite obviously fatal flaws in the State's explanation for the two statements, Villarreal made no effort to demonstrate why the State's prejudicial assertions were incorrect. Indeed, Villarreal could have simply repeated the observations made by Judge Limas during the suppression hearing: (1) "I mean, it's just weird because even the signatures are different." (8 RR 148); (2) "The thing about this is that those signatures appear to be Mr. Velez's signatures." (8 RR 149) and (3) "And I don't know what to tell you guys because even the witnesses are not the same witnesses. The witness on top on [State's Exhibit 64] is the witness on the bottom on the defense counsel's copy, and the signatures do appear to be of the witnesses so I don't know." (8 RR 150) The Court had apparently noticed very easily that the statements were not replicas, but contained signatures similar enough to appear to have been signed by the same people. These observations alone would have disproved the State's theory, and eliminated the harm of the State accusing Velez and his counsel of manufacturing evidence. Instead,

Villarreal did nothing to minimize the harm caused by the State's linking Velez to the fabrication of evidence.

In addition to failing to disprove the State's demonstrably wrong accusations, Villarreal did not use the exculpatory elements of the statement to assist Velez's defense. The statement contains no evidence of an intent to harm Angel, and affirmatively states that Velez did not hit Angel or any other child. (State's Ex. 64) In addition, the statement indicates that Acela Moreno "is very abusive towards her kids, she has hit her kids pretty bad including the baby (Angel Moreno) and even the neighbors can tell you how abusive she is towards her kids." (*Id.*) It continues to recount a specific incident of violence by Moreno against another one of her children when an ambulance was forced to arrive, and further states that Moreno has slapped her children to the point where it "has caused them to bleed from the mouth and nose." (*Id.*) The statement also recounts the many ways Moreno was abusive to her children: "She will hit them with sandals, with a belt; she has even thrown her cell phone at them when she had a phone. It is terrible the way she hits the kids." (*Id.*) Again, the statement provides the name of a witness, Ivonne Salazar, who can verify the information Velez provided to the police. (*Id.*)

Villarreal did not question Gosser or any other witness for the State on their efforts to investigate the misconduct Velez recounted. More importantly, however, Villarreal did not use the statement in any way to cross-examine Moreno.

5. Villarreal failed to effectively cross examine two convicts called by the State to testify about Mr. Velez's purported language skills.

Even in seeking to show that Mr. Velez could not read and understand the written statement and voluntarily waive of his *Miranda* rights, Villarreal's performance fell markedly short of reasonable in his dealing with two former inmates who had been incarcerated with Mr. Velez and were called by the State for the purpose of proving that Mr. Velez read,

understood, and conversed in English: David Bradshaw and Brian Martin. The same two witnesses testified for the same reason at the pretrial suppression hearing, so Villarreal should have been prepared for them at trial. As detailed at *infra* at 220–23, both Bradshaw an Martin were given plea deals in exchange for their testimony against Velez and that information was improperly withheld from the defense by the State in violation of *Brady v. Maryland*. Even so, Villarreal's minimal cross-examination of these witnesses was completely inadequate.

Bradshaw testified about conversations he allegedly had with Manuel in English and Spanish about newspaper articles from the *Brownsville Herald*. According to Bradshaw, he and Manuel read the *Herald* and then discussed current events afterwards. Villarreal could have asked specific questions about what articles were read and discussed by Manuel, how Bradshaw was able to remember with clarity what Manuel read and when they spoke in Spanish as opposed to English. Any questions testing Bradshaw's memory and credibility, including the nature of his criminal history (which included crimes of dishonesty and moral turpitude), would have cast some doubt on this witness. Villarreal failed to ask any questions of this nature. Instead, the jury was left with one ineffective question by trial counsel. That is, "when did you get your degree, your doctorate degree in forensic psychology?" The answer was "I don't have one, sir" but it did not matter. (18 RR 49)

Similarly, Martin testified that he too enjoyed reading the newspaper in jail and exchanging stories with Manuel. Martin, however, read the *Valley Morning Star*, which was provided by his family. Martin, who did not speak Spanish, testified on direct that Manuel borrowed his paper and not only read it, but translated it to other inmates. Martin also testified that he spent three to four hours writing a letter for Velez in English. Villarreal did not ask Martin how he knew what Velez was saying in Spanish if he did not speak it. Nor did he ask why Martin was writing a letter for Manuel if Manuel was able to read English so well that he

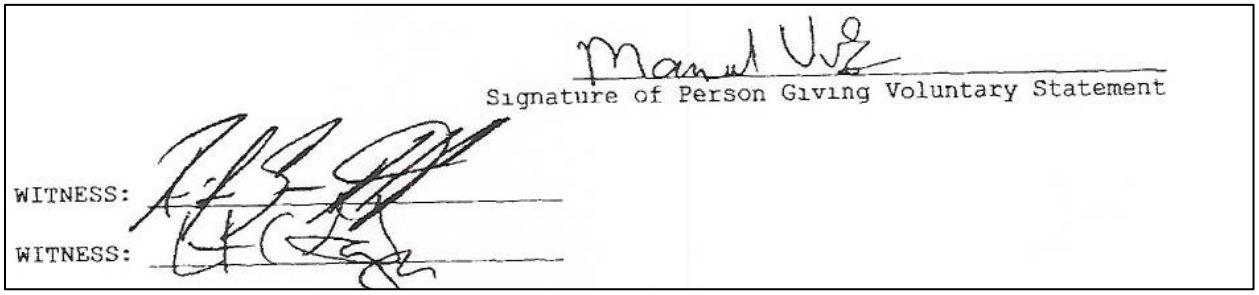
could translate it for fellow inmates. And Villarreal did not ask Martin about the nature of his crimes and what he was getting in return for his testimony. Instead, trial counsel again asked just one wholly ineffective question. That is, "Have you ever told a lie before?" (18 RR 58) Of course, Martin replied "no" (despite his crimes of moral turpitude), and that was the end of his testimony and trial counsel's alleged cross examination.

Trial counsel's deficient performance in dealing with the State's witnesses was "so patently unreasonable that no competent attorney would have chosen" the same tactic. *Sigman v. State*, 695 S.E.2d 232, 233 (Ga. 2010).

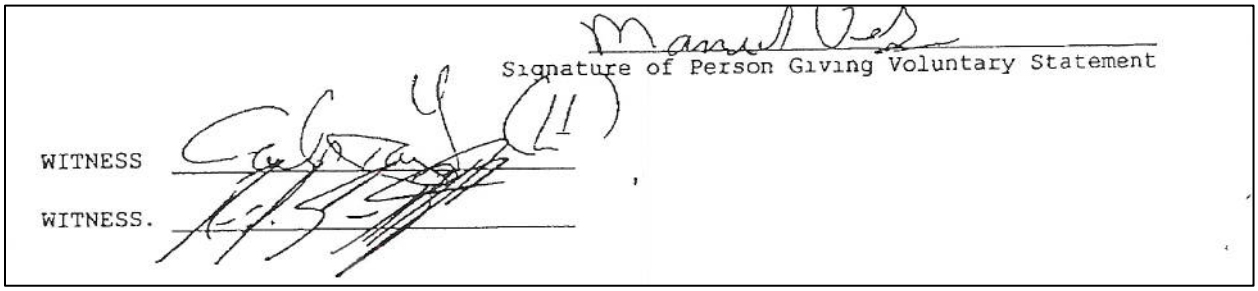
6. Trial counsel's deficient performance prejudiced Mr. Velez.

Mr. Velez's trial counsel failed to fully explore the differences in the three statements and present a logical story as to the circumstances surrounding their creation, adoption, and signing and, as a result, failed to mount any real challenge the State's highly prejudicial accusation that Velez had fabricated evidence. In short, Villarreal failed to present obvious differences in the statements that would have precluded any rational juror from concluding that the two-page statement was manufactured from the three-page statement by using a copy machine. Again, as shown below, there is simply no way the State's assertion was correct given the differences in the two signature blocks:

State's Exhibit 64:



Defense Exhibit 2:



Moreover, Villarreal consistently focused only on whether Velez could understand English and his *Miranda* rights sufficiently to adopt the statement as his own. Villarreal, however, completely failed to use the exculpatory portions of the statement to assist in Velez's defense. For example, although Villarreal's theory presented during opening statements was that Moreno was the person who harmed Angel, he did not use the repeated assertions of violence toward her children contained in the statement on cross-examination. Villarreal failed to ask Moreno if it was true that she had would hit her children with "sandals," "a belt," or a "cell phone." Villarreal also failed to ask Gosser what he had done to determine if the many instances of violence were true. Questions such as "Did you speak with Ivonne Salazar to determine if Acela Moreno had beat her children," would have highlighted this exculpatory evidence. Instead, Villarreal ignored this information, and failed to effectively examine the witnesses in a manner that would have shifted blame away from Velez. There can be no strategic explanation for not using the statement to Velez's advantage.

There is a reasonable probability that but for these failures, at least one juror would have refused to return a verdict of guilty and the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. This evidence, combined with the other evidence trial counsel failed to present in Velez's defense, is sufficiently strong that failure to present it for the jury's consideration undermines confidence in the outcome of the trial and could not have produced a

just result. Evaluating the totality of the evidence, the Court must conclude that Mr. Velez's conviction and sentence of death were imposed in violation of the Constitutions and laws of the State of Texas and the United States, and must be vacated.

E. Trial Counsel's Conduct in Jury Selection Deprived Mr. Velez of Effective Assistance of Counsel.

Effective voir dire is "critical" to protection of a defendant's constitutional right to an impartial jury. *Walker v. State*, 195 S.W.3d 250, 256 (Tex. App.—San Antonio 2006, no pet.). Texas courts have held that cursory and superficial voir dire constitutes ineffective assistance of counsel. *See, e.g., Walker*, 195 S.W.3d at 256-57 (holding that defense counsel was ineffective because he chose not to ask questions to explore potential juror bias); *Winn v. State*, 871 S.W.2d 756, 763 (Tex. App.—Corpus Christi 1993, no pet.) (ineffective assistance of counsel found, in part, because defense failed to adequately voir dire potential jurors and asked little more than "any reason you could not be fair?"). "[C]ounsel must be diligent in eliciting pertinent information from prospective jurors during voir dire in an effort to uncover potential prejudice or bias . . . [and] counsel has an obligation to ask questions calculated to bring out information that might indicate a juror's inability to be impartial." *Walker*, 195 S.W.3d at 256 (citing *Brasher v. State*, 139 S.W.3d 369, 373 (Tex. App.—San Antonio 2004, pet. ref'd)). Moreover, defense counsel can also fail to provide effective assistance at the voir stage by acting in a manner to alienate or offend the potential jurors. *Miller v. State*, 728 S.W.2d 133, 134-35 (Tex. App.—Houston [1st Dist.] 1987, no pet.) (ineffective assistance found, in part, because defense counsel made inflammatory remarks during voir dire).

In this case, Villarreal's questioning of the jurors that sentenced Mr. Velez to death reveals a haphazard, cursory, alienating, and often counter-productive voir dire. Trial counsel's

voir dire of the 12 individuals that became jurors constituted facially ineffective assistance of counsel. Specifically:

- Trial counsel conducted brief superficial questioning and made no meaningful attempt to investigate potential bias in favor of the death penalty. Ten of the jurors indicated support for the death penalty (17 SCR3 3385; 3407; 3429; 3451; 3492; 3514; 3535; 3557; 3579; 3601), but trial counsel failed to ask questions reasonably designed to determine whether such support would prevent Mr. Velez from receiving a fair trial. (3 RR 45-50 [Juror Quintanilla]; 3 RR 65-81 [Juror Fish]; 3 RR 136-45 [Juror Miller]; 4 RR 176-84 [Juror Lopez]; 5 RR 93-102 [Juror Cabrales]; 5 RR 129-33 [Juror Avalos]; 7 RR 19-36 [Juror Shroyer]; 7 RR 65-68 [Juror Rodriguez]; 9 RR 26-44 [Juror B. Garcia]; 10 RR 26-33 [Juror Johnson]; 12 RR 48-64 [Juror M. Garcia]; 12 RR 145-62 [Juror Peterson])

- Trial counsel failed to ask meaningful questions about key issues, particularly with respect to opinions concerning the death penalty and mitigation in cases concerning the death of a child. All of the jurors stated that the death penalty was required in "some circumstances" and/or "for some crimes," but trial counsel asked few questions exploring what those circumstances or crimes were. (*Id.*) Likewise, eleven of the jurors agreed that the death penalty should be given in cases involving the death of a child. (4 SCR3 653–54; 17 SCR3 3386–87; 3408–09; 3430–31; 3452–53; 3473–74; 3493–94; 3536–37; 3580–81; 3602–03) Yet, trial counsel asked no questions reasonably aimed to determine whether jurors could overcome such bias to fairly consider the facts in Velez's case and follow the law. (*Id.*)

- With respect to those jurors that had expressed particularly strong inclinations to sentence a defendant to death upon conviction of murder, trial counsel asked no meaningful questions aimed at demonstrating that such clearly-stated bias created grounds for disqualification. Seven of the jurors stated that their support of the death penalty was an "8 out of 10" or higher. (17 SCR3 3387 ("10" out of 10); 3431 ("8"); 3494 ("10"); 3516 ("10"); 3537 ("8"); 3581 ("8"); 3603 ("8.5") Instead of attempting to demonstrate bias, trial counsel spent his limited voir dire time attempting to rehabilitate most of these jurors. (3 RR 136–45; 4 RR 176–84; 7 RR 19–36; 7 RR 65–68; 9 RR 26-44; 12 RR 48–64; 12 RR 145–62) Trial counsel made only one objection to one of these potential jurors and accepted all of them by agreement,[40] perhaps because he had eliminated all hope of demonstrating bias through his own questioning.

- At least six jurors stated or strongly implied that they did not believe that a defendant deserves additional compassion because of possible mitigating circumstances surrounding his upbringing or past experience. (17 SCR3 3412; 3434; 3456; 3497; 3562; 3584) Considering the importance of the mitigation issues in this and any capital offense case, trial counsel should have explored these potential biases. But, trial counsel simply did not. (3 RR 65–81; 4 RR 176–84; 5 RR 93–102; 7 RR 19–36; 10 RR 26–33; 12 RR 48–64)

[40] Villarreal initially challenged selected juror Frank Peterson for cause, but agreed to Mr. Peterson's selection instead of exercising a strike. (13 RR 163-65)

- Trial counsel also wasted much of his limited voir dire time with pointless, irrelevant, confusing, and/or off-putting questions, including but not limited to:[41]
    - Asking a juror, "You're entity? You're a person? You're real?" and another juror whether he was actually "there" in the courtroom (3 RR 65–66, 74);
    - Asking jurors if they knew he was a "bed-wetter," in the context of a confusing story about circumstantial evidence (3 RR 139–40);
    - Telling one juror that he was really hurt by the comments about defense lawyers (3 RR 79–80);
    - Beginning questioning of one juror in an accusatory tone: "Is there anything you want to tell me about you that I should know that might affect you in your deliberations as a juror?" (5 RR 93);
    - Complaining about the stressful life of a defense lawyer, including that it can lead to "abuse of different things, you know, drugs, alcohol, horses, women." (5 RR 99; *see also* 7 RR 24);
    - Asking a juror, after a particularly brief voir dire, the pointless question (demonstrating Villarreal's "strategy" of basing the defense on Villarreal's personal credibility), "Is there any reason that you wouldn't trust me?" (5 RR 133; *see also* 7 RR 28 ["Do you trust me at this point in time?"]; 9 RR 31 ["Would you trust me?"]);
    - Wasting his limited time discussing the grand jury process with one of the prospective jurors (9 RR 27-28);

[41] A review of the entire voir dire transcript reveals a lack of competence and purpose of Villarreal in questioning potential jurors. The examples listed herein are not meant to be an exhaustive list of Villarreal's failure to ask meaningful and purposeful questions.

- Making jurors clearly uncomfortable, such as instructing one juror: "Convince me against the death penalty." (9 RR 35-36);
- In a confusing example regarding accusations, suggesting a scenario where Villarreal's wife accuses him of having an affair with the juror being questioned ("[Y]ou've been coochie-cooing around with Brenda, she accused me, right? It's not true, is it?") (9 RR 28-29);
- Directly or indirectly comparing his client to Jesus or comparing the trial of Jesus to the trial of Mr. Velez, and otherwise asking several jurors about their religious beliefs (3 RR 68, 140; 7 RR 36; 9 RR 39-40; 12 RR 50);
- Asking one juror about whether an "Indian" accused of murder might have his sentence mitigated because he's "used to the white man shooting at you all the time . . . and [y]ou see a white man with a gun, your first instinct is . . . get him before he gets you." (12 RR 54-56);
- Asking questions that presented legal standards in a confusing manner, such as (1) asking one juror whether he ever had doubts in his life, and suggesting that any of his doubts were reasonable because he was a reasonable person (3 RR 66-68), and (2) giving an inarticulate and inaccurate explanation of mitigation to a juror that expressed a lack of understanding of the concept (4 RR 181); and
- Asking jurors how they would treat an accused who killed someone by accident, when that was not an issue raised by the evidence or the defense argument (10 RR 28–29).

Trial counsel did not conduct voir dire in an objectively reasonable manner. His questions were not aimed to detect possible bias and develop grounds for dismissal of potential

jurors, nor were they effective in determining what jurors might justify his exercise of preemptory strikes. Trial counsel instead made his first impression to the jurors by asking irrelevant and off-putting questions and meandering through examination with no discernable purpose. Trial counsel's voir dire "fell well below an objective standard of reasonableness." *Walker*, 195 S.W.3d at 256. Considering the facially apparent bias of many of the jurors in favor of the death penalty and against mitigation, particularly in a case involving the death of a child, trial counsel's ineffectiveness during voir dire "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" and raises a "reasonable probability that the result of the proceedings would have been different" absent trial counsel's failings, especially when considered with his numerous other failings. *Winn*, 871 S.W.2d at 765 (reversing under *Strickland* standard, in part because of ineffective assistance at voir dire); *see also Walker*, 195 S.W.3d at 263 (same); *Miller*, 728 S.W.2d at 134–35.

F. Trial Counsel's Failure to Correct the Charge at the Culpability Phase Deprived Mr. Velez of Effective Assistance of Counsel.

At the close of evidence on the morning of October 22, 2008, the Court and counsel for the State and Mr. Velez worked to complete the Charge of the Court. (18 RR 58-59) Only 18 pages of the lengthy record reflect any discussion of the Charge, most of which is focused on instructions regarding the voluntariness of statements by Velez to the police and instructions regarding lesser included offenses. (18 RR 60–78) The record indicates that all instructions requested by the Defense were incorporated into the Charge. (18 RR 60–63, 77-78; 3 CR 403, 406–07)

Counsel for Velez made only one objection to the proposed Charge related to whether the jury must be unanimous on the manner in which Velez injured Angel in order to reach a

unanimous guilty verdict. (18 RR 76–77) The Court denied the objection, and Velez's counsel did not make any further objections or request any further instructions. (18 RR 77)

The Charge submitted to the jury at the end of the culpability phase was defective in multiple ways that materially prejudiced Velez. Specifically, the Charge wrongly (1) failed to instruct the jury on the need for accomplice corroboration evidence to find Velez guilty; (2) provided a lesser "intent" requirement to convict Velez; and (3) omitted instructions that any doubt should be resolved in favor of lesser included offenses. The State enthusiastically embraced the incorrect Charge and presented its arguments in accordance with the lowered burdens. Trial counsel failed to request key instructions and failed to object to certain defects altogether. As a result, Velez was convicted and sentenced to death.

1. Trial counsel failed to request, or to object to the trial court's failure to include, instructions that the testimony of accomplice Acela Moreno must be corroborated by other sufficient evidence.

Texas Code of Criminal Procedure article 38.14 provides:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

Acela Moreno was an "accomplice" as a matter of law by virtue of her status as a codefendant charged with capital murder, as well her conviction on the lesser-included offense of injury to a child. *Ex parte Zepeda*, 819 S.W.2d 874, 876 (Tex. Crim. App. 1991) (en banc); *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004).[42] Moreno's testimony was presented by the State as evidence of Velez's guilt, and the State relied heavily on Moreno's testimony in its case. (*See, e.g.*, 18 RR 100–14, 144–48, 150, *supra* at 122–49) Moreno's

[42] The State has expressly admitted "Moreno is an accomplice as a matter of law." (State's App. Br. at 26)

testimony was clearly "accomplice testimony," but the trial court did not charge the jury on the need for corroborating evidence in violation of Texas Code of Criminal Procedure article 38.14 and 36.14.[43] *See Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991) (holding that trial court erred as a matter of law in failing to charge the jury, *sua sponte*, on accomplice-corroboration requirement). Despite the fact that trial counsel's apparent, but unexecuted, trial theme was to argue that the child was injured by Moreno and not Velez, trial counsel did not request an accomplice corroboration instruction or object that the charge failed to include the statutorily required instruction that Moreno's testimony be corroborated by other competent evidence. (18 RR 76–77)

Given the key nature of Moreno's testimony, trial counsel's failure to take any action to have the Court include a corroboration instruction was a deficient performance that prejudiced Velez and unfairly lightened the burden on the State. *See Zepeda*, 819 S.W.2d at 877 ("[C]ounsel should have requested an instruction on accomplice witness testimony. This omission was an error rendering counsel's performance deficient"); *Hall v. State*, 161 S.W.3d 142, 156 (Tex. App.—Texarkana 2005, pet. ref'd) (concluding that trial counsel's failure to object to omission of an accomplice-witness instruction allowed the jury to convict without corroborating evidence); *Howard v. State*, 972 S.W.2d 121, 129 (Tex. App.—Austin 1998, no pet.) ("[C]ounsel's failure to . . . to request such an accomplice-witness instruction cannot be characterized as a sound trial strategy that a reasonable defense attorney would advocate."). Indeed, at the appellate argument on the direct appeal of this case, one of the justices of the Court of Criminal Appeals commented that "the accomplice witness instruction is very powerful. . . .

[43] Article 36.14 provides that the court must "deliver to the jury . . . a written charge setting forth the law applicable to the case."

I'm having trouble fathoming why a defense lawyer would not request that instruction." (10/19/11 Tr. of Arg. at 10 [Appx 133])

Because there is an insubstantial amount of non-accomplice evidence and because "the record reveals . . . rational bas[es] on which the jury could have doubted or disregarded that evidence," then there is a reasonable probability that, but for trial counsel's deficient performance in failing to obtain a corroboration instruction, the result of the guilt stage would have been different. *See Davis v. State*, 278 S.W.3d 346, 353 (Tex. Crim. App. 2009); *see also Hall*, 161 S.W.3d at 156 (concluding that trial counsel's failure to object to omission of an accomplice-witness instruction met both prongs of a *Strickland* analysis).

In its briefing on direct appeal, the State conceded that Moreno was an accomplice as a matter of law and admitted that the Charge was erroneous because no corroboration instruction was included. (State's App. Br. at 26, 54, 60) The State will undoubtedly argue, similar to its argument that there was no "egregious harm"[44] on the direct appeal, and that the error in excluding the corroboration instruction did not substantially prejudice Mr. Velez because sufficient "non-accomplice" evidence was submitted at trial. (*See* State's App. Br. at 28–75) The State cannot support that claim.[45] The State cannot point to any meaningful non-accomplice

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[44] The standard for finding ineffective assistance of counsel (as applied from *Strickland*) based on a failure to request an accomplice-corroboration instruction is less onerous than the "egregious harm" standard applicable to the direct appeal. If the State cannot present a "substantial amount of non-accomplice evidence" corroborating the accomplice testimony ***or*** if "the record reveals any rational basis on which the jury could have doubted or disregarded that evidence," trial counsel's failure to request an accomplice instruction constitutes ineffective assistance that requires reversal under *Strickland*. *See Davis*, 278 S.W.3d at 353; *Zepeda*, 819 S.W.2d at 877; *Hall*, 161 S.W.3d at 156.

[45] Generally, when assessing a trial court's failure to give an accomplice corroboration charge, the court must examine the "reliability or believability" of the non-accomplice evidence in the record, "the strength of its tendency to connect the [appellant] to the crime," *Herron v. State*, 86 S.W.3d 621, 632–33 (Tex. Crim. App. 2002), and whether it conflicts with other evidence. *Saunders*, 817 S.W.2d at 693 (considering evidence conflicting with the State's non-accomplice evidence to find egregious harm). The Court must ask if there is an "articulable basis for disregarding the non-accomplice evidence or finding that it fails to connect the [appellant] to the offense." *Herron*,

testimony to connect Mr. Velez to the charged crime. No other witness corroborated Moreno's testimony, accused Velez of injuring Angel, or testified that Velez had ever harmed another child. The State did not present any "crime-scene," biological, or other evidence that corroborated Moreno's testimony. Instead, on direct appeal, the State identified the following sparse and dubious evidence as corroboration:[46]

1. Mr. Velez's purported statement to the police;
2. A speculative timeline alleging that Angel was injured when family and friends could no longer "watch over" Velez and that Velez had the greatest opportunity to injure Angel;
3. Claims that Acela Moreno was a good and caring mother who could not have injured Angel;
4. Testimony that Velez wrongly claimed that a neighbor's phone did not work when he attempted to use it to call 911, which the State characterizes as "evading the authorities;"
5. Velez's alleged indifference as he remained on the scene when police and emergency services arrived in response to the 911 call; and

[Cont'd]

86 S.W.3d at 633. If there is an articulable basis to disregard non-accomplice evidence and that basis is not "especially weak," then the testimony does not fulfill the corroboration requirement. *Id.*.

[46] The arguments stated herein against possible corroboration claimed by the State are not exhaustive, and, to the extent the State has or will identify other allegedly corroborating evidence, Velez does not waive any right to address such claims and evidence. Nonetheless, the State's primary attempts to identify corroborating evidence in its direct appeal briefing demonstrate that no such evidence exists to justify the omission of a legally required corroboration instruction.

6. A nonsensical theory of motive—not argued at trial or supported by any testimony—that Velez wanted to harm Angel because he was the son of Moreno's abusive ex-boyfriend, Juan Chavez.

(State's App. Br. at 26, 29, 40-41, 43, 56, 59)

This evidence, whether considered together or separately, is "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Sanders*, 817 S.W.2d at 692. Moreover, such evidence was contradicted and/or explained by other evidence at the trial. In other words, the evidence was "exceedingly weak," did nothing "to connect [Velez] to the crime," and was contradicted by evidence that provided the jury with an "articulable basis" to disregard the evidence. *Herron v. State*, 86 S.W.3d 621, 632–33 (Tex. Crim. App. 2002); *see also Saunders*, 817 S.W.2d at 693; *Burns v. State*, 703 S.W.2d 649, 652 (Tex. Crim. App. 1985). There is more than an "rational basis" in the record to disregard the insubstantial non-accomplice evidence that the State might identify as potential corroboration. The lack of a corroboration instruction improperly permitted the jury to convict based on Moreno's testimony without any sufficient corroborating evidence. *Hall*, 161 S.W.3d at 156. As such, trial counsel's failure to secure such an accomplice-corroboration instruction was deficient, and there is reasonable probability that the outcome at trial would have been different had the instruction been given. *Zepeda*, 819 S.W.2d at 877 (holding that *Strickland* standard was met because "[h]ad the jury been informed that it could not convict applicant without corroboration of the testimony from [accomplices], in light of the remaining evidence presented, there is a reasonable probability a rational jury would not have convicted applicant."); *Howard*, 972 S.W.2d at 129 (also finding the *Strickland* analysis satisfied "[b]ecause the outcome depended so heavily on the accomplice testimony alone, defense counsel's failure to object to the omission of such an instruction rendered the counsel's performance deficient and prejudicial to the point that

it undermines our confidence in the outcome of the trial. There is a reasonable probability that the result of the proceedings would have been different, but for this deficiency.").

Mr. Velez's disputed statement. Velez's purported statement to the police was highly disputed at trial. Defense counsel argued and presented expert testimony that Mr. Velez could not have understood the English statement because of his cognitive limitations (including testing mentally retarded on I.Q. tests in English) and that Velez could not have voluntarily made the statement or waived his *Miranda* rights.[47] (17 RR 168, 170, 172, 174–75, 179–80, 182, 201–02; 18 RR 88–89; *supra* at 53–54) Thus, the very reliability of the statement itself was contradicted at trial.[48] In any event, the statement is exceedingly weak corroboration, if it can be said to corroborate Moreno's testimony at all. In the statement, Mr. Velez strongly denies intentionally causing any harm to Angel that resulted in the child's death,[49] states that he found Angel *after* Angel was injured, and accuses Acela of abusing her children, including "the baby [Angel]," by hitting them "with her hands and with anything she can get a hold of." (State's Ex. 64; 17 RR 75–81) The statement further provided that Angel had fallen from the bed several times because of Moreno's neglect. (*Id*.) Ultimately, the statement contradicts Moreno's testimony and points to Moreno as the person responsible for injuring Angel.

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[47] Additionally, the State's misleading use of the statement at trial constitutes misconduct, and the State should not be rewarded by permitting such weak evidence, bolstered only by the State's false accusations of fraud, to be corroboration for Moreno's contradicted and self-serving testimony. (*Infra* at 213–15)

[48] In *Burns v. State*, 703 S.W.2d 649, 652 (Tex. Crim. App. 1985), the Texas Court of Criminal Appeals rejected a similar argument that an accomplice's testimony (in absence of an accomplice-corroboration instruction) was allegedly corroborated by the appellant's confession because the appellant challenged the voluntariness of the statement before the jury. The Court reasoned: "we are presented with a situation where the jury . . . quite plausibly could have improperly convicted appellants because they could have found the statements involuntary and yet convicted appellants on [the accomplice] testimony alone." *Id.*

[49] At most, the statement says that Velez shook the child "with force" to get him to laugh in the past, but the State's own medical expert, Dr. DiMaio, testified that Angel's injuries could not have been caused by shaking. (State's Ex. 64; 17 RR 142)

The State's timeline. The State has cobbled together an unsupported timeline to argue that (1) Angel could not have been injured before Velez and Moreno moved into a new home on October 18, 2005 because family members living near Velez and Moreno before that date were watching over Velez, and (2) that Velez had the opportunity to injure Angel. (State's App. Br. at 31, 35, 38, 56) The untenable medical premise underlying this theory is exposed elsewhere in this Application. In any event, no credible evidence exists supporting this timeline in a manner that corroborates Moreno's testimony.

The claim that Angel was being prevented from harm before October 18th is based on the State's mischaracterization of the testimony of Moreno's sister, Magnolia Medrano, who lived across the street when Moreno lived in Mr. Velez's apartment on Chilton Street. Actually, on questioning by the State, Medrano admitted that she knew very little about what happened in the household where Angel lived with Velez and Moreno, and that Medrano—far from keeping a "watchful eye" on Velez—paid very little attention to the activities of Velez, Moreno, and Angel. (14 RR 41–42) When asked about Mr. Velez, Medrano testified that she had never heard from anyone (including Moreno) that he ever hurt Angel. (14 RR 51) Medrano further testified that Moreno admitted to biting Angel on the cheek causing a visible injury. (14 RR 48) None of the testimony implicates Velez and exculpates Moreno—it does not support the State's theory or Moreno's testimony. Indeed, the State's characterization of Medrano's testimony (and the State's timeline based thereupon, rather than corroborating Moreno's testimony, actually serves to implicate Moreno in injuring Angel, by emphasizing Mr. Velez's more limited role in Angel's life prior to his return from Memphis and the move to Vermont Circle.[50]

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[50] Additionally, the overwhelming evidence presented in this Application demonstrates that the injury to Angel was more likely caused during the time that Velez was out of the State, further discrediting the manufactured timeline presented by the State. (*See supra* at 22–30; 77–81)

Likewise, the State's claim that that there was evidence of Velez's opportunity to injure Angel *that corroborated Moreno's testimony* is without support. (State's App. Br. at 29) Again, the evidence actually presented contradicts the State's theory and demonstrates that Moreno—who stated that Velez was often out of the house, but that she stayed home "all the time"— had the greatest opportunity alone with Angel to cause the fatal injury. (16 RR 81–82) More importantly, Moreno stated that she "never" left Velez alone with Angel. (State's Ex 49A at 19) The fact that Velez was present in the house when Angel was found injured and when first responders arrived is not evidence corroborating Moreno's statement. Moreno was present as well. Moreno is attempting to evade culpability by shifting blame from herself to Velez. The presence of both of Velez and Moreno in their home does not make it any more likely that Velez committed the crime instead of Moreno. Accordingly, no meaningful undisputed evidence presented by the State regarding Velez's alleged opportunity to injure Angel actually connects Velez to the alleged crime. Thus, it cannot demonstrate lack of harm from the failure to include a corroboration instruction.[51] *Herron*, 86 S.W.3d at 632–33; *Saunders*, 817 S.W.2d at 693; *Burns*, 703 S.W.2d at 652.

Moreno's "care" as a mother. The State may argue that testimony characterizing Moreno as a good and caring mother (mostly from Moreno's sister Medrano) corroborates Moreno's statement. (State's App. Br. at 40–41) Any such evidence was plainly contradicted by the evidence at trial—including Moreno's admission to police that she burned Angel with a cigarette (for which she never sought medical treatment) and Medrano's testimony that Moreno had caused injury to Angel by biting him on the face. (State's Ex. 49A at 13–14, 41; 14 RR 48–49)

[51] Again, the evidence presented in this Application shows that the most serious head injuries to Angel occurred when the State concedes that Velez had no opportunity to injure Angel. (*See supra* at 22–30; 77–81)

The alleged statement of Velez heralded by the State also provides evidence that Moreno was routinely abusive to her children, including Angel. (State's Ex. 64) The evidence not only contradicts the State's claim of corroboration based on Moreno's history as a mother, it plainly disproves it.[52]

Velez's alleged indifference. The State has also claimed that Velez's alleged disaffected demeanor after Angel's injury somehow corroborates Moreno's statement. (State's App. Br. at 43) The State's argument is based heavily upon the testimony of a neighbor, Veronica Aparicio, who testified that Velez did not seem as "worried as any person . . . in this situation would be," and the testimony of officers at the scene who spoke with Velez. (State's App. Br. at 43–55) Such evidence is contradicted by the evidence the State ignores. The State's argument ignores Aparicio's testimony that Velez came running to her door, yelling for her to come out and help—showing that Velez was intent on finding aid for Angel. (14 RR 91) The State likewise ignores the testimony of police that Velez stood near the paramedics while they were giving aid to Angel, "looking . . . [l]ike what's going on with the baby"—showing Velez's concern for Angel's welfare. (14 RR 103) The State further ignores the fact that, while officers and paramedics were on the scene, Velez was taking care of his children and Moreno's children—demonstrating Velez's resolve to stay calm during the chaos for the benefit of the children. (17 RR 47, 49; 16 RR 14–15). Velez's behavior was that of a person behaving responsibly, not indifferently. The State has further claimed that (based on Aparicio's testimony), while Velez showed indifference, Moreno showed real concern. (State's App. Br. at 43) The State implies that such concern corroborates Moreno's testimony, but the State ignores Aparicio's testimony

[52] The additional evidence presented in this Application further details the extensive abuse and neglect by Moreno, demonstrating that Moreno was more than capable and willing to cause the injuries leading to Angel's death. (*See supra* at 15–21; 122–49)

that Moreno's concern did not seem deeply genuine: "Well, [Moreno] only would complain, she would say my baby, my baby, but I never really saw any tears." (14 RR 85) Moreover, even if evidence of Velez's allegedly indifferent demeanor were not contradicted, it is extremely weak—it is nothing more than subjective opinions regarding how Velez should seem to feel. This contradicted evidence does nothing to connect Velez to the crime.

Velez's alleged "evasion of authorities." The State claims that Velez attempted to evade the police by "refusing to call 911." (State's App. Br. at 7, 44–45, 57) The only evidence advanced by the State to support such a claim is testimony that when Velez was handed a neighbor's phone to make a 911 call, Velez wrongly claimed that the phone was not working. The trial evidence strongly contradicts any claim that Velez tried to avoid the authorities based on Velez's inability to operate his neighbor's phone. The authorities were contacted because Velez ran to the neighbor's house, yelling for help. (14 RR 91) Although Velez could not complete the call himself for some reason, he immediately handed the phone back to Aparicio so that she could immediately make the 911 call. When the authorities were called, Velez did not leave the scene; rather, he stayed taking care of the children and observing to see that Angel was receiving care. (14 RR 91; 17 RR 47, 49; 16 RR 14–15) Additionally, other evidence shows that he engaged the help of someone else to make the call, not because he was unwilling to do it, but because he was "too nervous." (14 RR 87–90; Def. Ex.1 [proffered]; Def. Ex. 6 at 10) In any case, the authorities were contacted because of actions by Velez. He alerted Moreno to the problem, he yelled for the neighbor to help, he remained on the scene taking care of the children, and he voluntarily spoke with the officers and aid providers, both at the scene and afterwards (State's Ex. 64; 14 RR 57, 91 16 RR 89; 17 RR 47, 49, 51) Velez did not give a false name, leave the scene, refuse to cooperate with police, try to prevent authorities and aid from arriving,

or exhibit any of the other hallmarks of an individual trying to evade authorities. Thus, as evidence of corroboration, such alleged evasion is contradicted and facially weak.

Velez's alleged motive. In an argument that defies logic, the State has also contended that a "reasonable jury could have determined that Chavez's beating of Moreno, [Velez's] paramour, following [Velez's] instigating phone call, could have given [Velez] ample motive for hurting Baby Angel, Chavez's only child with Moreno." (State's App. Br. at 29) This theory was never argued to the jury or mentioned by any witness or lawyer at the trial. It should not be sufficient corroboration that the State—years after the fact—can manufacture a theory of motive unheard by the jury and argue that the jury must have concocted the same theory, despite the lack of any testimony or other evidence supporting the theory. Nevertheless, such a patently nonsensical theory of motive—unsupported by any evidence—only demonstrates the State's desperation in trying to corroborate Moreno's testimony.

The lack of non-accomplice corroborating evidence at trial not only defeats any claim by the State that the exclusion of an accomplice-corroboration instruction was not harmful, it highlights the failure of trial counsel. Despite the lack of credible corroboration of Moreno's testimony, especially in light of the defense's theory that Moreno was testifying against Velez for leniency (18 RR 119, 126–27, 133–34, 137), trial counsel failed to request a corroboration instruction or object to the court's failure to include a corroboration instruction. Trial counsel's failure to do so was not the result of a strategic decision; rather, trial counsel has no explanation for failing to seek a corroboration instruction. (Flores Aff. ¶ 20 [Appx 14]) This is not a case that would "clearly warrant[] conviction independent of the accomplice's testimony." *Solis v. State*, 792 S.W.2d 95, 98 (Tex. Crim. App. 1990). The State's case—weakly circumstantial without Moreno's testimony—falls apart without it. Trial counsel's failure to insist on an accomplice-corroboration instruction severely prejudiced Velez and constitutes ineffective

assistance of counsel that raises a reasonable probability that the result of the proceedings would have been different, but for the ineffective assistance of trial counsel.

2. Trial counsel failed to object to the trial court's expansion of the intent charge beyond the result of Mr. Velez's actions to the "nature of his conduct."

The trial court incorrectly charged the jury on the "intent" element of capital murder. The trial court instructed the jury that a person has the requisite intent if he acted "intentionally or with intent with respect to the *nature of his conduct*" or "knowingly or with knowledge with respect to the *nature of his conduct*." (3 CR 402–11; 18 RR 82–85) Under Texas law, this is plainly wrong because "[i]ntentional murder . . . is a 'result of conduct' offense." *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994). "[A] trial judge err[s] in not limiting the culpable mental states to the *result* of appellant's conduct" in its jury charge. *Id.* (emphasis added); *see also Hughes v. State*, 897 S.W.2d 285, 296 (Tex. Crim. App. 1994) (applying *Cook* to intentional murder in capital case); TEX. PENAL CODE § 19.02. The Charge in this matter should have been limited to whether Velez intentionally or knowingly caused the *results of his conduct*. *Cook*, 884 S.W.2d at 491 (finding same charge error). Instead, the Charge was confusing as to whether the jury, in determining whether Velez "did intentionally or knowingly cause the death" of Angel Moreno, could consider Velez's intent or knowledge with respect to the *nature* of his conduct and its surrounding circumstances, or whether it was limited to considering his intent or knowledge with respect to the *result* of his conduct. *See Cook*, 884 S.W.2d at 491 (finding charge error on those grounds). The Charge effectively relieved the State of its essential burden to prove that Velez knowingly or intentionally caused death.[53]

[53] Because of the Charge error regarding intent, Mr. Velez's due process rights were plainly violated. *See Flowers v. Blackburn*, 779 F.2d 1115, 1121 (5th Cir. 1966); *see also* U.S. CONST. AMEND. XIV; *In re Winship*, 397

The State now concedes that the jury charge was erroneous because it did not properly instruct the jury that it had to find Velez intended the *result* of his conduct; *i.e.*, the death of Angel Moreno. (State's App. Br. at 73) At trial, however, the State seized on the opportunity to apply the incorrect standard. The closing arguments made by three different prosecutors (spanning 32 pages) virtually ignored the State's burden of proving that Mr. Velez intended the child's death. (18 RR 97–114, 137–52) The prosecutors repeatedly argued the incorrect standard that Mr. Velez intended his *actions*. (18 RR 98–99, 111, 139-40, 144–45) Indeed, the State plainly focused on the Charge's instruction that intent was satisfied by a showing that Mr. Velez intended his actions—the "nature of his conduct"—because the State itself presented evidence that Mr. Velez only intended the action and not the result. In the "statement" of Mr. Velez used by the State in their case, it is expressly stated that Mr. Velez did not intend to hurt the child. (State's Ex. 64) Further, Mr. Velez's seeking of help to call emergency services and his attempt to revive the child immediately after the injury is inconsistent with an intent that the child die. (State's Ex. 64; 14 RR 85) Further still, the State quoted the report of Dr. Rabin, the defense psychologist, to suggest that Mr. Velez's actions resulted from thoughtless impulsiveness caused by his diminished intelligence, not from any intent to kill. (18 RR 139–40 [quoting Def. Ex. 6 at 22]) In other words, the State presented only evidence that Mr. Velez intended his *actions* with the child, but not their ultimate *result*. Although this would be insufficient to satisfy intent for a capital murder charge under the correct standard, because the

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U.S. 358, 361-64 (1970); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (demonstrating that trial court's error should require reversal because it caused egregious harm).

jury applied the erroneous instruction expanding intent to Mr. Velez's conduct (rather than just its results), the jury found Mr. Velez guilty and sentenced him to execution.

Unfortunately, trial counsel failed to object either to the incorrect instruction or to the State's application of the incorrect instruction. (18 RR 76–77) Defense counsel's failure to object to the critical error in the Charge and the State's use of such standard allowed Mr. Velez to be convicted by a lesser standard than required by the law. This performance fell below any standard of reasonableness. *See Banks v. State*, 819 S.W.2d 676, 682 (Tex. App.—San Antonio 1991, pet. ref'd) (finding constitutionally ineffective assistance where counsel failed "to have the definitions of culpable mental states limited in the court's charge to that which related to the 'result' of the [result-of-conduct] offense. . . The failure to object to the court's charge . . . was without any plausible basis.").

3. Trial counsel failed to request, or to object to the trial court's failure to include, instructions that doubt should be resolved in favor of lesser included offenses.

The trial court charged the jury on lesser included offenses such as manslaughter, negligent homicide, and injury to a child. (18 RR 85–88) Accordingly, Mr. Velez was entitled, upon request, to a charge that, if the jury had a "'a reasonable doubt as to which of [the charged or lesser included] offenses he is guilty, then [it] *must* resolve that doubt in the defendant's favor and find him guilty of the lesser offense . . . .'" *Barrios v. State*, 283 S.W.3d 348, 350, 352 (Tex. Crim. App. 2009) (quoting instruction from trial court and collecting cases showing this instruction "has long been recognized in Texas law") (emphasis added). Each of the lesser included offenses involve a lesser culpable mental state than capital murder. (3 CR 402–07) In light of the highly circumstantial nature of the State's case, and especially considering the lack of evidence that Mr. Velez intended to cause the death of Angel (*see infra* 185–86), even if the jury believed that actions by Velez caused injuries to Angel or Angel's death, the jury would likely

have doubts as to whether he should be found guilty of capital murder or a lesser-included offense. A reasonable probability exists in this close case that, if properly instructed that it must give Mr. Velez the benefit of the doubt between the charged offense and lesser included offenses such as manslaughter or injury to a child, the jury would have convicted on a lesser included offense.

Despite the importance of directing the jury how to resolve doubts about lesser included offenses, trial counsel did not request an instruction (or object to the failure to include an instruction) that, if the jury had any reasonable doubt as to which of the multiple charged offenses Mr. Velez was guilty, the jury must resolve that doubt in favor of finding him guilty of a lesser offense. (18 RR 60–78)

4. Trial counsel's failure to object to the numerous charge errors was unreasonable and prejudiced the defense.

Trial counsel's failure to object to the legion of Charge errors (as well as the State's arguments applying the incorrect charge to seek conviction) or to request the inclusion of critical and proper instructions that would have been helpful to Mr. Velez fell below the objective standard of reasonableness such that it was deficient. *See Ex Parte Miller*, 2009 WL 3446468 at *3 (Tex. Crim. App. 2009). Errors in the Charge have an obvious and undeniable impact on the decision-making process of the jury, and counsel's failure to object to a charge error or request a beneficial instruction—especially a failure that permits a lower burden for the State or excludes beneficial evidence from consideration—necessarily constitutes prejudicial ineffective assistance. *See Zepeda,* 819 S.W.2d at 877 (holding that a defense attorney's failure to object to the omission of a jury instruction may amount to ineffective assistance of counsel); *Howard*, 972 S.W.2d at 128 (stating that defense attorney's failure to object to jury-charge omission would almost always amount to ineffective assistance of counsel). There is a high probability that the

outcome of the trial would have been different had trial counsel acted to correct the numerous Charge errors, let alone all of them. In light of the erroneous and unconstitutional provisions of the Charge covering determination of guilt, sentencing, and mitigation, confidence in the outcome should be extremely low.

And crucially, if the Court of Criminal Appeals should deny any of these charge claims on direct appeal due to counsel's failure to object and the corresponding imposition of a higher prejudice hurdle, counsel's ineffectiveness will have twice prejudiced Mr. Velez, furthering the need for just relief in this proceeding.

G. The State Relies On Villarreal's Failures In Seeking to Uphold Mr. Velez's Conviction On Direct Appeal.

On direct appeal, the State acknowledged that this habeas proceeding is an appropriate forum in which to raise Mr. Velez's ineffective assistance of counsel claim. (State's App. Br. at 81) Moreover, in response to Mr. Velez's direct appeal of his conviction, the State identified no fewer than 13 separate failures by defense counsel to properly object to errors during the guilt/innocence phase of trial, which the State contends waived Mr. Velez's rights to have the Court of Criminal Appeals properly examine those errors or require the Court to review such errors under a heightened standard of review. But such arguments merely serve to highlight the ineffective assistance of counsel and thus establish Mr. Velez's right to a writ of habeas corpus.

Defense counsel's failures acknowledged by the State include:

- **Failure to request an accomplice witness instruction.** The State concedes that the jury charge on which Mr. Velez was convicted of capital murder was erroneous because it did not include an accomplice witness instruction as required by statute. (State's App. Br. at 54) But the State argues that such error should be overlooked because defense counsel failed to request such instruction or object to its omission from the charge. Because of such failure, the State argues that Mr. Velez must now meet a heightened standard of demonstrating that the "error was so egregious that he did not have a fair and impartial trial," rather than the lesser "some harm" standard. (*Id*. at 54, 60)

- **Failure to object to the incorrect charge regarding the required mental state**. The State also concedes that the jury charge was erroneous because it did not properly instruct the jury that it had to find Mr. Velez intended the *result* of his conduct; *i.e.*, the death of Angel Moreno. (*Id*. at 73) Accordingly, the jury was allowed to convict Mr. Velez on the improper theory urged by the prosecutor, that Mr. Velez merely engaged in intentional acts that happened to cause death.

- **Failure to file a written motion requesting findings of fact regarding Mr. Velez's suppression hearing.** The State does not dispute that Mr. Velez had a right to have the findings of facts and conclusions of law regarding his suppression hearing "made by the same judge who conducted the hearing."[54] But it argues that Mr. Velez waived this valuable right because his counsel failed to request such findings and conclusions in writing. (*Id*. at 89–91) Accordingly, Judge Lopez, as the new judge of the 44th District Court, who did not attend the hearing, simply adopted verbatim the proposed findings and conclusions prepared by a new prosecutor, who also was not present at the hearing. (1 SCR5 155–60; *see* 8 RR2)

- **Failure to properly object to the admission of both the three-page and two-page alleged statements by Mr. Velez.** The trial court clearly erred in this case by allowing the jury to consider a two-page written statement and a three-page written statement, both allegedly made by Mr. Velez, and particularly by allowing the prosecution to argue to the jury that it was Mr. Velez who was trying to defraud the jury by manufacturing one of the versions of his statement. (18 RR 101–02) But the State argues that Mr. Velez waived his right to complain about this error on appeal because his counsel failed to properly object at trial or ask for an instruction to disregard. (State's App. Br. at 96–97) Although the trial judge sustained Mr. Velez's objection to the prosecutor's improper jury arguments regarding the two-page statement, the State claims that defense counsel "failed to request an instruction to disregard, and did not move for a mistrial" and, therefore, "forfeit[ed] appellate review" of this improper argument. (*Id*. at 117–18)

- **Failure to insist on Sgt. Gosser's notes.** Mr. Velez had the right to receive the notes of Sgt. Gosser, who testified against Velez at trial. But the State alleges that he waived that right because defense counsel failed to insist that the State comply with its obligation at trial and also failed to include the notes in the appellate record so that the appellate court could gauge the harmfulness of the error. (*Id*. at 98–100)

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[54] *See Garcia v. State*, 15 S.W.3d 533, 536 (Tex. Crim. App. 2000) (rescinding findings and conclusions made by trial judge who did not preside at hearing).

- **Failure to protect Mr. Velez's right to be present when the court answered a key jury note and resolved an important factual issue.** The trial court violated Mr. Velez's right to be present when it held an in chambers conference and discussed how to respond to a key jury note in Mr. Velez's absence. (18 RR 228) The State contends, however, that Mr. Velez has no recourse for these violations because his counsel failed to insist that he be present and, in one instance, purported to waive Mr. Velez's right to be present. (State's App. Br. at 104)

- **Failure to insist that Mr. Velez not attend trial in shackles.** The State argues that Mr. Velez's counsel failed to re-urge his pretrial motion requesting that Mr. Velez not be shackled in front of the jury and that Mr. Velez, therefore, has lost his right to complain on appeal about that violation of his rights. (*Id*. at 110–12)

- **Failure to object to the bias of the special prosecutor.** The State violated Mr. Velez's constitutional rights by employing a special prosecutor who was biased (because of comments he made at the hearing on a motion to recuse him for conflict of interest based on his meeting with and receiving confidential information from Mr. Velez's sister). But the State now argues that defense counsel did not make the proper objection at trial and that Mr. Velez has, therefore, waived this error. (*Id*. at 112–13)

- **Failure to object to prosecutorial misconduct.** One of the grounds for reversal asserted on direct appeal was that the State obtained this conviction through improper, inflammatory, and misleading arguments to the jury. Prosecutors were apparently emboldened through the course of their argument by Villarreal's failure to lodge appropriate objections. The State argues that "out of all the instances of alleged prosecutorial misconduct during the prosecution's guilt-innocence phase closing argument that Appellant points to in issue twenty-two, [defense counsel] only objected four times," and that Mr. Velez has now waived his right to complain about these improper arguments. (*Id*. at 116)

- **Failure to object to Aircare Nurse Perez's hearsay testimony.** Mr. Velez's counsel permitted Nurse Perez to testify without objection regarding a report by another nurse indicating that "Baby Angel was flung into a wall by the father, [supposedly] referring to Appellant." (*Id*. at 39) The State argues that because Villarreal failed to object to this (double hearsay) testimony, the jury could have concluded the testimony was a "suspicious circumstance" tending to "connect [Velez] to Baby Angel's murder." (*Id*.)

- **Failure to object to the State's use of an excluded and prejudicial photograph.** The State argues that defense counsel failed to object at trial and obtain a ruling on the record

from the trial court when the prosecutor used an excluded and prejudicial autopsy photograph while examining Dr. Camacho. (*Id*. at 121–23)

- **Failure to object to a highly prejudicial and irrelevant autopsy photograph.** The State argues that defense counsel failed to appropriately object to the admission of a highly prejudicial autopsy photograph of Angel Moreno's shaved head covered with grotesque bruises. (*Id*. at 123–24)

- **Failure to object to hearsay statements by Dr. Zamir and Cpt. Reyna.** The State claims that defense counsel failed to object to the admission of hearsay statements by Dr. Zamir and Cpt. Reyna, noting that "even constitutional errors may be waived by failure to object at trial." (*Id*. at 126)

In sum, the State on direct appeal identifies at least 13 instances at the culpability stage in which Villarreal failed to object or preserve error—and the State relies on these deficiencies in its effort to uphold Mr. Velez's conviction on appeal.[55] Whether or not that effort succeeds on appeal, defense counsel's errors support a finding of ineffective assistance of counsel to justify a writ of habeas corpus.

H. Trial Counsel's Deficient Performance Prejudiced Mr. Velez—Had Trial Counsel Performed Adequately, There Is A Reasonable Probability That The Outcome Would Have Been Different.

As set forth in Section II.A, the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland*, 466 U.S. at 685. Ineffective assistance of counsel occurs when counsel's performance was deficient, falling below and objective standard of reasonableness, and the deficient performance prejudiced the defense. *Id.* at 687. As the Supreme Court has articulated:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or

[55] Additional failures by Villarreal at the punishment phase highlighted by the State on direct appeal are discussed *infra* at 294.

> jury. . . . ***Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.*** Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695–96. Trial counsel's inexcusable failures, falling far below any reasonable standard, are detailed in the foregoing pages and summarized here.

In this case, there was simply no "meaningful adversarial testing" of the State's medical evidence, which is constitutionally required by the right to effective assistance of counsel. *Strickland*, 466 U.S. at 688; *Cronic*, 466 U.S. at 656. Villarreal did not ask a single question of Angel's pediatrician, who testified the baby was perfectly healthy as of October 18, and did not retain an expert to date Angel's injuries or contradict testimony of the State's witnesses. Thus, the State's central theory of the case—that the injuries inflicted on Angel resulting in his death *all* occurred within the previous 7-14 days—remained unchallenged throughout the trial. Indeed, counsel acquiesced in and even emphasized this theory. (*See* Part One, Section II.C) Had trial counsel properly investigated, he could have presented evidence that Angel likely suffered a severe head trauma during the summer of 2005 and that other injuries contributing to Angel's death occurred while Mr. Velez was working outside the State of Texas. (*See* Part One I.B.1–3)

In addition, Villarreal utterly failed to investigate and present evidence of Moreno's abusive history, information the jurors that convicted Mr. Velez would have wanted to hear before rendering their verdict. (*See* Part One, Section II.D.5) Villarreal did not challenge Moreno's testimony or confront her with her admission that she struck Angel on October 31. Jurors specifically stated they would have wanted to know about Moreno's admission and the substance of her guilty plea and would have considered that evidence before convicting

Mr. Velez. (*Id*.) Villarreal did not even interview the single witness that implicated Mr. Velez in a case that was purely circumstantial. No trial strategy can explain trial counsel's failures, which are entirely inconsistent with the theory of defense. *Soffar*, 368 F.3d at 473.

Villarreal further failed to object to the admission of evidence in violation of the Confrontation Clause. *See Ex parte Kearse*, Tex. Crim. App. Unpubl. LEXIS 527 at *1–2; *Ex parte Sanders*, Tex. Crim. App. Unpub. LEXIS 637 at *1. (*See* Part One, Section III) Villarreal otherwise conducted utterly ineffective cross examinations of the State's witness, performance that was so patently unreasonable that no competent attorney would have made the same tactical trial decision. *Sigman*, 695 S.E.2d at 232. (*See* Part One, Sections II.B, C, D)

Villarreal did not preserve Mr. Velez's constitutional right to be present during a conference in chambers regarding the admissibility of the two markedly different statements the State alleged Mr. Velez made to police. He not effectively exploit the circumstances surrounding the statements' creation and did not highlight exculpatory portions of the statements consistent with the defense theory. He did not object when the prosecution made unfounded accusations that the defense had engaged in fraud in creating one of the statements. (*See* Part One, Section II.D)

Moreover, trial counsel made multiple constitutional errors with respect to the jury charge during the culpability phase. Most egregiously, counsel neglected to instruct the jury on the need for accomplice testimony, an instruction trial counsel admits should have been requested and was not. (Flores Aff. ¶ 20 [Appx 14]) Villarreal also failed to correct a jury charge that provided for a lesser intent than required by law and omitted instructions that doubt should be resolved in favor of lesser included offenses. (*See* Part One, Section II.G) These failures fall below the objective standard of reasonableness required for effective assistance of counsel. *See Ex Parte Miller*, 2009 WL 3446468 at *3.

While any one of the foregoing critical failures, viewed independently, justifies relief in this case, in measuring whether trial counsel's deficiencies prejudiced Mr. Velez, the Court must consider the cumulative effect of all the alleged deficiencies taken together, rather than judging the effect of each in isolation. *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) ("[T]he question is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable.") (citing *Strickland*, 466 U.S. at 686); *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. Tex. 1997) (finding district court properly considered cumulative errors by counsel); *see also, e.g., Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995) ("a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]"); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions"); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (finding that "significant errors . . . , considered cumulatively, compel affirmance of the district court's grant of habeas corpus"); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (observing that "prejudice may result from the cumulative impact of multiple deficiencies").

There is no doubt that, when trial counsel's deficiencies are viewed in concert, Mr. Velez suffered prejudice. Mr. Velez's counsel failed him at virtually every turn—he did not investigate, challenge the State's case, present crucial evidence, or preserve Mr. Velez's constitutional rights through proper objections or ensuring the accuracy of the jury charge. There is a reasonable probability that, but for these failures, at least one juror would have refused to return a verdict of guilty and the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. (*See also* Juror Declarations [Appx 43–47]) Mr. Velez was deprived of his right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments.

III. MR. VELEZ'S CONSTITUTIONAL RIGHTS TO CONFRONT WITNESSES AGAINST HIM AND TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY THE INTRODUCTION OF TESTIMONIAL HEARSAY.

Mr. Velez's conviction was secured with testimony presented to the jury in violation of the Sixth Amendment right to confront a witness testifying against him. The Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. U.S. Const. Amend. VI.; *see Crawford v. Washington*, 541 U.S. 36, 59 (2004); *and* Tex. Const. art. I, § 10 (Texas's confrontation clause). The Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54; *United States v. Tirado-Tirado*, 563 F.3d 117, 122 (5th Cir. 2009). Following the seminal *Crawford* decision in 2004, testimonial evidence must independently satisfy the Confrontation Clause; it is no longer sufficient to comply with traditional rules of hearsay. *See Crawford*, 541 U.S. at 61; *Wood v. State*, 299 S.W.3d 200, 212 (Tex. App.—Austin 2009, pet. ref'd) (stating that "evidence rules cannot trump the Sixth Amendment").

The Confrontation Clause limits "testimonial statements," a concept that has been developing in recent case law, and now clearly includes documentary statements, such as reports, that are testimonial in nature. *United States v. Holmes*, 406 F.3d 337, 348 (5th Cir. 2005). The Supreme Court decided in 2009 that allowing a Certificate of Nonexistence of Record report in an immigration case to be introduced at trial without the author of the report being subject to confrontation was a violation of the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009); *United States v. Martinez-Rios*, 595 F.3d 581, 585 (5th Cir. 2010). Because the record was functionally an affidavit and "made under circumstances which would

lead an objective witness reasonably to believe that the statement would be available for use at a later trial," it was testimonial evidence subject to the Confrontation Clause. *Id.*; *accord de la Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008). A person makes a testimonial statement when the objective purpose of that statement is to preserve facts for a future criminal prosecution. *See Davis v. Washington*, 547 U.S. 813, 822 (2006); *de la Paz*, 273 S.W.3d at 680.

Similarly, courts have repeatedly barred testimonial hearsay offered through the mouths of state experts when the underlying witness who testifies against the accused does not testify at trial. *See, e.g., United States v. Crockett*, 586 F. Supp. 2d 877, 888 (E.D. Mich. 2008) (citing the Confrontation Clause and *Crawford* in prohibiting a government expert from relying on testimonial hearsay reports); *United States. v. Taveras*, 585 F. Supp. 2d 327, 340 (E.D.N.Y. 2008) (refusing to permit psychologist testifying to transmit to the jury, in the guise of expert testimony, testimonial hearsay whose admission would violate *Crawford*); Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & Pol'y 791, 834 (2007).

Furthermore, in *Melendez-Diaz* the Supreme Court made it clear that forensic analysis and testimony, including various reports, are part of the core class of testimony to which the Confrontation Clause applies, for the "Confrontation Clause is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz*, 129 S. Ct. at 2537.

Because a Confrontation Clause violation is constitutional error, Mr. Velez's conviction must be reversed unless the Court can determine beyond a reasonable doubt it did not contribute to Mr. Velez's conviction. *See United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008). In key parts of the trial Mr. Velez never had an opportunity to confront three declarants who had testimonial evidence presented at the trial without being made available for Mr. Velez to cross-examine these witnesses.

Villarreal's failure to object to the infringement of Mr. Velez's rights do not preclude this Court's consideration of this issue. The Court of Criminal Appeals has recognized that where a habeas applicant has alleged ineffective assistance of counsel because trial counsel failed to object to the admission of evidence in violation of the Confrontation Clause, those facts, if true, might entitle that habeas applicant to relief. *Ex parte Kearse*, No. WR-72,348-01, 2009 Tex. Crim. App. Unpub. LEXIS 527 at *1-2 (Tex. Crim. App. Aug. 19, 2009); *Ex parte Sanders*, No. WR-68,723-01, 2007 Tex. Crim. App. Unpub. LEXIS 637 at *1 (Tex. Crim. App. Dec. 5, 2007). Tactical trial decisions serve as grounds for reversal when they are "so patently unreasonable that no competent attorney would have chosen them." *Sigman v. State*, 695 S.E.2d 232, 233 (Ga. 2010).

A. Presentation of Dr. Brown's Neuropathology Report Without Dr. Brown Testifying Violated the Confrontation Clause.

Dr. Farley's autopsy report included critical testimonial evidence from Dr. Brown, the doctor who analyzed Angel's brain as part of the autopsy analysis. Dr. Brown's report was attached to, and portions were quoted in, the autopsy report, which provided the foundation for the testimony of both Dr. Farley and Dr. DiMaio. (Autopsy Report at 3, 5 [Appx 58]) Mr. Velez was deprived of his Confrontation Clause right to be confronted by Dr. Brown at trial. Instead, Dr. Brown's crucial medical opinions were entered as hearsay through testimony of other doctors.

Autopsy reports are the epitome of testimonial statements when the "medical examiner would reasonably expect the statements in the report to be used prosecutorially." *Herrera v. State*, No. 07-09-00335-CR, 2011 Tex. App. LEXIS 7021 at *7 (Tex. App.—Amarillo Aug. 26, 2011, no pet.); *Gilstrap v. State*, No. 04-09-00609-CR, 2011 Tex. App. LEXIS 181 at *3-4 (Tex. App.—San Antonio Jan. 12, 2011, pet ref'd); *see also Martinez v. State*, 311 S.W.3d 104, 112

(Tex. App.—Amarillo 2010, pet ref'd) (indicating that relying on the autopsy report of another might be proper, but reading the opinions contained within another's autopsy report is a violation of the Confrontation Clause).

The circumstances of this case confirm that the autopsy report was expected to be used for criminal proceedings. Police declared the investigation into Angel's death a crime scene on October 31, 2005. (*See* 17 RR 51:9–10) Dr. Farley conducted her autopsy on November 3, 2005, and shortly thereafter, sent the brain to Dr. Brown for his assessment. (Autopsy Report at 1 [Appx 58]) Thus at the time that both Dr. Farley and Dr. Brown investigated Angel's cause of death, they could have reasonably expected that the statements made in their reports would be used by the State in its case against Mr. Velez and Acela Moreno. *See Herrera v. State*, 2011 Tex. App. LEXIS 7021 at *7; *Gilstrap v. State*, 2011 Tex. App. LEXIS 181 at *3-4. Therefore, the autopsy report, including Dr. Brown's opinions contained therein, is quintessentially testimonial evidence because it had the objective purpose of observing the body and the statements regarding those observations would "likely be relevant to a future criminal proceeding." *Coronado v. State*, 351 S.W.3d 315, 324 (Tex. Crim. App. 2011).

Mr. Velez was not able to confront Dr. Brown concerning the crucial portions of the autopsy report he authored. Even though Mr. Velez, through his counsel, was able to confront Dr. Farley regarding portions of the autopsy report, the key analysis from Dr. Brown must itself satisfy the Confrontation Clause. Dr. Farley's testimony concerning "an older organizing subdural hemorrhage in both of the parietal regions" (17 RR 26:15–16), although she does not credit Dr. Brown, is based directly on his analysis. When Dr. Farley sent the brain to Dr. Brown in December 2005, she had observed that some of the hematomas "appear somewhat older and attached to the dura." (12/20/05 Letter with attached draft autopsy report [Appx 116]) The draft, "not corrected" autopsy report accompanying Dr. Farley's letter references "subdural

hemorrhage within the dura itself which is pending neuropathology consult." (Draft Autopsy Report at 1 [Appx 116]) It is only after receiving Dr. Brown's Neuropathology Report identifying "Organizing subdural hematoma membrane" (1/25/2006 Neuropathology Autopsy Report of Dr. Brown at 1 [Appx 116]) that Dr. Farley corrects her autopsy report to include those terms. (Autopsy Report at 1–2 [Appx 58]) Dr. Farley also quotes substantial portions of Dr. Brown's report describing the "well-developed subdural membrane with dense fibrovascular connective tissue." (*Id*. at 3, 5) Likewise, Dr. Farley's conclusions concerning an "acute subarachnoid hemorrhage" are also derived entirely from Dr. Brown. (*Compare* Draft Autopsy Report [Appx 116] *with* 11/3/05 Autopsy Report of Angel Moreno [Appx 58]) Dr. Farley's testimony on these critical issues, although she does not mention Dr. Brown, clearly relays a portion of Dr. Brown's testimonial hearsay to the jury, which constitutes a violation of the Confrontation Clause.

Dr. Brown's conclusions contained in Dr. Farley's autopsy report were also relayed to the jury through the testimony and report of Dr. DiMaio. (State's Ex. 65; 17 RR 142:13–18) Notably, Dr. DiMaio did not conduct his own independent examination of Angel's brain, making it even more apparent that the witness regarding the crucial medical issue of prior brain injuries, functionally, was Dr. Brown. (*See* State's Ex. 65 at 1) Dr. DiMaio testified about an "old hemorrhage [ ] . . . [that was] reorganized and mostly scar tissue." (17 RR 133:24–134:2) The only source of this information is Dr. Brown's report, included in Dr. Farley's autopsy report. Dr. DiMaio's conclusions regarding the "subarachnoid hemorrhage" (17 RR 135:15–18, 136:4–8) again mirrors Dr. Brown's opinions contained within the autopsy report. (11/3/05 Autopsy Report of Angel Moreno at 3, 5 [Appx 58]) The court admitted Dr. DiMaio's report into evidence. (17 RR 140:11) Dr. DiMaio's report addresses the older subdural hematoma and the

more recent subarachnoid hemorrhage. (*See* State's Ex. 65 at 2) Dr. Brown's opinions, through Dr. DiMaio, were communicated to the jury through both evidence and testimony.

Despite the repeated presentation of Dr. Brown's opinions, Dr. Brown was not called to testify, the record does not reflect his unavailability, and Mr. Velez's attorneys did not have a prior opportunity cross examine him, although he had been identified as a potential expert witness by the State. (State's Disclosure of Experts at 1 [Appx 59]) Thus, Dr. Brown's opinions, offered secondhand through Dr. Farley and Dr. DiMaio, were improperly admitted. This error is compounded by the fact the jury heard a truncated portion of Dr. Brown's opinions. Had Dr. Brown been asked to testify, he would have told the jury that the older subdural hematoma was older than the two weeks mentioned by Farley and DiMaio, and would have exposed the testifying doctors' false reliance on Dr. Brown's report. (Dr. Brown Aff. ¶¶ 16–17 [Appx 2])

Mr. Velez was harmed when he was denied his right to cross-examine Dr. Brown about his crucial testimonial statements regarding brain injuries. Determining how and when Angel's head injuries occurred was essential to the determination of guilt or innocence, especially considering the State's reliance on a two-week timeline for Angel's injuries to convict Mr. Velez. (18 RR 113:22–24) Further, the statement was not cumulative—both Dr. DiMaio and Dr. Farley instead *relied* on Dr. Brown's observations in arriving at their conclusions. (State's Ex. 65 at 1; *see* 17 RR 142:13–18; *see also* 11/3/05 Autopsy Report of Angel Moreno at 3, 5) Any "corroborating" evidence thus came from the two experts who both relied on (and misconstrued) Dr. Brown's opinions contained in the autopsy report.

Most importantly, if Dr. Brown had been called to testify in this case, the State's case would have floundered. Dr. Brown was of the opinion in 2006 (if anyone had bothered to ask) that the organizing subdural hematoma was older than the two-week maximum suggested at trial.

(Brown Aff. ¶ 16 [Appx 2]) Dr. Brown has now determined that the organizing subdural hematoma reflects a trauma that occurred between eighteen and thirty-six days before Angel's death. (*Id*. ¶ 15) Dr. Brown's explanation of this older injury would have shown the jury that the injury occurred while Mr. Velez was in Memphis, Tennessee between September 10 and October 14, 2005. But because his opinions were relayed by Dr. Farley and Dr. DiMaio, and he was not called to testify, the jury was left with incomplete and highly misleading testimony.

Dr. Brown's testimonial evidence was presented against Mr. Velez without complying with the Confrontation Clause. This violated Mr. Velez's Sixth Amendment rights. Additionally, Mr. Velez was detrimentally harmed by the testimony presented in Dr. Brown's absence. Thus, Mr. Velez's conviction must be reversed based on this egregious, constitutional error.

Moreover, Mr. Velez's trial counsel failed entirely to object to the witnesses' relaying Dr. Brown's opinions, which is objectively unreasonable and constitutes ineffective assistance of counsel. These errors are compounded by the fact that if Dr. Brown had been asked to testify, he would have told the jury that the older subdural hematoma was older than the two weeks mentioned by Farley and DiMaio, and would have exposed the testifying doctor's false reliance on Dr. Brown's report. (Brown Aff. ¶¶ 16–17 [Appx 2])

B. Presentation of CT Scan Report Without Dr. Dones-Vasquez Testifying About His Report Violated the Confrontation Clause.

A second witness whose testimonial evidence was presented without confrontation was Dr. Dones-Vasquez, whose analysis from a CT scan of Angel was reported as hearsay through a different doctor, Dr. Maria Camacho. The analysis of the CT scan and related report came from circumstances where the witness would expect the report to be used in criminal proceedings.

Dr. Camacho ordered two CT scans after Angel's transport to Valley Baptist Medical Center in Harlingen. (10/31/05 VBMC Harlingen Physician Orders [Appx 54]; VBMC

Harlingen Radiology Department CT Scan Reports [Appx 54]) At the time of Angel's transport, the doctors and nurses were aware of the police and CPS investigation into Angel's injuries. (10/31/05 Emergency Room Nursing Record at 2 [Appx 55]) Additionally, Dr. Camacho herself suspected possible child abuse. (15 RR 17:24–18:4) When Dr. Vasquez conducted the CT scan after Angel's arrival in Harlingen, he was aware of the potential use of his report results in a future criminal prosecution—making his CT report and findings testimonial hearsay. *de la Paz*, 273 S.W.3d at 680.

Just as with the Certificate of Nonexistence of Record at issue in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the witness responsible for this crucial report must be subject to confrontation. Instead, Dr. Dones-Vasquez did not testify and the testimonial evidence was presented as hearsay through Dr. Camacho, who testified regarding Angel's CT scans. (15 RR 33–36) She first states that the CT was done by Dr. Dones-Vasquez and then states what "he said" when he interpreted the CT scan. (15 RR 33:13–14) Dr. Camacho stated:

> He said head CT scan shows that there is small frontal subdural hematoma which is chronic in nature with some shifting, but not cause of this clinical fixture. What he is seeing is he is looking subdural hematoma [sic] that may also—there was trauma before this event. That means chronic.

(15 RR 33:14–19) Dr. Camacho went on to say "that's not me reading. I'm going to try to tell you what doctor is saying [sic]." (15 RR 34:20–22) Notably, Dr. Camacho merely read Dr. Dones-Vasquez's "findings" regarding the CT scan and adopted them as her own—she was not utilizing her own independent judgment. *Johnson*, 2011 Tex. App. LEXIS 284 at *11–12; (15 RR 34:7–12, 35:12–13); *Martinez v. State*, 311 S.W.3d at 112. Dr. Dones-Vasquez was not called to testify, the record does not show he was unavailable, and Mr. Velez's attorneys did not have a prior opportunity to cross-examine him.

Mr. Velez was severely harmed by Dr. Camacho's testimony without having Dr. Dones-Vasquez on the stand. Dr. Dones-Vasquez's CT report showed that there was a "chronic" subdural hematoma. (15 RR 33:15; VBMC Harlingen Radiology Department, CT Scan of Head Without Contrast [Appx 54]) By stating that the subdural hematoma was "chronic," Dr. Dones-Vasquez, in medical terms, stated that the injury existed for at least three weeks, perhaps several months prior to death. (Vincent DiMaio, FORENSIC PATHOLOGY (2d ed. 2001) at 167) Under the four factors set forth above, the State's case was predicated on a brain injury occurring within two weeks of Angel's death, and the description of a "chronic" brain injury refutes that possibility. (Brown Aff. ¶ 13 [Appx 2]) But Dr. Dones-Vasquez was not present to testify to explain his CT findings. Had he testified, he could have been cross-examined on his description of the "chronic" subdural hematoma. Because Dr. Dones-Vasquez did not testify, Mr. Velez was harmed when he could not cross examine him regarding his findings. This testimony was presented in violation of the Confrontation Clause, harmed Mr. Velez, and requires the conviction to be reversed.

Villarreal did not object to Dr. Camacho's improper testimony. Indeed, he even elicited additional hearsay from Dr. Camacho regarding the opinions of Dr. Dones-Vasquez. (15 RR 34–35) An attorney who solicits improper testimony in violation of his own client's rights has certainly fallen below the level of objectively reasonable.

C. Rene Perez's Testimony Concerning Hearsay Relayed to Him By Another Nurse Violated the Confrontation Clause.

Rene Perez, the AirCare nurse, testified to the contents of a report relayed to him by an emergency room nurse, who was not called to testify. (15 RR 41:20–25, 53:1–4) At the time the emergency room nurse was making his reports, he knew that both the police and Child Protective Services were already investigating possible abuse. (10/31/05 Emergency Room Nursing Record

at 2 [Appx 55]) Further, the investigation was considered to be a criminal investigation as of October 31, 2005. (*See* 17 RR 51:9–10) The substance of the report volunteered by Mr. Perez did not relate to medical treatment, but to the identity of the person that someone else apparently believed was responsible for the child's injuries. (15 RR 53:1–3)

Rene Perez testified regarding a report he did not create about what happened to the child. (15 RR 53:1–3) Although Villarreal successfully objected to this (double hearsay) testimony on direct examination (15 RR 42:1–14), he elicited the same information during cross examination anyway, despite its obvious violation of Mr. Velez's rights. (15 RR 53:1–3) In response to Villarreal's question if Perez knew the cause or perpetrator of Angel's injuries, Perez stated, "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 [sic]." (15 RR 53:1–4) Villarreal did not object or interrupt when Perez began to volunteer this statement (which was at least double hearsay, passing on something some unidentified person had told the ER nurse). Nor did Villarreal move to strike the statement, which was harmful because it was the only statement where a person affirmatively stated the conclusion that a man, implying Mr. Velez, threw the child against the wall. Indeed, the gratuitous remark should have prompted a motion for mistrial. At a minimum, Villarreal should have confirmed that the witness had no personal knowledge, and that the ER nurse could not have had personal knowledge, of what had happened at the house. Preventing this evidence from reaching the jury, or clarifying its complete lack of reliability, would very likely have had an effect on the outcome of the trial. In this instance, the violation of Mr. Velez's rights under the confrontation Clause was the result of his own counsel's grossly ineffective assistance.

D. Each Of These Instances Of Unconstitutional Testimonial Hearsay Harmed Mr. Velez.

Because a Confrontation Clause violation is constitutional error, Mr. Velez's conviction must be reversed unless the Court can "determine beyond a reasonable doubt it did not contribute" to Mr. Velez's conviction. *Herrera*, 2011 Tex. App. LEXIS 7021 at *10. There are four factors that enter the harm analysis: (1) the importance of the statement to the State's case, (2) whether the statement was merely cumulative of other admissible evidence, (3) whether there is any corroborating evidence supporting the statement, and (4) the total strength of the State's case. *Id.*

1. Mr. Velez was harmed when he was denied his right to cross examine Dr. Brown.

Dr. Brown's statements regarding the head injuries were crucial to the State's case because the cause of death was identified as blunt force trauma to the head. (11/3/05 Autopsy Report of Angel Moreno at 2 [Appx 58]) Determining how and when that trauma occurred was essential to the determination of guilt or innocence, and the State relied on a two-week timeline for Angel's injuries in its closing. (18 RR 113:22–24) Further, the statement was not cumulative—both Dr. DiMaio and Dr. Farley instead *relied* on Dr. Brown's observations in arriving at their conclusions. (State's Ex. 65 at 1; *see* 17 RR 142:13-18; *see also* 11/3/05 Autopsy Report of Angel Moreno at 3, 5) Further, any "corroborating" evidence came from the two experts who both relied on (and misconstrued) Dr. Brown's opinions contained in the autopsy report.

Finally, if Dr. Brown had been called to testify in this case, the strength of the State's case would have floundered. Dr. Brown is of the opinion that Angel's brain injury is older than the two-week maximum suggested at trial. (Brown Aff. at ¶ 16 [Appx 2]) Dr. Brown instead

indicates that the organizing subdural hematoma occurred between eighteen and thirty-six days before Angel's death. (*Id*. at ¶ 15) Dr. Brown's explanation of this older injury would have shown the jury that the injury occurred while Mr. Velez was in Memphis, Tennessee between September 10 and October 14, 2005. But because his opinions were relayed by Dr. Farley and Dr. DiMaio, and he was not called to testify, the jury was left with incomplete testimony.

Dr. Brown was not called to testify in violation of Mr. Velez's Sixth Amendment rights. Additionally, Mr. Velez was detrimentally harmed by the testimony presented in Dr. Brown's absence. Thus, Mr. Velez's conviction must be reversed based on this egregious, constitutional error.

2. Mr. Velez was harmed by the admission of Dr. Camacho's testimony regarding the CT report.

Mr. Velez was severely harmed by Dr. Camacho's testimony without having Dr. Dones-Vasquez on the stand. Dr. Dones-Vasquez's CT report showed that there was a "chronic" subdural hematoma. (15 RR 33:15; VBMC Harlingen Radiology Department, CT Scan of Head Without Contrast [Appx 54]) By stating that the subdural hematoma was "chronic," Dr. Dones-Vasquez, in medical terms, stated that the injury existed for at least three weeks, perhaps several months prior to death. *See* Vincent DiMaio, FORENSIC PATHOLOGY (2d ed. 2001) at 167. Under the four factors set forth above, the brain injury occurring within two weeks of Angel's death was significant for the State's case, but the description of a "chronic" brain injury refutes that possibility. (Brown Aff. ¶ 13 [Appx 2]) But Dr. Dones-Vasquez was not present to testify to explain his CT findings. Had he testified, he could have been cross-examined on his description of the "chronic" subdural hematoma. Because Dr. Dones-Vasquez did not testify, Mr. Velez was harmed when he could not cross examine him regarding his findings.

3. Mr. Velez was harmed by the admission of Rene Perez's testimony regarding the nurse's report.

Mr. Velez was significantly harmed when the jury heard that the "patient was flung into a wall by the father." (15 RR 53:1–4) This statement was of paramount importance to the State's case. It was the only affirmative statement of that action and was not definitively corroborated by other evidence. Without that statement, the State's case was severely weakened because all other evidence was purely speculative. (*See, e.g.,* 17 RR 27:5–12, 127:19–24) Therefore, Mr. Velez was harmed by this violation of the Confrontation Clause because the nurse who allegedly made this statement could not be cross-examined regarding the source or accuracy of this statement. Therefore, Mr. Velez's conviction should be reversed on these grounds.

IV. THE STATE'S MISCONDUCT IN PRETRIAL AND CULPABILITY PHASE OF TRIAL.

"It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." TEX. CODE OF CRIM. PROC. art. 2.01. The United States Supreme Court has explained that a prosecuting attorney

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935); *see also Rougeau v. State*, 738 S.W.3d 651, 657 (Tex. Crim. App. 1987) (prosecuting attorney must be an impartial representative of justice, and "never let his zeal get the better of his judgment").

The State's contribution to the grossly unfair trial accorded Velez began with appointing a special prosecutor with a disqualifying conflict of interest, and continued through trial with *Brady* violations and the presentation of and reliance on false and misleading testimony.

A. Special Prosecutor Luis Saenz Should Have Been Disqualified From Representing The State.

It is undisputed that after Mr. Velez was charged with capital murder, his sister, Marisol Velez, and other family members immediately set upon the task of finding an attorney to represent him, and one of the attorneys the Velez family consulted was Luis Saenz, a licensed attorney in private practice. (7 SRR1 21) Saenz testified at the hearing on Defendant's Motion to Recuse Saenz, that he "remember[ed] talking to [a] family member" of Velez's and that he quoted the Velez family a fee for representing Manuel Velez. (7 SRR1 21–22) Other details of the communications between Saenz and the Velez family are provided by Marisol and Elmita Velez. (*See* 8/28/07 M. Velez Aff., Ex. 1 to 8/28/07 Hearing, 7 SRR1 61; 8/22/07 E. Velez Aff., 2 CR 202; *see also* M. Velez Aff. ¶¶ 20–22 [Appx 37]) Specifically, Marisol Velez told Saenz at a meeting in his office that Acela Moreno was a "very irresponsible mother," and she provided an alibi for Velez by confiding in Saenz that Velez had been out of town working, returning to town only two or three weeks before Angel's death. (Ex. 1 to 8/28/07 Hearing, 7 SRR1 61) Saenz told Ms. Velez he would check on the status of the case and they agreed to follow-up in a few days. (M. Velez Aff. ¶ 21) Eventually, the family learned that Saenz had been appointed special prosecutor against Velez.

After soliciting this information from Ms. Velez, Saenz then used that same information to prosecute Manuel Velez. Saenz not only exculpated Acela Moreno of responsibility for Angel's death, but he also sought to disprove Velez's alibi defense by predicating the State's case against Manuel on the theory that the injuries to Angel could not have been more than two weeks old. Accordingly, the timing of Manuel's return to Brownsville was critical in the State's case against him and it was confidential information gathered by Saenz in his meeting with Ms. Velez. As demonstrated elsewhere in this application, such a theory is contrary to the

medical evidence. Saenz was nevertheless forced to shape his theory of the case to conform with the information regarding Manuel's return to Brownsville—information provided to him by Manuel's sister in the context of meeting concerning employing Saenz as Manuel's attorney.

Because Saenz received confidential information from Ms. Velez during their meeting, he should have been disqualified from representing the State. *See In re Gerry*, 173 S.W.3d 901, 903 (Tex. App.—Tyler 2005, no pet.) (holding that an attorney's receipt of confidential information during a meeting concerning employment by potential client disqualifies attorney from representing a party adverse to potential client); *see also State v. Laughlin*, 232 Kan. 110, 112 (Kan. 1982) ("prosecuting attorney cannot be permitted to participate in a criminal case if by reason of his professional relations with the accused he has acquired any knowledge of facts upon which the prosecution is predicated, or which are closely related thereto"); *see also* American Bar Association Standards Relating to the Prosecution Function, Standard 3-1.3(a) ("a prosecutor should avoid a conflict of interest with respect to his or her official duties").

Saenz's disqualifying conflict does not require that he agreed to represent Velez or that the information he received was "privileged" under the evidence rules. "Confidential information" encompasses "unprivileged client information," which includes "all information relating to a client or furnished by the client, other than privileged information, acquired by the attorney during the course of or by reason of the representation of the client." *In re Gerry*, 173 S.W.3d at 903. And under Texas law, the term "client" includes one who consults an attorney with a view to obtaining professional legal services from that attorney. *See* TEX. R. EVID. 503(a)(1).

Saenz's conduct is so troubling that three independent experts on ethical rules have concluded that he "should have been disqualified by a disabling conflict of interest from ever assuming that role [of Special Prosecutor]." (Brief of Legal Ethics Experts as Amici Curiae at

15 [Appx 113]) In their view, Seanz's agreement to prosecute Velez after speaking with Ms. Velez, in addition to the use of false testimony described below, was "egregious unethical conduct" and caused Velez's conviction to "constitute a serious miscarriage of justice." (*Id.* at iv-v)

Saenz's unethical and improper conduct resulted in prejudicial error. *See Ex parte Morgan*, 616 S.W.2d 625, 626 (Tex. Crim. App. 1981) (prosecutor's receipt of confidential information resulted in reversing judgment, irrespective of prejudice); *Ex parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979) (receipt of confidential information is clearly prejudicial to the defendant).

B. The State Presented Testimony By Acela Moreno It Knew To Be False And Did Not Take Any Measures To Correct The False Testimony.

A conviction obtained through the use of false evidence, known to be such by representatives of the State, violates the Fourteenth Amendment of the United States Constitution. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); s*ee also Ex parte Castellano*, 863 S.W.2d 476, 479-80 (Tex. Crim. App. 1993); U.S. Const. amend XIV. In *Napue*, the Supreme Court articulated the well-settled rule that a defendant's constitutional right to due process is violated when: (1) a witness gives false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false. Further, it is not necessary that the false testimony be perjurious—due process is violated where the testimony is highly misleading. *See Blakenship v. Estelle*, 545 F.2d 510 (5th Cir. 1977) (granting relief when the testimony was not technically perjurious but highly misleading). Prosecutorial misconduct occurs when the State knew **or should have known** the testimony was false or misleading. *See Ex parte Adams*, 768 S.W.2d 281, 291 (the question is whether the State "knew, or should have known," that the testimony was false or highly misleading); *see also*

Duggan v. State, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989) (stating that the proper test is whether prosecutor "should have recognized the misleading nature of the evidence"). Further, the State has an affirmative obligation to correct false testimony when it is aware of it. *Estrada v. State*, 313 S.W.3d 274, 288 (the prosecutor carries the "duty to correct 'false' testimony whenever it comes to the State's attention") (quoting *Napue*, 360 U.S. at 269).

1. Acela Moreno pleaded guilty to striking Angel.

When questioning Moreno at trial, Saenz asked:

> Q: And what is your understanding as to why you're going to be serving 10 years?
>
> A: Because I am guilty of not having reported to the police that Manuel was hurting my child.

(16 RR 95) This testimony is not true.

On May 18, 2007, Moreno pled guilty to Count III of the indictment under 06-CR-83-D. Count III stated,

> Acela Moreno… on or about the 31st day of October, 2005 . . . did then and there ***intentionally or knowingly cause serious bodily injury*** to Angel Moreno, a child 14 years of age or younger, ***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***.

(Indictment, 1 SCR3 6-8) (emphasis added). In Moreno's plea papers, someone wrote, "State Abandons 'serious bodily injury'—Defendant will plea to 'bodily injury.'" (SCR4 at 3) Explaining the plea's factual basis, Saenz stated, "As the investigation developed and as we continue to work on the case, the State does not have any evidence to show that the defendant before this court actually participated in the death of the child. We do have evidence that she participated in acts that led to injuries to the baby, but not the actual death of the child." (6 SRR1 5)

In the written guilty plea to which she swore that day, Moreno affirmed that "that each and every allegation in [the indictment] with the offense of injury to a child . . . is true and correct . . ." (SCR4 at 4) Saenz (and defense counsel) also signed this document, under the words "agreed and approved." *Id.* Of course, this admission is consistent with Texas law: by entering a guilty plea, a defendant admits all of the facts charged in the indictment. *Prochaska v. State*, 587 S.W.2d 726, 728 (Tex. Crim. App. 1979).

Moreover, Moreno reaffirmed in open court that the allegations in Count III were, in fact, true:

> Judge: The state is alleging in Count III that on or about the 31st of October of the year 2005 here in Cameron County, you did commit the offense of injury to a child causing bodily injury here in Cameron County. Is that allegation true and correct?
>
> Moreno: Yes.

(6 SRR1 6) The judge later confirmed that Moreno was pleading guilty because she was, in fact, guilty as charged:

> Judge: And are you pleading guilty because you are guilty?
>
> Moreno: Yes.
>
> Judge: You are guilty?
>
> Moreno: Yes.

(*Id*. at 8) Defense counsel said that Moreno had been debriefed twice by the State and the State confirmed that her plea was "consistent" with the debriefings. (*Id*. at 11–12) The court also asked Moreno if her attorney had showed her the evidence against her, whether she understood everything that had been said that day, and whether she needed anything explained to her further. (*Id*. at 11) "Based on the evidence submitted, the court [found Moreno] guilty." (*Id*. at 12)

2. Moreno gave false testimony at trial.

When Moreno answered Saenz's questions at Velez's trial, however, she told a different story. Whereas she had pleaded guilty to intentionally or knowingly causing bodily injury to her child by striking him on his head or striking his head against an unknown surface on October 31, 2005, the State elicited testimony from Moreno at trial that she was serving a ten-year sentence because she was "guilty of not having reported to the police that Manuel was hurting my child." (16 RR 96) The State did not correct this false testimony.

Moreover, Moreno's trial testimony described the entirety of that day without ever admitting having struck the child's head. Moreno described having breakfast with her children, cleaning the house, having lunch, going to a bedroom to nap, and arising to find Angel Moreno injured and taking his last breath. (16 RR 84–92) Leading Moreno through the events of that day, Saenz variously asked "what happened," what was Moreno "doing," and what Moreno "did." (*Id.*) Moreno alleged that the child became injured only after he was alone with Velez in the home while she was in a bedroom with another child for twenty minutes. (16 RR 89–92) At no point in describing the events of October 31, 2005, did Moreno admit that she hit Angel Moreno on the head or hit his head against a surface. And at no point, did Saenz correct the false impression Moreno left.

During Saenz's culpability-phase summation, he bolstered Moreno's lies, rather than correcting them, as was his constitutional duty. (*See* 18 RR 148–149 ("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."); (18 RR 112) ("His mother did not call the police. His mother only told the defendant don't do it. Why are you doing it. And she didn't think that anything else would happen. She let him down. . . . She made bad choices and because of those choices that she made, she is doing her time. She accepted responsibility for her inaction.")). *See Jenkins v. Artuz*, 294 F.3d 284,

294 (2d Cir. 2002) (finding that prosecutor's summation "falsely suggesting the absence of a deal between [witness] and the prosecution" only "sharpened the prejudice" flowing from the untruthful testimony itself).

3. The State's misconduct contributed to Mr. Velez's conviction and punishment.

The State allowed Moreno to provide false and highly misleading testimony and took no actions to correct her error. The State had an affirmative obligation, which it ignored to correct Moreno's false testimony that directly contradicted her guilty plea. *Estrada*, 313 S.W.3d at 288 (noting State's obligation to correct false testimony). Under *Napue*, the State's conduct violates Velez's right to due process. *Napue*, 360 U.S. at 269–70; *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009).

Given the central importance of Moreno's testimony to the State's case against Manuel, and the lack of other evidence, the only logical conclusion is that Moreno's false testimony contributed to his conviction or punishment. *Napue*, 360 U.S. at 771. Suspicion undoubtedly already clouded Moreno's testimony because the State had dropped charges of capital murder against her and allowed her to escape with a sentence of ten years in exchange for her testimony against Velez. (1 CR 107–08, 16 RR 35, 95–96) Had the jury known that, contrary to her testimony, Moreno had injured Angel Moreno by striking his head or striking it against something on the same day as his fatal injuries—acts medical experts found consistent with the injuries Angel suffered (17 RR 42–43, 138)—it would likely have suspected Moreno as the culprit and doubted Velez's guilt. Had the jury also known that Moreno lied when she said she was imprisoned merely for failing to protect her child, it would have had every reason to discredit her testimony. Giving the jury the truth concerning Moreno's guilty plea most likely would have impacted the verdict. (*See* Juror Declarations [Appx 43–47])

C. The State Created Multiple Versions of Mr. Velez's *Voluntary Statement of Accused* and Improperly Accused Mr. Velez of Fraudulently Creating One of Them.

The evidence overwhelmingly points to the Sheriff's office as the creator of both the three-page statement (State's Ex. 64) and the two-page statement (Defense Ex. 2). To begin with, Sergeant Gosser, while disavowing any knowledge of the two-page statement, testified that the two-page statement appeared to have come from the Sheriff's department. (8 RR 156-8) Moreover, the types of difference and the amount of them indicate that the two-page statement could not have been derived from the three-page statement, the theory proffered by the State at trial. (*See* Report of Document Examiner Linda James [Appx 12]) For example, a comparison of the two statements reveals the following:

- The initials "ML" on the two statements have the same handwriting characteristics, but are not replicas. If the two-page statement was created from the three-page statement, these initials would be replicas.
- The signature of "Manuel Velez" on the two statements have the same handwriting characteristics, but are not replicas. If the two-page statement was created from the three-page statement, these signatures would be replicas.
- The witness signature of Carlos Garza on the two statements have the same handwriting characteristics, but are not replicas. Indeed, on two-page statement is signed "Carlos Garza (Lt)," but the three-page statement is signed "Lt Garza." If the two-page statement was created from the three-page statement, these signatures would be replicas.

- The witness signature of Rene Gosser on the two statements have the same handwriting characteristics, but are not replicas. If the two-page statement was created from the three-page statement, these signatures would be replicas.
- The two witness signatures of Mr. Garza and Mr. Gosser on the two statements are in a different order. If the two-page statement was created from the three-page statement, these signatures would be replicas and would appear in the same order.

(Report of Linda James [Appx 12]) The only logical conclusion is that the two-page statement was not a fabrication made by the defense from the three-page statement. Indeed, the only logical explanation is that the Sheriff's department produced the two-page statement, and then added an additional paragraph.

Despite no evidence of a forgery, and certainly no ruling from the trial court, the State pronounced to the jury that the two-page Voluntary Statement of Accused had been ruled fraudulent: "This is exhibit that the court at a prior hearing found to be fraudulent." (17 RR 104) Even if there had been any record support for such a ruling, it was improper to tell the jury about the court's ruling on the admissibility of a statement from a prior hearing: "Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner." TEX. CODE OF CRIM. PROC. art. 38.22 § 6. The State blatantly violated Velez's rights by falsely telling the jury how the Court had supposedly ruled at the suppression hearing. (Indeed, had the court made such a ruling, it would not have admitted the statement as evidence.) Moreover, the purpose of the State's assertion can only be to cast Velez's entire defense as "fraudulent."

Compounding this egregious misconduct, the State emphasized its groundless conclusion that the statement was a forgery. In its closing argument, and without any factual support, the

State again accused the defense of submitting a fraudulent document into evidence. (18 RR 100–02) Mr. Eckert, on behalf of the State, told the jury:

> There's a second statement, Ladies and Gentlemen, that the defense entered. I'd like you to take notice of certain things, which you'll notice is, number one, it's a fraud. It's a fraudulent document.
>
> * * *
>
> Ladies and Gentlemen, this is a document that somebody with a copy machine can come back and just a little but [sic] of effort can go back and try to forge a document.

(*Id.*; *see also id.* at 138–39)

Nothing in the record supports Mr. Eckert's accusation that the document is forged or fraudulent. And the evidence actually establishes the contrary: that the State's assertion is demonstrably false. Nevertheless, the State repeatedly made these unsupported accusations. The State's actions were improper and designed to solely to distract and inflame the jury in violation of Velez's rights under the United States Constitution.

D. The State Withheld Material Exculpatory and Impeachment Evidence in Violation of *Brady v. Maryland*.

The State violated Mr. Velez's constitutional right to due process by withholding impeachment evidence regarding three of the prosecution's material witnesses. First, the State withheld TDFPS records describing Moreno's abuse of her children, which was material to the defense theory that Moreno, not Velez, had abused Angel and caused his fatal injuries. In addition, the State failed to disclose that two of its witnesses, David Scott Bradshaw and Brian Martin, received disproportionately favorable plea agreements in exchange for their testimony against Mr. Velez, and that Sergeant Rene Gosser had been terminated from the Sheriff's Department for misconduct at the time of trial. The State's suppression of this evidence

precluded Mr. Velez from effectively cross-examining and impeaching these witnesses, and thus deprived Mr. Velez of his constitutional right to due process. Accordingly, the State's failure to disclose this evidence materially prejudiced Mr. Velez and his conviction and death sentence must be reversed.

1. The State is required to disclose material exculpatory or impeaching evidence.

It is well-settled that a defendant's due process rights are violated if the prosecution suppresses or withholds evidence material to the defendant's guilt or punishment, whether the suppression was willful or inadvertent. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); U.S. CONST. amend V, XIV cl. 1. The prosecution has a duty to disclose any exculpatory or impeachment evidence favorable to the accused even if the defendant failed to specifically request the information. *See United States v. Agurs*, 427 U.S. 97, 107 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). This obligation extends to information known only to the police, as well as information known to other investigative or governmental entities working on behalf of the prosecution. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Green*, 527 U.S. 263, 275 n.12 (1999). Prosecutors therefore have a duty to learn of and disclose any *Brady* evidence known to others acting on the State's behalf in a particular case. *See Harm*, 183 S.W.3d at 406; *Brady*, 373 U.S. at 87.

Accordingly, a petitioner is entitled to habeas relief under *Brady* if (1) the prosecution suppressed or withheld evidence; (2) the evidence would have been favorable to the accused; and (3) the evidence would have been material to his defense. *See Brady*, 373 U.S. at 87; *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999). Favorable evidence is material for purposes of *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different. *See Bagley*, 473 U.S. at 682; *Franks v. State*, 90 S.W.3d 771, 796 (Tex. App.—Fort Worth 2002, no pet.).

In this case, Mr. Velez's conviction and death sentence must be reversed because the State suppressed impeachment evidence that undermines the testimony and credibility of three prosecution witnesses and that improperly contributed to the guilty verdict and death sentence.

2. The State violated *Brady* by improperly withholding exculpatory evidence concerning Moreno's abuse of her children.

Reports from two counseling and foster care organizations with the Texas Department of Family & Protective Services ("TDFPS") state that Moreno's children were abused by Moreno and that the children told their counselors that Moreno harmed their half-brother, Angel. These two exculpatory documents, described in more detail below, were in the possession of the State but the State failed to disclose them to defense counsel.

Mr. Velez's original counsel, Gary Ortega, sought records from the Texas Department of Family and Protective Services ("TDFPS"), and eventually received some records from the agency. (1 CR 21-24; *see* 7/10/07 Letter and Accompanying Material from TDFPS to Gary Ortega [Appx 72–73]) Those records included a recommendation by a social worker that Moreno's children Emily and Alexis not visit their mother in jail, but provided no reason or further details. (12/06 TDFPS Monthly Report [Appx 73]) Villarreal, who had received the TDFPS documents in Ortega's files, requested more documents and information from TDFPS and the Bair Foundation in September 2008, shortly before trial. (9/3/08 Defense Subpoenas [Appx 74])

When the agencies objected to Villarreal's subpoenas, Judge Limas was given the TDFPS and Bair Foundation documents for *in camera* review, but never expressly ruled on the objections, even after a reminder by defense counsel at trial (*see* 16 RR 40-41), and the

documents were never turned over to defense counsel. But the same documents had been provided to the District Attorney's office (*see* Habeas Counsel's Certification of files received from District Attorney's Office [Appx 83]; 9/22/08 Letter from Steven Eckert to Petra Cruz [Appx 98]), and the State had a separate obligation to provide the defense with the necessary documents under *Brady*. As a result of the State's failure to disclose the documents and the court's refusal to issue the subpoenas, defense counsel was never aware of and had no opportunity to use these two critical, exculpatory documents.

The first report is an Individual Service Plan Review for Moreno's son Alexis (date of birth February 24, 2003). (*See* 11/30/05 Bair Foundation Individual Service Plan Review for Alexis Moreno [Appx 89]) The report is dated November 30, 2005 and is the first extensive report after Alexis and his sister Emily (date of birth September 6, 2001) had been placed into foster care on November 1, 2005. The review and report were conducted by Beverly Kaupp, M.S., the case manager, and Mari Rodriguez, the caseworker, and listed the following as the "reason for placement" into foster care:

> - "Alexis was being **physically abused by her [sic] biological mother**. He was placed into TDFPS custody with his sister, Emily Moreno. **She was also a target of the mother's abuse and neglect**."

(*Id*. at 1)

Moreno's children were in foster care and counseling throughout 2006 and into 2007. Rosalee Farber, a Licensed Professional Counselor with South Texas Family Counseling, issued a report in February 2007 about her counseling over the previous nine months with both Emily and Alexis. (*See* 2/7/07 South Texas Family Counseling, Report on Emily and Alexis Moreno [Appx 92]) In the report, Ms. Farber recommended that the children no longer be required to visit their mother at the jail. Ms. Farber discussed the "emotional damage" caused by the court-

ordered visits. In doing so, Ms. Farber makes clear that the children fear their mother and that the children believe that their mother killed their brother:

> - Emily "constantly thinks about her mother in jail and **what her mother did to her little brother**. **There is never any closure for her – the incident is constantly refreshed every time she sees her mother in jail**."
>
> - "With their mother, **[Emily and Alexis] constantly remember what she did to their brother and they are afraid of her**."

(*Id*. at 2 (emphasis added)); *see also* 1/16/07 TDFPS-CPS Monthly Statement on the Moreno Children [Appx 72] ("Alexis goes home very aggressive after his visits at the jail with his mother."); 12/06 TDFPS-CPS Monthly Statement on the Moreno Children (indicating that Emily's and Alexis' therapist does not recommend that they continue with visits at the jail to see their mother))

Even though the reports are from two different professionals from two different agencies and span fifteen months, the information contained is consistent: **according to her own children, it was Moreno who harmed the victim and who physically abused the children.** Because both the State and the Court failed to release this evidence to the defense, trial counsel never discovered the reports, never presented them to the jury, and never confronted Moreno with the reports. This evidence condemning Moreno and indicating that she harmed the victim and caused his death was evidence of Moreno's abuse of her children that the jury never saw. The State's withholding of this material evidence, which could have inculpated or at least impeached Moreno, the State's star witness, constituted a serious breach of the State's *Brady* obligations.

3. The State violated *Brady* by withholding evidence that David Bradshaw and Brian Martin received lenient plea agreements in exchange for their testimony against Velez, as well as other impeachment evidence.

The State suppressed evidence that two of its material witnesses, David Bradshaw and Brian Martin, received disproportionately favorable plea agreements in exchange for their testimony against Velez. The State also did not disclose evidence concerning the criminal records of these witnesses. The State called Bradshaw and Martin to testify that Velez spoke and read English to rebut the defense's theory that Velez did not understand the written statement created by Sergeant Gosser. (Ex. 64) Bradshaw and Martin testified that they were incarcerated with Mr. Velez while he was awaiting trial and that Velez frequently spoke and read English. (18 RR 46:2–48:13, 52:23–53:23, 54:9–23; 55:8–57:4) Unbeknownst to defense counsel, however, Bradshaw and Martin received extremely favorable plea agreements in exchange for their testimony against Velez. (*See* 2/16/07 Bradshaw Plea Agreement for Theft [Appx 126]; 2/16/07 Bradshaw Plea Agreement for Failure to Register as a Sex Offender [Appx 126]; 6/2/08 Martin Plea Agreement for Assault [Appx 125])

The State's failure to disclose these plea agreements and information concerning their crimes violated Mr. Velez's right to due process under *Brady*. *See Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (holding that *Brady* is violated when the prosecution fails to disclose that a witness has been promised leniency in exchange for his or her testimony); *Burkhalter v. State*, 493 S.W.2d 214, 215–18 (Tex. Crim. App. 1973) (prosecution violated *Brady* by failing to disclose an undocumented understanding with witness's lawyer that charges would not be pursued if testimony was made). The plea agreements and the details of their criminal histories call into question the credibility and motivation of Bradshaw and Martin in providing adverse testimony, and thus should have been disclosed to defense counsel under *Brady*.

The suppression of the this information requires a reversal of Velez's conviction and death sentence. *See Granger v. State*, 653 S.W.2d 868, 873–77 (Tex. App.—Corpus Christi 1983), *aff'd*, 683 S.W.2d 387 (Tex. Crim. App. 1984) (reversing life sentence where prosecutor, judge, and witness's counsel failed to disclose the existence of a deal that changed the witness's sentence from death to life). The State's failure to disclose these plea agreements and criminal background information materially altered the outcome of the trial. One of the critical issues at trial was whether Velez could read English and was capable of knowingly signing the statement presented to him by Sergeant Gosser. (17 RR 60:12–17) By introducing the testimony of Bradshaw and Martin, the State was able to effectively rebut defense counsel's claim that Velez did not speak or comprehend English and could not have knowingly signed the statement. (18 RR 97:7–102:12) Because the State suppressed evidence that Bradshaw and Martin received extremely favorable plea agreements and the details of their criminal convictions in exchange for their testimony against Velez, defense counsel was unable to impeach the credibility of these witnesses. The prosecution's suppression of this critical evidence warrants reversal of Velez's conviction and death sentence. *See Tassin v. Cain*, 517 F.3d 770, 779 (5th Cir. 2008) (affirming grant of habeas corpus where the prosecution failed to disclose the fact that a key witness received a sentencing deal in exchange for his testimony against the defendant).

Indeed, had the state properly disclosed this impeachment evidence, there is a reasonable probability the outcome of the trial would have been different. *See Bagley*, 473 U.S. at 682. The lopsided nature of the plea agreements demonstrate that Martin and Bradshaw had a clear motive to testify against Velez for their own benefit. The two witnesses received shockingly lenient sentences in exchange for their testimony, providing a clear motivation to give false testimony and calling into question the credibility of the witnesses. For example, Martin only received one year community supervision and no jail time for assault, which was originally charged as

aggravated assault. (6/2/08 Martin Plea Agreement for Assault [Appx 125]; 6/17/08 Martin Judgment of Conviction at 3 [Appx 125]) In exchange for Martin's testimony, the State decreased Martin's charge from aggravated assault to assault, resulting in no jail time. (6/2/08 Martin Plea Agreement for Assault [Appx 125]) In the plea agreement hearing, Martin's counsel expressed to the court that Martin "is still to cooperate and remain available to cooperate and testify truthfully in a case in which he has been assisting the State of Texas with." (6/2/08 Hrg. Tr. for Martin's Plea of Guilty at 5:15–17 [Appx 125])

The State did not disclose the violent nature of the assault, nor did it disclose Martin's gruesome criminal history. The assault for which Martin received no jail time involved injury to another person by first choking him and subsequently beating him with a metal pipe. (Brian Andrew Martin Indictment [Appx 125]) Even more disturbing is that Martin previously served no jail time for two counts of injury to a child and one count of aggravated assault. (9/27/05 Martin Plea Agreement for Injury to a Child and Assault [Appx 125])

Specifically, Martin and his girlfriend had fed her infant son raw meet with the hope that the child would become ill and die. (7/16/04 Notes of Rebecca Cruz at 3 [Appx 125]) Martin's 2008 plea agreement was so lenient that the presiding judge initially rejected the terms of the agreement noting that "Mr. Martin has gotten himself into lots of trouble and continues to get himself into trouble, even after the Court was very generous with him quite a few years ago." (6/2/08 Hrg. Tr. for Martin's Plea of Guilty at 6 [Appx 125]) It was only after an off-the-record discussion with the prosecutor that the Court begrudgingly agreed to sentence Martin to probation, rather than additional jail time. (*Id.*) This evidence, including the plea transcript hearing, constitutes powerful impeachment evidence illustrating the extent of the sweetheart deal negotiated by the State in exchange for Martin's testimony. *See Giglio*, 405 U.S. at 154–55.

Similarly, Bradshaw received a reduced sentence of 180 days in prison in exchange for a plea of guilty to aggravated theft and failure to register as a sex offender. (2/16/07 Bradshaw Plea Agreement for Theft [Appx 126]; 2/16/07 Bradshaw Plea Agreement for Failure to Register as a Sex Offender [Appx 126]) The State suppressed this evidence, as well as evidence of Bradshaw's extensive criminal record, which included a prior conviction for the brutal rape of a young woman. (8/28/06 Brownsville Police Dept. Offense Report at 2 [Appx 126]) Had defense counsel known of the existence and lopsided terms of the plea agreements, he could have properly impeached both Martin and Bradshaw and discredited the State's claim that Velez spoke English and was "a fraud" for suggesting otherwise. The prosecution's failure to disclose this crucial impeachment evidence thus denied Velez due process and his sentence and conviction must be reversed. *See Giglio*, 405 U.S. at 154–55; *Bagley*, 473 U.S. at 683.

The extensive impeachment evidence on Martin and Bradshaw withheld is so heinous as to call into question their general character for truthfulness and would have been considered powerful evidence by the jury in choosing to rely on their testimony. In fact, the materiality of this impeachment evidence is illustrated by the fact that the underlying crimes committed by Bradshaw and Martin are considered crimes of moral turpitude. *See Matter of G.M.P.*, 909 S.W.2d 198, 207 (Tex. App.—Houston [14th Dist.] 1995, no writ) (defining crime of moral turpitude).

4. The State violated *Brady* by suppressing impeachment evidence that Sergeant Rene Gosser had previously been disciplined, and indeed terminated, for violating department policy and procedure.

The State failed to disclose that its lead investigator and material witness, Sergeant Rene Gosser, had been terminated before trial for violating the Sheriff Department's policy and procedure. Indeed, the State failed to disclose a pattern of misconduct by Sergeant Gosser that resulted in his employment being terminated from the Sheriff's Department on more than one

occasion. As the case agent and the State's only proffered witness regarding the contents of Velez's alleged statement, Sergeant Gosser was a critical witness at trial for the State. (17 RR 54) Gosser's testimony was, therefore, instrumental in establishing whether Velez's statement was made voluntarily and knowingly—a critical and highly disputed point at trial, especially considering the dispute as to the authenticity of the two page version of the statement.

Notwithstanding the importance of Gosser's testimony and credibility at trial, the State failed to disclose to defense counsel that Sergeant Gosser had, at the time he testified, been discharged from the Sheriff's Office for misconduct on two separate occasions. (11/5/06 Cameron County Sheriff's Dep't Violation [Appx 127]; 5/21/03 Tex. Comm'n on Law Enforcement, Report of Separation of License Holder [Appx 127]; 4/18/06 Tex. Comm'n on Law Enforcement, Report on Separation of License [Appx 127]; 4/11/06 Cameron County Sheriff's Dep't Notice of Separation [Appx 127]) Evidence of a police officer's disciplinary history, including misconduct and violation of department policy and procedure, is considered impeachment evidence for purposes of *Brady*. *See, e.g.*, *Ealoms v. State*, 983 S.W.2d 853, 857–58 (Tex. App.—Waco 1998, pet. ref'd) (information in police officer's personnel file is subject to disclosure under the *Brady* doctrine because it constitutes impeachment evidence); *Rocha v. Thaler*, 619 F.3d 381, 396–97 (5th Cir. 2010) (evidence that police officer had been investigated for suspected illegal activities constitutes impeachment evidence under *Brady*). The State possessed Sergeant Gosser's personnel file containing critical impeachment evidence, and thus had a duty to disclose the evidence under *Brady*. *See Harm*, 183 S.W.3d at 406; *Brady*, 373 U.S. at 87. Accordingly, the State violated by Velez's due process rights by failing to disclose Sergeant Gosser's disciplinary history and subsequent termination prior to trial.

The State's failure to disclose this evidence constitutes reversible error. The evidence strongly calls into question the credibility of Sergeant Gosser's testimony. Indeed, the

termination record demonstrates that Sergeant Gosser's employment with the Sheriff's Department was terminated "while under investigation for a criminal violation or in lieu of disciplinary action including suspension, demotion, or termination." (*See* 4/18/06 Tex. Comm'n on Law Enforcement F-5 Report of Separation of Licensee [Appx 127]) Additionally, the State failed to disclose that Sergeant Gosser previously had been terminated in May 2003 from the Cameron County Sheriff's Department for earlier misconduct. (*See* 5/21/03 Tex. Comm'n on Law Enforcement Report of Separation of License Holder [Appx 127]) Sergeant Gosser's testimony was critical to the State's case, including establishing that Velez knowingly and voluntarily signed the statement(s) prepared by Gosser. Evidence that Sergeant Gosser had numerous disciplinary violations and a history of being terminated would have called into question his credibility and thus materially altered the outcome of the trial.

Nor can Gosser's testimony be considered merely cumulative of other evidence in the record. Sergeant Gosser was the only prosecution witness capable of testifying to whether the written statement properly reflected Velez's own statements and whether Velez understood the words contained in the statement. Given the dispute concerning the multiple versions of the statement, Gosser's testimony was critical. Accordingly, there is a reasonable probability that, had defense counsel been able to effectively impeach Sergeant Gosser through his prior disciplinary record, the outcome of the trial and sentencing phase would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

5. The cumulative effect of the Brady violations requires reversal of Mr. Velez's conviction and death sentence.

While each of these *Brady* violations independently warrants reversal of Velez's conviction and sentence, their cumulative effect was to remove any semblance of a fair trial consistent with elementary due process. *See Ex Parte Bradley*, 781 S.W.2d 886, 893–94 (Tex.

Crim. App. 1989) (noting that courts must consider the petitioner's *Brady* claim in light of the record as a whole, including other due process violations). The Supreme Court has repeatedly observed that the materiality of a particular *Brady* violation must be evaluated in the context of the surrounding record. *See Bagley*, 473 U.S. at 711 (holding that the prosecution's failure to disclose evidence must be considered in light of the record as a whole and "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt"). This standard does not require the suppressed evidence to exonerate the accused; it is sufficient if the evidence undermines confidence in the jury's verdict. *Id*.

Here, Velez's conviction and death sentence must be reversed because the cumulative effect of the suppressed evidence raises a substantial doubt regarding Velez's guilt and punishment. *See Bagley*, 473 U.S. at 683. The evidence of Acela's abuse of her other children withheld by the State would have helped defense counsel substantiate the theory that Acela inflicted Angel's injuries, and could have provided powerful impeachment of her testimony at trial. Additionally, the unimpeached testimony of Gosser, Bradshaw, and Martin erroneously led the jury to believe that Velez admitted culpability for Angel's injuries, and their testimony was used to discredit Velez to show a general character for untruthfulness and cowardice. (18 RR 97–103) During closing arguments, the State repeatedly invoked Sergeant Gosser's testimony and the written statement to assert that Velez "wanted to kill that baby" and "knew exactly what he was doing." (18 RR 111:5–21) The State repeatedly asserted that Velez was a "fraud" who "puts earphones on and acts like he doesn't understand." (18 RR 102:15–16) The State based its argument that Velez was a fraud for asserting he did not speak English on the testimony from "other people that spent some time in the county jail with him." (18 RR 97:25–98:1) Thus, the

State emphasized and relied heavily on the unimpeached testimony of these three witnesses to convict Velez without any direct evidence of his guilt.

E. The State Violated Mr. Velez's Constitutional Rights By Referencing His Decision Not To Testify.

The only proper subjects for the prosecution's closing argument are: (1) a summation of the evidence; (2) a reasonable deduction from the evidence; (3) a response to an opponent's argument; or (4) a plea for law enforcement. *Gomez v. State*, 704 S.W.2d 770, 771 (Tex. Crim. App. 1985); *see also Harris v. Crockrell*, 313 F.3d 238, 245 (5th Cir. 2002) (noting habeas relief is appropriate when the prosecutor's improper remarks are so prejudicial that they render the trial fundamentally unfair).

Here, one of the prosecutors, Gabriella Garcia, impermissibly referenced Velez's right to remain silent when she pointedly referred to something "the defendant didn't want to talk about in his statement." (18 RR 107) Similarly, the lead prosecutor, Saenz, expressed his disgust with Velez's decision not to testify. Saenz stated, "You know, we have talked about consistently and repeatedly about the defendant's right to this and the defendant's right to that. I'm sick and tired of that. How about talking about baby Angel's right. How about talking about baby Angel's right to live, to be happy, to grow up." (18 RR 141) Similarly, Saenz again referenced Velez's silence in his summation during the punishment phase. Saenz told the jury:

> And just like he had his opportunities to comply with probation and parole, he said the hell with it. I don't care. I'm Manuel Velez. Big guy that he is, huh? **Big guy that he is and yet he . . . brings his child to speak on his behalf. The epitome of a coward.**
>
> * * *
>
> **To bring a 10 year old to speak for him**.

(20 RR 155–56) (emphasis added).

The "Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids [ ] comment by the prosecution on the accused's silence . . . ." *Gongora v. Quarterman,* 2008 U.S. App. LEXIS 22164 (5th Cir. 2008) (citing *Griffin v. California*, 380 U.S. 609 (1965) (emphasis omitted); *see also Newtown v. Quarterman,* 272 Fed. Appx 324, 329 (5th Cir. 2008) ("Comments by a prosecutor on a defendant's exercising his Fifth Amendment right not to testify are, of course, constitutionally impermissible."). Here, the State's multiple comments on Velez's exercise of his constitutional right cannot be considered harmless "where an inference of guilt from silence is stressed to the jury as a basis for conviction." *Anderson v. Nelson,* 390 U.S. 523, 524 (1968). The State's statements regarding Velez's exercise of his constitutional right is laden with the inference of guilt. The State, when discussing Velez's statement, implied to the jury that Velez "refused" to tell them what happened to Angel, and therefore, Velez must be guilty of capital murder. Such an inference by the State is constitutionally improper and caused a "substantial and injurious effect of influence in determining the jury's verdict." *Id*. (citing *Brecht v. Abrahamson,* 507 U.S. 619 (1993)).

V. THE TRIAL JUDGE'S CORRUPTION AND JUDICIAL ERRORS DENIED MR. VELEZ A FAIR TRIAL.

A. The Court Should Grant A New Trial Because The Corrupt And Disgraced Former Trial Judge Was Biased In Violation Of Mr. Velez's Fundamental Right To Due Process.

Henry Ward Beecher once aptly stated, "[t]ake all the robes of all the good judges that have ever lived on the face of the earth, and they would not be large enough to cover the iniquity of one corrupt judge." *The Original Plymouth Pulpit: Sermons of Henry Ward Beecher*, The Pilgrim Press, Chicago (1869), at 241. The shameful iniquities of Manuel Velez's trial Judge,

Abel Corral Limas are enough to taint his due process rights to a fair trial by a neutral judge and warrant granting of Habeas relief.

Limas was elected to serve as the 404th State District Judge in 2000 and re-elected in 2004. The Brownsville Office of the Federal Bureau of Investigation began its investigation of Limas in May 2007. Limas lost his re-election primary in March 2008, but he remained in his position as judge until December 2008. Significantly, Mr. Velez's trial took place in October 2008, over a year after the investigation of Limas began and over six months after Limas lost his primary election. Limas was indicted on March 29, 2011 and two days later he pled guilty to illegally generating income "though bribery and extortion, favoritism, improper influence, personal self-enrichment, self-dealing, concealment, and conflict of interest" while serving as judge of the 404th Judicial District Court. (Judge Limas Indictment [Appx 117])

Judge Limas solicited and accepted bribes and extorted money from persons with cases pending before him in return for favorable judicial orders, rulings and treatment. (*Id*. [Velez_00067]) At the very least, Limas has admitted eight separate racketeering acts involving bribes for favorable treatment in his courtroom in the Plea Packet Memo filed with the United States District Court Southern District of Texas March 31, 2011. (Plea Packet Memo for Judge Limas [Appx 118]) Significantly, these corrupt acts occurred May 2007 through the end of 2008, with most of the events occurring the last half of 2008, during Velez's trial. Limas's sentencing has been postponed several times and is now scheduled for June 8, 2012. *Limas, Solis Sentencing Pushed Back Again*, Valley Morning Star (Jan 13, 2012).

The U.S. Supreme Court has made clear that the probability of unfairness, such as existed in Mr. Velez's trial, is a sufficient basis for granting habeas relief. The Fourteenth Amendment of the U.S. Constitution guarantees that no state will deprive a citizen of life or liberty without due process of law. U.S. CONST. amend. XIV, § 1; *see also* TEX. CONST. art. I, §§ 10, 19.

Upholding this fundamental right, the Supreme Court has held, "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136 (1955); *Tumey v. Ohio,* 273 U.S. 510, 532 (1927); *Caperton v. A.T. Massey Coal Co., Inc.,* 129 S. Ct. 2252 (2009). Mr. Velez did not receive a fair trial in a fair tribunal, and his murder conviction was obtained in violation of his fundamental right to due process.

1. Judge Limas took bribes while Mr. Velez's case was pending in his court.

Former Judge Limas was indicted in March 2011 on eight counts of racketeering involving numerous wrongful acts in which he accepted money in exchange for favorable rulings and appointments in judicial proceedings. Limas admitted to each of those charges and to receiving approximately $257,300 in bribes and extortion. Specifically, Limas admitted:

a. In August 2007, Judge Limas accepted money in return for continuing probation revocation hearings and ultimately dismissing the case after a defendant violated the terms of his probation.

b. In January 2008, Judge Limas accepted money in return for his agreement to convert a $25,000 cash bond to a personal recognizance bond for an illegal alien convicted on a possession of cocaine charge.

c. In April 2008, Judge Limas accepted money in return for his agreement to modify the terms of a defendant's probation so he could report to the probation officer by mail rather than in person.

d. After Judge Limas lost his re-election bid in his party's primary in March 2008, he began accepting money from a law firm for whom he had committed to working as "of counsel" in return for favorable rulings.

e. In August 2008 through December 2008 (including the time of the Velez trial), Judge Limas accepted substantial amounts of additional money from the law firm

for whom he had committed to working as "of counsel" in return for favorable rulings.

f. In January 2008, Judge Limas accepted money in return for an ad litem appointment.

g. In June 2008, Judge Limas accepted money in return for a denial of a sanctions motion and other orders.

h. In August 2008, Judge Limas accepted money for the termination of probation for a defendant. Limas later that month also threatened of removal of ad litem appointment if referral not given to Limas's "of counsel" firm. The case was ultimately referred, and Limas received money for the referred case. Limas also admits to improperly obtaining seized gambling devices to his financial benefit.

(Limas Plea Packet Memo [Appx 118])

Judge Limas's associates have also been indicted in connection with Limas's criminal conduct and many more are under investigation and have been indicted. For example, "Person F" in the indictment is Jaime Munivez. Munivez was Judge Limas's bailiff from 2000 to 2004 and served as an investigator with the Cameron County District Attorney's Office from January 2005 to May 2011. The investigation of Limas led to Munivez and Munivez pled guilty to two counts of extortion in December 2011. (*See* 2/13/11 Press Release of the U.S. Attorney's Office [Appx 108]) Notably, at least a portion of Munivez's challenged conduct is said to have occurred during the period between October 2007 and February 2008, while Mr. Velez's case was in pretrial preparation at the District Attorney's office. (The Monitor, *Former Cameron County Investigator Indicted*, Aug. 24, 2011 [Appx 109])

Review of the District Attorney's records in this case indicates that Munivez worked on Mr. Velez's case. (*See*, *e.g.*, 9/07 Summons to Appear for Acela Moreno; 9/07 Summons to

Appear for Blanca Barrera; 11/07 Summons to Appear for Shawn Michaels [Appx 94]) Further discovery into Limas, Munivez, and the District Attorney's Office will be required to determine the extent to which Judge Limas's and Munivez's corruption affected Mr. Velez's case.

2. A due process violation does not require proof of direct bias in Mr. Velez's case.

The right to a trial before a fair and impartial judge is a fundamental component of due process. U.S. CONST. amend. XIV; TEX. CONST. art. I, §§ 10, 19.[56] Indeed, because "our system of law has always endeavored to prevent even the probability of unfairness," appellate courts must consider all the "circumstances and relationships" in a case to determine whether the trial judge's "interest in the outcome" violated the defendant's due process rights. *In re Murchison*, 349 U.S. at 136.

Due process is violated if the tribunal has actual bias against the defendant or interest in the outcome of his case. *See generally Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Bracy v. Gramley*, 520 U.S. 899 (1997) (*quoting Withrow v. Larkin*, 412 U.S. 35, 46 (1975). To that end, the Supreme Court has explained that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof . . . or which might lead him not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey*, 273 U.S. at 532. In *Tumey*, the Court found a Due Process Clause violation when the prohibition violations were adjudicated by the mayor who received $12 every time he convicted a defendant and nothing when he entered an acquittal. A unanimous Supreme Court held that "the possible temptation" that might have induced him to be

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[56] Section 10 provides in relevant part: "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury." TEX. CONST. art. I, § 10. And modeled after the Fourteenth Amendment, section 19 states: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19.

prejudiced was in itself a violation of the defendant's due process rights. *Id.* at 532. Similarly, in *Connally*, the Court granted a new trial, holding that the Justice of the Peace who had issued the warrant was not a neutral and detached magistrate, as required by the Constitution, because he received a $5.00 fee for every search warrant he issued. *Connally v. Georgia*, 429 U.S. 245, 251 (1977); *see also Ex parte Kelly*, 111 Tex. Crim. 54, 10 S.W.2d 728, 729 (1928) (granting habeas relief because the Justice of the Peace received a portion of the fine assessed).

The Texas Court of Criminal Appeals has held that protecting this right of the accused is so fundamental to our democracy, that "[i]f there exists in the mind of [the] court any doubt as to the fairness or impartiality of the trial, it becomes [the court's] duty to award a new trial." *Ruth v. State*, 522 S.W.2d 517, 519 (Tex. Crim. App. 1975)*; Williams v. State*, 145 Tex. Crim. 536, 170 S.W.2d 482, 489 (1943). A judge's bribe-taking "[is] clearly inconsistent with the performance of his duties and casts discredit upon the judiciary and the administration of justice." *In re Bates*, 555 S.W.2d 420, 436 (Tex. 1977).

It is undisputed that actual bias violates due process and calls for an automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991) (judicial bias is one of "three constitutional errors" that cannot be categorized as harmless error). However, a judge's potential or indirect interest in a trial also violates a defendant's constitutional rights and merits a new trial. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2263 (2009) ("the Due Process Clause has been implemented by objective standards that do not require proof of actual bias."); *Bracy*, 520 U.S. at 905. Nor must the financial interest be great. *Tumey*, 273 U.S. at 532. In *Aetna*, Justice Embry had no direct pecuniary interest in the case; instead his bias was having an identical claim pending against a different defendant. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986). The Court concluded that his participation alone violated an insurer's due

process rights because the outcome "undoubtedly 'raised the stakes'" in his own, unrelated case. *Id.* at 825, 829.

3. Judge Limas's interest in protecting his own criminal conduct shows bias.

The constitutional error asserted here does not require, and is not predicated on, evidence that Judge Limas accepted a bribe that directly affected Velez's trial (although discovery is necessary to determine whether or not that occurred). Rather, it was Judge Limas's criminal conduct in accepting bribes in other cases that reveals a bias against defendants who were punished for not bribing the judge. A judge's corruption in any one case he adjudicates rebuts the presumption that he "properly discharged [his] official duties" in any other case. *Bracy v. Gramely*, 520 U.S. 899, 909 (1997).

Moreover, "when the trial judge is discovered to have had some basis for [prejudice], his actual motivations are hidden from review, and [the court] must presume that the process was impaired." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). In *Bracy*, the Court granted the defendant habeas discovery in a case where the trial judge was subsequently convicted of taking bribes in return for favorable rulings. Although there was no allegation that the judge had been bribed in the *Bracy* case, the Court agreed that acceptance of bribes in other cases could induce compensatory bias against defendants who did not bribe the judge because the judge would not want to appear "soft" on criminal defendants. Significantly, the Court stated that "if it could be proved, such compensatory, camouflaging bias . . . would violate the Due Process Clause of the Fourteenth Amendment." *Bracy*, 520 U.S. at 905.

A review of the record, as well as the circumstances and relationships surrounding Velez's trial, demonstrates that Judge Limas had at least "a possible temptation to . . . forget the burden of proof . . . which might lead him not to hold the balance nice, clear, and true" between the State and Velez. *Tumey v. Ohio*, 273 U.S. at 532. Limas had a personal and significant

interest in the outcome of Velez's trial. The vast majority of bribes Limas has admitted to taking occurred in the months leading up to Velez's trial. Limas had great incentive to camouflage his preferential rulings for those who had bribed him by convicting those who had not. Velez's trial also occurred over six months after Limas was voted out of office but while he still was on the bench. As evidenced by the extortion and bribery Limas has admitted to in connection with his "of-counsel firm," Limas was only focusing on one thing at that point—his own financial position and how long he could maintain it.

Because Judge Limas had both pecuniary and intangible stakes in the cases in which he accepted bribes, his bias also manifested in those where he did not take bribes, such as in Velez's trial. Limas could only continue his pattern of demanding bribes in return for favorable rulings/treatment if he camouflaged such conduct by convictions and tough positions in those cases where he did not accept bribes. This behavior simultaneously concealed his true corrupt nature while encouraging others to pay additional bribes.

These facts suffice to reveal a constitutional violation and warrants habeas relief. Moreover, even if this Court finds that Judge Limas's corruption alone is insufficient to show a presumption of bias against Velez, Limas's discretionary conduct in this case further reveals bias in violation of Velez's fundamental right to due process. Specifically, as described in the following sections, Limas made several discretionary rulings during the Velez trial that illustrate bias against Velez and his right to have a fair trial.

B. Judge Limas Violated Mr. Velez's Rights in Connection with the Two Statements of the Accused.

1. Mr. Velez's right to be present for proceedings.

As explained fully in Part One, Section II.F, the Court conducted a hearing to resolve issues concerning the admissibility of the three-page and two-page versions of the "Voluntary

Statement of the Accused." (8 RR 228) A portion of that hearing was conducted in chambers and there is no record of the in-camera proceedings or how the court resolved the issue that day.

Mr. Velez had a constitutional right to be present during the conference in chambers because it was a "critical stage" of the trial. *See* U.S. Const. amends. VI, VIII, XIV; *Snyder v. Massachusetts*, 291 U.S. 97, 105-08 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *State v. Meyer*, 481 S.E.2d 649, 651 (N.C. 1997) (finding in-chambers conference during *voir dire* a critical state at which defendant had a right to be present). The in-chamber proceedings bore a substantial relationship to Mr. Velez's opportunity to defend against the charge as the Court apparently decided, in Velez's absence, that the jury could hear a more inculpatory statement Velez may not have made. *Snyder*, 291 U.S. at 105-06; *Meyer*, 481 S.E.2d at 651. Mr. Velez's absence from this critical stage "so fundamentally undermine[d] the fairness or the validity of the trial" that it is properly characterized as a "structural" error, subject to automatic reversal. *Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir. 1996) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). In any event, reversal on this point is required because the State cannot prove beyond a reasonable doubt that Mr. Velez's absence from the in-chambers proceeding was harmless in the context of such a weakly circumstantial case. *Chapman v. California*, 386 U.S. 18, 24 (1967).

2. Judge Limas failed to make required findings.

On October 18, 2007, defense counsel filed a Motion to Suppress the Written or Oral Statements of the Defendant. (SCR5 82–85) Counsel also filed a Motion for Hearing on Admissibility of Any Statement by Defendant whether Written or Oral or Evidence Resulting from Same and requested the trial court conduct a hearing in accordance with Texas Code of Criminal Procedure art. 38.22 § 6. (SCR5 125–27) As previously described (*see supra* at 47–

49), the evidentiary hearing was held ten days before the capital murder trial began. (8 RR 1–171)

A week later, during jury selection on the morning of October 13, Judge Limas orally denied the Motion to Suppress, but failed to file the findings of fact and conclusions of law required by Texas Code of Criminal Procedure art. 38.22 § 6 despite defense counsel's request for such findings. (12 RR 66–68) Judge Limas said his ruling encompassed both the two page and the three page statements without further explanation. (*Id*.) Both versions of the statements were admitted at trial, as State's Ex. 64 and Def. Ex. 2.

In early 2010, years after the suppression hearing, and after Judge Limas had left the bench, Judge Lopez adopted the prosecutor's proposed requested findings and conclusions. (1 SCR5 155–59; *see supra* at 70–72) The inability to have the judge who heard live testimony concerning the statements issue findings of fact and conclusions of law violated Velez's rights under Texas Code of Criminal Procedure art. 38.22. *See Garcia v. State*, 15 S.W.3d 533, 536 (Tex. Crim. App. 2000) (findings and conclusions must be made by same judge that conducted the hearing because they depend on assessments of credibility and demeanor).

C. Judge Limas Committed Reversible Error By Refusing to Provide the Jury With Requested Evidence During Deliberations.

The jury asked to view Moreno's entire video and transcript at 9:50 a.m. on October 23. (10/23/08 Jury Note; 3 CR 399) Then, at 11:36 a.m., the jury requested to view the last five to ten minutes of the video where Moreno alleged that Mr. Velez hurt her child. (10/23/08 Jury Note; 3 CR 400) Without receiving such requested evidence, the jury reached its verdict of guilty at 2:50 p.m., five hours after the initial request. (10/23/08 Jury Note; 3 CR 401)

1. The judge's failure to provide the jury with requested evidence was fundamental error, requiring automatic reversal.

The Texas Code of Criminal Procedure provides that "[t]here *shall* be furnished to the jury upon its request any exhibits admitted as evidence in the case." TEX. CODE CRIM. PRO. art. 36.25 (emphasis added). This statute is mandatory. *Liggins v. State*, 979 S.W.2d 56, 64 (Tex. App.—Waco 1998, pet. ref'd). The court commits error if it prohibits the jury from viewing the evidence during deliberations when the jury has complied with Article 36.25. *See Lopez v. State*, 628 S.W.2d 82, 85 (Tex. Crim. App. 1982). Further, the court's failure to provide such evidence upon request is fundamental error, requiring automatic reversal because it affects the defendant's right to a fair trial. *Parker v. State*, 745 S.W.2d 934, 936-37 (Tex. App.—Houston [1st Dist.] 1988, writ ref'd). A fundamental error is one that affects the "substantial rights" of the defendant. *Blue v. State*, 41 S.W.3d 129, 131 (Tex. Crim. App. 2000). These substantial rights are "so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system." *Id.* Thus, because of the egregious nature of the error, the error alone is harmful, demanding automatic reversal. *See Parker*, 745 S.W.2d at 937 (citing *Lopez v. State*, 628 S.W.2d 82, 85 (Tex. Crim. App. 1982)).

In this case, Mr. Velez's conviction must be reversed because the trial court failed to provide the jury with evidence it properly requested. Evidence that was admitted during trial must be provided to the jury upon request—this "evidence" includes videos played for the jury during trial. *Liggins*, 979 S.W.2d at 65; *Parker*, 745 S.W.2d at 935–36. The video and accompanying transcript of Acela Moreno's interrogation were admitted into evidence during trial as State's exhibits 49A and 49B. (16 RR 45:18-21) Thus, they were clearly items of evidence falling under Texas Code of Criminal Procedure Article 36.25. *Liggins*, 979 S.W.2d at 65; *Parker*, 745 S.W.2d at 935-36. Judge Limas acknowledged that fact, stating "that clearly

falls now under a different category which the jury's request that the—any evidence the court shall deliver to the jury if requested and it's been requested." (19 RR 16:21–25) Despite this recognition and the jury's two requests to review this evidence, the record clearly shows that the jury never received the evidence before reaching the verdict. (19 RR 16:21–25, 21:10–23:24) This egregious error by the court requires automatic reversal.

2. Even if proof of harm were required for reversal, Mr. Velez was harmed by the court's failure to provide the requested evidence to the jury.

Had the jury been able to review the video and accompanying transcript of Moreno's interrogation before they reached a verdict, they would have seen the following admissions from Moreno:

- Moreno admitted that she might have accidentally burned Angel with a cigarette. (State's Ex. 49A at 13–14, 41)
- Moreno declared that she did not hear anything during the time she was in the bedroom after leaving Angel on the sofa. (*Id*. at 22, 30–31)
- Moreno said that she did not even ask Manuel what happened to her child once she found out he was not breathing—a question the jury could believe a concerned parent would probably ask. (*Id*. at 32)
- Moreno testified that Mr. Velez was blowing air after Angel could not breathe, indicating that Mr. Velez was trying to resuscitate Angel. (*Id*. at 34)
- Moreno mentioned that Mr. Velez referred to Angel as "my son." (*Id*. at 43)

Each of these statements suggests that Acela was not a responsible parent and may have even harmed the child herself. Further, her admission that Mr. Velez called Angel his "son" suggests that Mr. Velez loved Angel as his own son. Therefore, had the jury been able to review this evidence, it might have raised a reasonable doubt as to Mr. Velez's guilt, precluding a guilty verdict. Therefore, even if harm is required, Mr. Velez was substantially harmed by the court's failure to provide the requested evidence to the jury.

D. Judicial Errors Undermined The Integrity Of The Trial.

In addition to the refusal to allow the jury unfettered access to the evidence admitted at trial, Judge Limas committed several other fundamental errors that undermined the integrity of Mr. Velez's trial—whether or not they are attributed to Limas's personal corruption. Such errors include, without limitation:

- Judge Limas refused to disqualify Special Prosecutor Luis Saenz because of his conflict of interest. (*See supra* at 206–08)

- Judge Limas refused to release material evidence of Juan Chavez's abuse of Moreno and of Moreno's abuse of her children contained in records of the Texas Department of Family and Protective Services and the organization Friendship of Women, Inc. (*See supra* at 15–16)

- Judge Limas conducted a material portion of the hearing on the motion to suppress Velez's statements *in camera*, without having Mr. Velez present, and without ensuring a court reporter's record of the proceedings. (*See supra* at 48)

- After denying the defense motion to suppress, Judge Limas failed to issue written findings of fact and conclusions of law as required by TEX. CODE CRIM. PROC. art. 38.22 § 6. (*See supra* at 47–50) This error could not be cured by having a rote set of findings and conclusions issued two years later by a successor judge who did preside at the suppression hearing.

- Judge Limas allowed prosecutors to make improper and prejudicial assertions concerning a purported "finding" that the two-page statement was a "fraud." (*See supra* at 213–15)

Finally, although required by law regardless of whether trial counsel for Mr. Velez objected or requested the instruction, Judge Limas failed to charge the jury that it could not convict Mr. Velez based on the testimony of Acela Moreno (an "accomplice" as a matter of law) unless her incriminating testimony was "corroborated by other evidence tending to connect [Velez] with the offense committed." TEX. CODE CRIM. PROC. art. 38.14; *Howard v. State*, 972 S.W.2d 121, 126 (Tex. App.—Austin 1998, no pet.) (holding that failure for court to provide accomplice-corroboration instruction is error irrespective of whether trial counsel requested

instruction because it is the law applicable to the case and not a defensive issue that defendant must timely object to or make request for to preserve error). (*See supra* at 170–85) This error alone, whether or not prompted by Judge Limas's corruption or bias, mandates reversal of the judgment entered against Mr. Velez.

PART TWO
ERRORS JUSTIFYING RELIEF—PUNISHMENT PHASE

The entire punishment phase of Mr. Velez's trial was held on October 24, 2008. Opening statements and the presentation of evidence were concluded by lunch time. (20 RR 124:9-19). That afternoon, after hearing closing arguments limited by Judge Limas to 15 minutes (*id.* at 134:15–16, 151:1, 152:14) and receiving instructions and special issues, the jury returned its verdict and Mr. Velez was sentenced to death.

The jury was asked two questions in the punishment phase, the first concerning future dangerousness, and (predicated on a unanimous "yes" answer to the first question) a second question concerning any mitigating circumstances that would warrant life without parole rather than execution. Specifically, the jury was presented the following questions:

> Special Issue No. 1
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

(3 CR 439)

> Special Issue No. 2
>
> Taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral capability of the Defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed?

(3 CR 440)

Fundamental, constitutional flaws in these issues and the accompanying instructions are addressed below, in Section IV of this Part Two. For purposes of this section, however, the jury charge provides the backdrop for evaluating the arguments and evidence presented by both the State and defense counsel in the punishment phase of the trial.

I. INTRODUCTION – PUNISHMENT PHASE TRIAL PROCEEDINGS

Judge Limas began the punishment phase of Mr. Velez's trial by telling the jury that "this is like a little mini trial." (20 RR 7:5) The prosecution then told the jury in its opening statement that

> we introduced the evidence that we had during the trial. You get to decide whether that evidence is enough to proceed to the death penalty. The evidence that we'll remind you of will be the bite marks, the fractures of the skull, cigarette burns on the feet and the buttocks, the skin tear, the blunt force trauma. All that being alone being sufficient to warrant the death penalty.

(*Id.* at 8:14–22)

Mr. Velez's defense counsel responded with a bizarre opening statement largely devoted to telling the jury that capital cases are hard on counsel. (*Id.* at 10:3–12:24) He concluded by telling the jury: "So do what you want." (*Id.* at 12:23–24) His entire opening statement covers less than three pages of trial transcript. (*Id.* at 10:3–12:24)

The State presented three witnesses: A.P. Merillat (whose surname is incorrectly spelled "Marilock" in the trial transcript), who testified that Texas prisons are violent and Texas prisoners present a danger to those with whom they come in contact (20 RR 13:6–42:25); Louise Crisman, a deputy sheriff from Wisconsin who testified that Mr. Velez was convicted in

Wisconsin of battery and driving under the influence, both committed in 1991 (Trial Exs. 66 & 67), and both misdemeanor offenses (20 RR 66:24–67:1); and Luis de Leon, an investigator for the Cameron County District Attorney's office who testified that Mr. Velez's prior convictions in Texas consisted of (i) forgery in 1984 (20 RR 75:3–16), (ii) criminal mischief in 1988 (*id.* at 78:2–7), (iii) driving while impaired in 1998 (*id.* at 80:25–81:8), (iv) evading arrest in 2001 (*id.* at 81:12–21), and (v) passing three bad checks in 2005 (*id.* at 82:13–83:18). The 1984 forgery was a felony offense, and all of the others were misdemeanors. (*Id.* at 88:12–89:3) Mr. de Leon acknowledged that he had "no evidence of violence on the part of" Mr. Velez. (*Id.* at 89:15–18) As explained below, the State's evidence of "future danger" was fatally flawed in many respects, although Villarreal did little to expose these flaws.

Villarreal called three witnesses, attempting to show "mitigating circumstances." Leticia Velez, Mr. Velez's sister, testified that the Velez family's father left when Mr. Velez and his six siblings were children, leaving their mother to raise them (*id.* at 94:19–95:24); that Mr. Velez did not finish high school, could not read or write much English, and attended special classes in school (*id.* at 99:2–100:4); that Mr. Velez worked and used his money to buy clothing, take his mother out to eat, and buy food for the family (*id.* at 100:3-12); and that she never saw Mr. Velez fight anyone when he was growing up or get thrown out of school for fighting, and she never heard of him hurting anyone (*id.* at 101:14–23). Maria Hernandez, Mr. Velez's ex-wife, testified that during 1998 to 2004, when she lived with Mr. Velez, she never saw Mr. Velez strike their two children or other children she had from a previous relationship. (*Id.* at 109:22–110:10) Finally, Jose Manuel Velez, Mr. Velez's nine-year-old son, testified that he missed his father (*id.* at 119:12–21, 121:13–19), that he never saw Mr. Velez hit any of his children (*id.* at 120:15–17), and that he would visit Mr. Velez in the penitentiary and write letters to him (*id.* at 122:6–20).

> The defense did not present a mental health expert to explain to the jury how the testimony of these witnesses related to the jury's task of determining whether there existed "sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed."

The scant mitigation evidence presented by Mr. Velez's counsel enabled the prosecutor to conclude his closing argument with the statements:

> There is not sufficient mitigating evidence. There's not enough. *They didn't bring you anything. . . . [T]here's nothing mitigating in his background*.

(20 RR 159:4–6, 160:7–8) As shown below, that last statement is not true.

At 5:00 p.m., the jury returned its verdict. (*Id.* at 160:24–161:17; 3 CR 439–41) Judge Limas thereupon sentenced Mr. Velez to death. (20 RR 162:12–163:13) Danalynn Recer, an attorney and expert experienced in the defense of capital cases in Texas who also has considerable experience as a mitigation specialist and defense investigator, has read, *inter alia*, the punishment-phase trial transcript. In her expert opinion:

> Overall, this transcript reads as if the case were tried in the 1980s. The misunderstandings and mistakes of this defense team are of the nature and caliber that I have not seen since very early in my career when I worked in a post-conviction office and most of our clients had been convicted and sentenced under the old, pre-*Penry*, Texas statute. Failing to prepare mitigation, continuing to dispute guilt even after the verdict, making policy arguments against capital punishment to a death-qualified jury, and confusing mental health evidence relevant to competence and voluntariness with that available for a penalty phase presentation are all very old-fashioned errors virtually unheard of among today's capital defense practitioners. Yet, Mr. Velez's trial took place only three years and three months ago.

(Affidavit of Danalynn Recer, January 23, 2012 ¶ 182 [Appx 13])

II. SPECIAL ISSUE NO. 1: FUTURE DANGEROUSNESS

The jury's affirmative answer to Special Issue No. 1, whether "there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were allowed to live, was the product of prosecutorial misconduct and ineffective assistance of Mr. Velez's trial counsel.

A. The State Sponsored False and Highly Misleading Testimony of A.P. Merillat That Left a False Impression With the Jury.

TDCJ Policy: "Offenders convicted of Capital Murder and sentenced to 'life without parole' will not be classified to a custody less restrictive than G-3 throughout their incarceration." (July 2005, TDCJ Unit Classification Procedure [Appx 113])

Merillat: "A convicted murderer with a life sentence will go in automatically as a G3 right in the middle. In other words that can be the same as a burglar or thief or a forger, or DWI felon. They could go in as a G3 too or they can be a G3 while in prison. **You can promote up to better classification if you behave, you can go down to more strict classification."** (20 RR 16) (emphasis added)

Lacking any evidence that Velez would pose a future danger, the State relied on false and highly misleading testimony of its expert, A.P. Merillat, to convince the jury that a convicted capital murderer sentenced to life without the possibility of parole would not be subject to different rules in prison because he was convicted of capital murder, and thus would have the opportunity to commit future crimes:

Q. And he's not going to be treated–an individual serving a life sentence without parole will not be treated any differently than anyone serving time?

A. No, sir.

(20 RR 24) Indeed, a continuing theme of Merillat's testimony was that a person serving life in prison without the possibility of parole was subject to the same restrictions (or lack thereof) and the same rules that governed all other inmates in the penitentiary:

> That person will have the same privileges and opportunities to go to school, go to church, go to visitation, interact with other inmates, be housed with other inmates, come and go from his cell without shackles or without supervision, go to work if he chooses to. He can do all those things as any other inmate can until he starts behaving badly enough that it requires him to be more strictly classified or more securely housed, which that could happen to any other inmate, not just a capital murder [*sic*].

(20 RR 17) Merillat emphasized this comparison with inmates not serving life without parole, by testifying that that "[a capital murderer] has privileges and all the things that a normal inmate does until he behaves so badly that they have to hold him tight." (20 RR 18)

The impact of this testimony necessarily led the jury to believe that Mr. Velez, if not sentenced to death, would begin his incarceration with a G-3 classification, but would have the "same privileges and opportunities" as other inmates, including the ability to "promote up to a better classification" with good behavior, subjecting him to less restrictive confinement. Merillat never clarified this testimony, and the State did not fulfill its obligation to correct the misinformation. By allowing this false testimony to go uncorrected, the State deprived the jury of crucial information it needed to make its decision and violated Mr. Velez's constitutional rights. *See* U.S. CONST. AMENDS. V, VI, VIII, and XIV.

1. Factual history.

Effective September 1, 2005, over three years before Mr. Velez's October 2008 trial, life without parole became the only sentencing alternative to a death sentence for capital murder. TEXAS PENAL CODE § 12.31. In July 2005, the Texas Department of Criminal Justice ("TDCJ") adopted and promulgated classification procedures for sentences of life without parole, stating

unambiguously that "offenders convicted of Capital Murder and sentenced to 'life without parole' will not be classified to a custody less restrictive than G3 throughout their incarceration." (7/05 TDCJ Unit Classification Procedure 2.0) In an accompanying newsletter, TDCJ stated that a "lifetime of tight supervision awaits offenders sentenced to life without parole in Texas." (*Fewer Restrictions Not an Option*, TDCJ Agency News, January/February 2006 [Appx 105])

Nevertheless, the State elicited testimony from Merillat that would cause the jury to believe that if they did not vote to give Mr. Velez the death penalty, he would be treated just like all other inmates and would "have the same privileges and opportunities" as those offenders not serving life without parole. (20 RR 16-17, 25) Necessarily included in those privileges is the ability to reduce the restrictions of incarceration through good behavior: "You can promote up to better classification if you behave, you can go down to more strict classification." (20 RR 16) This is false information, and the State breached its duty to correct it.

2. Legal authority.

Constitutional due process prohibits the State from securing a conviction or death sentence through the use of false or highly misleading evidence. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (holding that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment"). The Supreme Court's holding in *Napue* and the cases applying *Napue* require that the death sentence given to Mr. Velez be reversed because: (1) Merillat's testimony that a prisoner convicted of capital murder could "promote up to better classification [than G-3] if you behave" was actually false and highly misleading, and left a false impression with the jury; (2) the State knew or should have known that the testimony was false or highly misleading; and (3) the testimony was material, *i.e.*, not harmless beyond a reasonable doubt. *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994); *Ex parte Adams*, 768 S.W.2d 281, 289 (Tex. Crim. App. 1989); *Giglio v. United*

States, 405 U.S. 150, 154 (1972) ("whether the nondisclosure [is] a result of negligence or design, it is the responsibility of the prosecutor").

The testimony at issue need not rise to the level of criminal perjury. *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011) ("Though the case law in this area frequently refers to 'perjured' testimony, there is no requirement that the offending testimony be criminally perjurious.") Indeed, the testimony need not even be literally false, but instead must only leave a "false impression" with the jury. *Id.* at 478 ("It is sufficient if the witness's testimony gives the trier of fact a false impression.") (quoting 42 George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice & Procedure* § 22.53 (2d ed. 2002)); *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (due process was violated where witness gave the jury a "false impression"); *Burkhalter v. State*, 493 S.W.2d 214, 218 (Tex. Crim. App. 1973) (due process violated when, even though not technically false, the testimony "conveyed an impression to the jury which the State knew to be false").

The Court of Criminal Appeals has previously reviewed false testimony by Merillat concerning the classification of convicted capital murderers. In *Estrada v. State*, 313 S.W.3d 274, 286-88 (Tex. Crim. App. 2010), the Court reversed the appellant's death sentence as "constitutionally intolerable" because it was predicated on Merillat's false testimony that "a sentenced-to-life-without-parole capital murderer could achieve a lower (and less restrictive) G classification status than a G-3 status." *Id*. at 286.[57] Likewise, Mr. Velez's death sentence was based on Merillat's false and misleading testimony, and this Court should also find that the State

[57] In *Estrada*, the State confessed error and agreed that Merillat's false testimony necessitated a new trial on punishment. *Estrada*, 313 S.W.3d at 286. Nevertheless, the Court was not bound by the parties' stipulation, and independently determined that a new sentencing hearing was required. *Id.* at 286-88.

violated Mr. Velez's constitutional rights. U.S. CONST. AMENDS. V, VI, VIII, XIV; TEX. CONST. art. I, § 13.

3. Merillat's testimony was actually false and highly misleading, and left a false impression.

Merillat testified that a capital murderer would initially receive a G-3 classification, "the same as a burglar or thief or a forger, or DWI felon." (20 RR 16) Once in prison, Merillat testified, "[y]ou can promote up to better classification if you behave, you can go down to more strict classification." (20 RR 16) This testimony is false and highly misleading.[58] TDCJ Unit Classification Procedure 2.0, adopted in July 2005, unequivocally mandates that capital murderers **never** become eligible for a more lenient custody status than G-3. Merillat—an expert sponsored by the State to testify on conditions of incarceration—never informed the jury that if Mr. Velez were sentenced to life without parole, TDCJ policy requires that he never be subject to restrictions less than classification G-3. Therefore, the implication that Mr. Velez, like all other offenders, would be able to improve his status through good behavior (and thus have a greater opportunity to commit dangerous acts), left a false impression on the jury in violation of his constitutional rights.

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[58] Merillat has repeatedly testified falsely on the classification system applicable to convicted capital murderers sentenced to life without parole after September 1, 2005. In addition to his false testimony in *State v. Estrada*, where the State confessed error, in *State v. Runnels*, Cause No. 48,950-D, 320th Judicial District Court, Potter County, Texas, Merrilat falsely testified on November 16, 2005, shortly after Unit Classification Procedure 2.0 became applicable to capital murderers, that a capital murderer would "be a G-3 inmate, and he'll be classified as such for a minimum of ten years." (*Runnels* Tr. at 107 [Appx 110]) This testimony is clearly false in light of the actual rule. Merillat has continued to testify falsely. On March 12, 2008, Merillat provided similar testimony in *State v. Quintero*, Cause No. 1085704, 248th Judicial District Court, Harris County, Texas. (Quintero Tr. at 57, 63, 66: "Q. So it's your testimony someone who has a life without parole, then after ten years, can be elevated to G2? A. Yes, ma'am." [Appx 111]) It is unclear why the State continues to sponsor sworn testimony on the State's prison classification system from a purported expert who repeatedly demonstrates either an intentional disregard of or blindness to the facts forming the basis of his opinions.

4. The State knew or should have known Merillat was testifying falsely.

As a threshold matter, courts impute the knowledge of the "prosecution team" to the prosecutors trying a case. *Ex parte Fierro,* 934 S.W.2d 370, 370 n.3 (Tex. Crim. App. 1996); *see also Pennsylvannia v. Ritchie*, 480 U.S. 39, 60-61 (1987) (finding that *Brady* obligation applied to state youth agency in case prosecuted by the Pittsburgh district attorney's office); *Love v. Johnson,* 57 F.3d 1305, 1314 (4th Cir. 1995) (State's obligation is "not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial control"). Merrilat is necessarily a member of that prosecution team—he works for Walker County as a peace officer as a member of the Special Prosecution Unit, a state-funded agency, and he was a state-sponsored expert on TDCJ's classification of inmates and violence in Texas prisons. *See id*. (finding a constitutional violation when a police officer testified falsely, and stating that "prosecutors have a duty to reveal the perjured testimony of members of the 'prosecution team,' whether or not the prosecutor has knowledge of such perjury").

Merrilat undoubtedly knew or should have known the correct details of TDCJ's classification system, which formed the primary basis for his expert conclusion that Mr. Velez, as an inmate sentenced to life without parole, would have an opportunity to commit additional crimes in prison. As a purported expert on this issue, Merillat had an obligation to know the State's policy. Given the central importance of his testimony to the State's case, there is absolutely no excuse for Merillat not to know the black-and-white rules of the classification system on which he purports to be an expert. Although his good or bad faith is irrelevant, *Thomas v. State*, 841 S.W.2d 399, 402 n.5 (Tex. Crim. App. 1992), not knowing and not testifying to the complete and accurate rules that would govern Mr. Velez's life-without-parole confinement could only be the result of willful or reckless conduct.

Moreover, past testimony demonstrates that Merillat does know that a convicted capital murderer serving life without parole cannot improve from a G-3 classification with good behavior. In *State v. Chanthakoummane*, Cause No. 380-81972-07, 380th Judicial District Court, Collin County, Texas, Merillat accurately testified that an inmate serving life without parole could not improve his G-3 classification:

> Q. Investigator Merillat, are you familiar with the classification that an individual would receive upon entry into the Texas Department of Criminal Justice if they entered with a life without parole sentence?
>
> A. Yes, sir.
>
> Q. Would you mind telling the members of the jury what classification that person would receive upon entry into the prison system?
>
> A. Yes, sir. He'll receive a G-3 classification. G-3 is a medium range classification; it's not the worst you can have, it's not the best you can, it's right in the middle. The classification can get worse depending on his behavior or her behavior once they get there. If they're throwing feces on guards, using drugs, trying to stab people, that classification can be made more tight. *It won't improve, however, it won't go up to G-2 or G-1, it's going to stay in the middle of the road classification, which is not totally prohibitive of the existence.* You can live in general population, work, go to school, go to church, go to visitation as G-3. It simply tells the prison system that there are certain things you're not allowed to do while you're in the penitentiary as a G-3 inmate.

(*Chanthakoummane* Tr. at 71–72 [Appx 112] (emphasis added)) This testimony, which demonstrates Merillat's actual knowledge of the classification system as it applies to capital murderers, was given on October 16, 2007, approximately one year before his false testimony in this case on October 24, 2008. It is inexplicable that Merillat would at one time know the proper classification rules, but later testify incorrectly.

Even if Merillat did not know the truth concerning the classification system on which he testified, the prosecutors themselves knew or should have known. The TDCJ policy, forbidding a capital murderer sentenced to life without parole from ever being under restrictions less

restrictive than a G-3 classification, was at the heart of the State's future dangerousness case against Velez. This policy is not merely a technical or obscure fact. Instead, it is of critical importance to the prosecutor's job in ascertaining: (1) which defendants pose a threat of future danger warranting the State's pursuit of a death sentence; (2) the appropriateness of plea dispositions in capital cases; and (3) how the State proves that the particular defendant on trial will pose a future danger to society, when a death sentence is sought.

In seeking a death sentence for Mr. Velez, the State took the position that Mr. Velez posed a future danger in prison if given life without parole because the inmate classification system provided convicted capital murderers with ample opportunity to commit additional crimes (both violent and non-violent). In sponsoring the testimony of Merillat, the State affirmatively demonstrated that the classification system was important to its case by asking multiple questions focused on the level of restrictions to which Mr. Velez would be subject if not sentenced to death. (20 RR 16, Merrilat: "[The classification system is] the very heart of a prison inmate's sentence or his time [in] prison.") Given the role the classification system placed in the State's punishment phase evidence, if the prosecution did not know about TDCJ Unit Classification Procedure 2.0, it had a duty to learn of it through its own research or from other state personnel before eliciting the testimony from Merillat. *See Ex parte Adams*, 768 S.W.2d 281, 289 (Tex. Crim. App. 1989) (setting forth the "knew or should have known" standard). In the event the State did not know the actual classification rules applicable to Mr. Velez, its failure constitutes willful recklessness, especially considering the life and death consequences.

5. The misleading testimony was material and highly prejudicial.

In *Ex parte Adams*, the Court of Criminal Appeals explained the applicable "harmless error analysis" used to determine if false testimony is material. 768 S.W.2d at 291–92. There, the Court articulated two tests, which it determined the United States Supreme Court considered

equally applicable: (1) whether there was a "'reasonable likelihood' . . . that the absence of such [false] testimony would have 'affected the judgment of the jury,'" and (2) whether it is "beyond a reasonable doubt that the perjured testimony did not contribute to the applicant's conviction or punishment." *Id.* (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Under both standards for materiality, the testimony here requires a new sentencing trial.

Because of the importance of the classification issue to the State's case that Mr. Velez posed a threat of future danger if not given a death sentence, the State's failure to correct Merillat's false and misleading testimony, and the false impression that testimony left with the jury, caused prejudice to Mr. Velez. The State's evidence of future dangerousness was extremely weak, consisting of: (1) Merillat's testimony on the TDCJ classification system and associated violence in prison, while admitting that he has no knowledge or insight into whether Mr. Velez posed a future danger: "I'm not qualified to say how he'll act. That's something for people much smarter than me." (20 RR 34); (2) evidence of low-level and non-violent past crimes and a remote 17-year-old misdemeanor battery conviction; (3) improper evidence of the use of aliases; and (4) improper evidence of Mr. Velez's tattoos, none of which were gang-related or otherwise reflected a violent nature.

There was no competent evidence that Mr. Velez posed any threat of future danger, in or out of prison. He had been in jail awaiting trial for three years, but never had any problems there. (20 RR 102; *see also* 18 RR 102 (prosecutor acknowledging this fact); Def. Ex. 6 at 6 ("[Velez's] prison records do not indicate any misconduct or disciplinary actions")). Additional, accurate proof that Mr. Velez could never be eligible for confinement less restrictive than G-3 would certainly have strengthened his sentencing phase defense. It also would have undermined the State's case against Mr. Velez.

Based on the significant portion of the State's evidence Merillat's testimony comprised, premised on a faulty understanding of TDCJ's classification system, the false and misleading evidence provided through Merillat was material. Indeed, the Cameron County District Attorney described Merillat's role in Mr. Velez's trial as "vital." (11/4/08 Letter from Cameron County District Attorney to A.P. Merillat [Appx 99]) ("Your knowledge played a vital role in our case.")

In *Estrada*, the Court found that there was a "fair probability" that the jury's death sentence was based on Merillat's testimony. 313 S.W.3d at 287. Here, in light of Mr. Velez's years of model behavior in jail and prison, and the State's almost non-existent case that he would be a continuing threat to society, there is a *substantial* probability that the jury based its future dangerousness answer on Merillat's false testimony. In addition, the lack of any direct evidence, either through eye-witness testimony or DNA evidence, supporting the underlying offense further supports an inference that the jury relied on the testimony of Merillat, the State's key witness in the punishment phase, to answer the future dangerousness question. *Ward v. Hall*, 592 F.3d 1144, 1181 (11th Cir. 2010) (finding capital sentence error prejudicial in case where evidence of the underlying offense was circumstantial and not overwhelming). Under these circumstances, the jury necessarily understood Merillat's testimony to mean that Mr. Velez, if sentenced to life without parole, would have more opportunities for violence than he truly would have, and thus would be a threat of danger, given the conditions of prison according to Merillat. *See Fewer Restrictions Not an Option*, TDCJ Agency News, January/February 2006 ("lifetime of tight supervision awaits offenders sentenced to life without parole in Texas" [Appx 105]). Therefore, there is a reasonable likelihood that had Merillat not testified falsely, the jury's finding would have been different, and the State cannot show that Merillat's false testimony did not contribute to Mr. Velez's death sentence beyond a reasonable doubt. As juror Jennie Johnson has stated in ¶ 13 of her Declaration [Appx 44]:

> I remember the testimony of the prison expert presented by the state. His testimony played a big role in my decision and influenced me in favor of the death penalty. If evidence exists that what he said was incorrect, that would have factored into my decision, and I would have expected defense counsel to present that evidence. It may have made a difference in the sentencing decision.

By sponsoring Merillat's false testimony that Mr. Velez "could promote up to better classification" and be given a greater opportunity to be dangerous, the State corrupted the truth-seeking function of the trial forum, blindfolded the jury, and obtained a death sentence predicated on false and highly misleading testimony. Merillat's testimony was material under the Fifth, Sixth, Eighth and Fourteenth Amendments and *Napue*. Here as in *Estrada*, Merillat's false testimony concerning the classification of an inmate serving life without parole requires a new trial on sentencing, where the jury can decide future dangerousness on truthful factual evidence.

B. Merillat's Testimony Violated Mr. Velez's Constitutional Rights.

1. Merillat's testimony violated Mr. Velez's Eighth Amendment right to individualized sentencing.

The Eighth Amendment right to be free from cruel and unusual punishment in the context of a death penalty case mandates *individualized* sentencing determinations and *heightened* reliability. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). The required "individualized determination" whether a defendant should be executed is to be based on "the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (collecting Supreme Court precedents). One-size-fits-all testimony that can apply to any capital defendant in any capital proceeding, such as that offered by Merillat, violates this strict requirement because it "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless,

undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson*, 428 U.S. at 304. Indeed, as the Supreme Court has recognized, "a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

Far from meeting the Eighth Amendment's requirement of individualized sentencing, Merillat's testimony consisted of no more than pattern, one-size-fits-all testimony describing lurid evidence of violent acts committed within the prison system by offenders other than Mr. Velez. Merillat did not even attempt to speak about Mr. Velez specifically, even admitting that he was "not qualified to say how [Mr. Velez will] act" in prison (20 RR 34), and that he "[knew] very little about this case" (20 RR 38). Instead, Merillat regaled the jury with a litany of violent acts that had nothing to do with Mr. Velez. For example, Merillat testified:

- "There have been 156 murders inside the prison in Texas since we came into existence as of this day.… We have in the last three and a half, four years have prosecuted for felony, violent felony crimes about 94 convicted capital murderers serving life sentences who have committed those crimes. When they got to the penitentiary after they have been convicted in court.… The level of violence is extremely high inside Texas prisons."

(20 RR 18–19)

- "There's been two murders on death row. There have been many guard assaults, stabbings, primarily stabbings of guards by condemned capital murderers on death row even though they are locked in a cell alone 23 hours a day. Under shackles they still manage to get out of those shackles and hurt guards."

(20 RR 19)

- "We prosecute a lot of drug cases on death row, methamphetamines, cocaine, marijuana. We have weapons on death row."

(20 RR 19)

- "[In the TDCJ system], we indicted and prosecute everything we do in the free world; drugs, arson, theft, extortion, murder, rape, escapes from the custody [*sic*], fraud cases."

(20 RR 21)

- "There are many potential victims inside the prison other than just guards or other inmates. There are visitors of course all of the time in and out of prison."

(20 RR 23)

Further, Merillat specifically referenced two Brownsville convicted murderers, Noe Beltran and Rogelio Kennedy, to show that Mr. Velez (also convicted in Brownsville) would be violent: "[Beltran and Kennedy] are convicted capital murderers from Cameron County who got to prison and killed again and after they were sent to prison from Cameron County." (20 RR 20) Merillat's testimony as to what other convicted Cameron County murderers did—with no discussion of Mr. Velez at all, or without any testimony purporting to link the actions of these two violent offenders with Mr. Velez—serves no purpose other than to unfairly equate Mr. Velez with some of the most violent offenders in Texas history, and to show that Mr. Velez would likely commit future crimes simply because Beltran and Kennedy did. This testimony goes far beyond simple testimony that prison is a violent place, and instead serves to show that capital murderers from Brownsville are especially prone to violence if not found to be a future danger.[59] Such testimony is anathema to the mandate of individualized sentencing and creates exactly the

[59] In fact, Merillat's testimony on Beltran was not only impermissible because it did not apply to Mr. Velez individually, it was also false. Merillat misrepresented that Beltran was sentenced to death, had his death sentence overturned due to lack of evidence of future dangerousness, killed again, was convicted of a subsequent capital murder, but "wasn't eligible then…for the death penalty because he'd already been reversed from that one, he got a life sentence." (20 RR 20) In fact, when Beltran was convicted for capital murder a second time, based on murder for remuneration within prison, he was originally sentenced to death. *See Beltran v. State*, No. 01-97-00105-CR, 2000 WL 356410, at *1 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (not designated for publication). The Texas Court of Criminal Appeals reversed the capital murder conviction itself (not the sentence), holding there was insufficient evidence of remuneration. *Id.* (*citing Beltran v. State*, No. 70,888 (Tex. Crim. App. Apr. 28, 1993) (not designated for publication)). Beltran was retried, convicted of murder rather than capital murder for remuneration, and sentenced to fifty years imprisonment. *Beltran v. State*, 99 S.W.3d 807, 809 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Thus, contrary to Merillat's false testimony, Beltran was not eligible for the death penalty for his second murder because he had not been convicted of capital murder.

type of "false consistency" that the Supreme Court has cautioned against. *See Eddings*, 455 U.S. at 112.[60]

In fact, after the conclusion of Merillat's testimony, the jurors knew nothing more about Mr. Velez as an individual; instead, all they knew was that he would be one of the "faceless, undifferentiated mass" of a violent prison society, that, according to Merillat, commits violent acts not only against other inmates in prison society, but also against non-inmates who come into contact with prison society. (*See* Peterson Decl. ¶ 4 [Appx 46]) ("We also heard testimony about how violent it was in prison. . . . Because the only testimony we heard was about that people can go to prison and be violent, the only logical conclusion was that we had to vote for execution")). By falsely associating Mr. Velez with violent acts of others, Merillat's testimony encouraged the jury to sentence Mr. Velez to death for the acts of others, in clear violation of his constitutional right to individualized sentencing under the Eighth and Fourteenth Amendments.

2. Merillat's testimony violated Mr. Velez's Sixth Amendment right to confront witnesses.

In addition, Merillat's testimony violated Mr. Velez's Sixth Amendment right to confront witnesses by introducing non-confronted hearsay allegations of inflammatory acts of prison violence—committed by inmates other than the defendant—for the pretextual purpose of supporting the uncontroversial opinion that the opportunity for criminal violence exists in prison. Merillat's testimony of hearsay allegations of prison violence included:

- a reference to the prison escape by the "Texas Seven" (20 RR 22);

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[60] *Cf. United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 366-67 (5th Cir. 2010) ("[T]he district court plainly erred in admitting Agent Crawford's testimony that the majority of people arrested at immigration checkpoints are couriers. This testimony implied that Gonzalez-Rodriguez was a drug courier, and therefore knew he was carrying drugs, because he was arrested at a checkpoint. Of course, Gonzalez-Rodriguez is presumed innocent until proven guilty, and it was the Government's burden to prove that Gonzalez-Rodriguez was properly in custody because he was a drug courier. The Government impermissibly put the cart before the horse.").

- "killing another inmates [*sic*][,] raping them and extorting from them, beating them and steeling [*sic*] from them" (20 RR 24);

- "156 murders inside the prison in Texas" since the SPU came into existence (20 RR 18);

- "many guard assaults, stabbings, primarily stabbings of guards by condemned capital murderers on death row" (20 RR 19);

- "gangs in prison [who] control their own people … [and] even guards" (20 RR 37).

Merillat's testimonial hearsay allegations violated Velez's constitutional rights under the Confrontation Clause of the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 59 (2004); *Russeau v. State*, 171 S.W.3d 871, 880 (Tex. Crim. App. 2005) (finding Confrontation Clause violation due to admission of non-confronted testimonial hearsay). *See also* TEX. CONST. art. I, § 10 (setting forth, *inter alia*, Texas's confrontation clause); *United States v. Mejia*, 545 F.3d 179, 199 (2d Cir. 2008) (finding violation of Confrontation Clause in law enforcement's testimony as "expert witness" to testimonial hearsay about crime). The Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54. *See* U.S. CONST. AMEND. VI, XIV; TEX. CONST. art. I, § 10; *Russeau*, 171 S.W.3d at 880. Mr. Velez never had an opportunity to confront the hearsay allegations Merillat made to demonstrate Texas prison violence; moreover, Merillat's hearsay allegations, learned in the course of his investigations (or third-hand from other investigators in his unit), are quintessentially "testimonial." *See Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements made to police officers are testimonial if not made to enable police to respond to an emergency and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

For example, in *Russeau*, 171 S.W.3d at 880, the trial court, presiding over a capital sentencing hearing, admitted jail and prison disciplinary reports containing statements which appeared to have been written by corrections officers and which purported to document, in detailed and graphic terms, numerous and repeated disciplinary offenses on the part of appellant while he was incarcerated. The court determined that, in writing the statements, the corrections officers relied upon their own observations or, in several instances, the observations of others. None of the individuals who supposedly observed appellant's disciplinary offenses testified at his trial. *Id.* Reversing the appellant's death sentence, the Court of Criminal Appeals found the reports to contain "testimonial statements which were inadmissible under the Confrontation Clause, because the State did not show that the declarants were unavailable to testify and appellant never had an opportunity to cross-examine any of them." *Id.* at 880-81. "Indeed, the statements in the reports amounted to unsworn, ex parte affidavits of government employees and were the very type of evidence the Clause was intended to prohibit." *Id.* at 881.

Merillat's hearsay allegations of prison violence are indistinguishable from the testimonial hearsay statement at issue in *Russeau*. His allegations are based on the observation of witnesses who did not testify at Mr. Velez's trial, who were not unavailable, and whom Mr. Velez never had an opportunity to cross-examine. Moreover, the hearsay allegations involved graphic acts of violence.

The rules of evidence permitting experts, in appropriate circumstances, to rely on hearsay do not permit the State to violate the Confrontation Clause. *See Crawford*, 541 U.S. at 61 (holding that the Sixth Amendment is not subject to the "vagaries of the rules of evidence"). Indeed, courts have repeatedly barred testimonial hearsay offered through the mouths of state experts. *See, e.g.*, *United States v. Crockett*, 586 F. Supp.2d 877, 888 (E.D. Mich. 2008) (citing Confrontation Clause and *Crawford* in prohibiting government expert from relying on

testimonial hearsay reports purporting to establish that cocaine expert tested was the same substance the defendant, a former police officer, had stolen from a police property room and noting that Rule 705(d) balancing test is not available to the government because *Crawford* disavowed "the idea that judicial balancing tests can substitute for cross examination"); *United States v. Taveras*, 585 F. Supp. 327, 340 (E.D.N.Y. 2008) (refusing to permit psychologist testifying to transmit to the jury, in the guise of expert testimony, testimonial hearsay whose admission would violate *Crawford*). *See also Floyd v. State*, 2007 WL 2811968, *2 (Ala. Crim. App. 2007) (assuming *Crawford* violation where ballistics expert's testimony was "mixed in terms of his own experiences with shotguns and cases involving shotguns and in terms of the findings of Joe Saloom-Saloom, who was characterized as a state firearms expert, did not testify and there is no indication in the record as to his availability"); Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & Pol'y 791, 834 (2007) ("However, in those instances when an expert's basis evidence is testimonial, cross-examining the expert cannot be deemed a constitutionally adequate substitute under *Crawford* for being able to confront whoever actually issued the testimonial statements. . . . To see why this is so, imagine the same issue outside of the expert context: it is abundantly clear that under *Crawford* the policeman who interrogates a witness cannot testify about the substance of the witness' statement in lieu of having the witness herself take the stand.").

Notably, even courts that have permitted experts to rely on testimonial hearsay have emphasized that it should not be transmitted to the jury. *United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007) ("*Crawford*, however, did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (***without repeating to the jury***) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703.") (emphasis added); *United States v. Lombardozzi*, 491 F.3d 61, 73-74 (2d Cir. 2007) ("McCabe's

reliance on out-of-court testimonial statements in forming his opinion that Lombardozzi is affiliated with organized crime may only have been permissible if McCabe applied his expertise to those statements ***but did not directly convey the substance of the statements to the jury***.") (emphasis added).

Here, not only did the trial court permit Merillat's non-confronted testimonial hearsay allegations of prison violence in violation of the Confrontation Clause, but such testimony was transmitted to the jury, who were surely affected by his lurid and graphic testimony. Thus, Merillat's testimony violated Velez's constitutional rights under the Confrontation Clause of the Sixth Amendment and the Fourteenth Amendment.

C. The Prosecution Improperly Presented Inadmissible Evidence of Prior Conduct That Did Not Result in Conviction for Felonies or Violent Acts, Including Evidence of Alleged Aliases and Tattoos.

The State attempted to show Mr. Velez presented a future danger if not executed by presenting a distorted, misleading, and highly improper description of his previous criminal record and his character. This caused unfair prejudice and confusion of the issues, and was misleading to the jury.

1. The State's review of Mr. Velez's criminal record included inadmissible references to remote and nonviolent offenses.

Mr. Velez was 40 years old in 2005 and his only conviction for a violent crime was a misdemeanor stemming from a Wisconsin bar fight 14 years earlier in 1991, "where a gentleman had attacked another man with either a baseball bat or ax handles." (20 RR 67, 46; State's Ex. 66c (listing Mr. Velez's date of birth)) Overruling defense counsel's objection, Judge Limas allowed evidence of this old conviction. (20 RR 45, Exhibit 66) This remote misdemeanor conviction—the only conviction involving a crime of violence—was a "poor indication of present character." *Ex parte Miller*, 2009 WL 344646, at *6 & n.26 (observing that remote

convictions are a "poor indication" of present character) (citation omitted). It had no "tendency" to make "more probable," TEX. R. EVID. 401, "that [Mr. Velez] would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 § 2(b)(1). Even if the 14-year-old conviction had some minimal probative value, which it did not, that value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." TEX. R. EVID. 403.

The evidence could only have misled the jury to believe that it could sentence Mr. Velez to death because of his prior criminal record rather than adherence to the special issues. The risk of the jury sentencing Mr. Velez to death based on his prior record or otherwise improperly considering this evidence was too great to permit the admission of evidence so tenuously connected to the special issues. And, because the evidence did not relate to Mr. Velez's character or the crime, its admission violated the Eighth and Fourteenth Amendments. *See Zant v. Stephens*, 462 U.S. 862, 879 (1983).

Mr. Velez's only felony offense was an even older 1984 forgery. (20 RR 88) The State also presented evidence that Mr. Velez had been convicted of misdemeanors for writing three "hot checks" (2005), evading arrest (2001), driving while impaired (1998), and criminal mischief (1988). (20 RR 46, 64, 75–84; State's Exs. 66, 69c, 70, 71, 71A, 72, 73, 74, 75) Judge Limas erred by admitting a 20-year-old criminal mischief conviction that was irrelevant and whose probative value, if any, was greatly outweighed by the danger of prejudice and jury confusion. This old conviction was for Mr. Velez having "unlawfully, intentionally, and knowingly damag[ing] and destroy[ing] a vehicle," which caused between $200 and $750 in damage. (State's Ex. 70) It is inconceivable that a misdemeanor offense of this sort could have had any "tendency to make … more probable," TEX. R. EVID. 401, "that [Mr. Velez] would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071

§ 2(b)(1). Because this testimony about a two-decades-old misdemeanor failed to relate to Mr. Velez's character or to the crime, its admission violated the Eighth Amendment, and Judge Limas erred by admitting it. *See Zant*, 462 U.S. at 879.

Finally, the State introduced testimony containing mere allegations of past criminal charges with no evidence that Mr. Velez was guilty of the charges or that he had been convicted. Judge Limas permitted the introduction, through Louise Crisman, a former deputy in the Sauk County (Wisconsin) Sheriff's Office, that she arrested him in 1991 and charged him with aggravated battery, dangerous use of a weapon, and disorderly conduct. (20 RR 55 and Ex. 66(c) (listing nonproven charges)) The State presented no evidence that Mr. Velez was guilty or convicted of any of these offenses—Mr. Velez's conviction was solely for battery (unadorned).[61] Judge Limas erred in admitting testimony about these remote, unadjudicated allegations. Even if this type of testimony had some minimal probative value, which it did not, it was introduced solely to cause unfair prejudice, confuse the issues and mislead the jury such that any probative value was "substantially outweighed." TEX. R. EVID. 403. This evidence injected into the capital sentencing process arbitrary considerations not bearing on whether Mr. Velez should be executed under the Eighth and Fourteenth Amendments or article 37.071. *Zant*, 462 U.S. at 879; *Jackson*, 608 So.2d at 954.

Furthermore, Judge Limas erroneously admitted evidence of an alleged prior crime for which the State had not provided notice. (20 RR 55–57) State's Exhibit 66 is a judgment of conviction of a Wisconsin battery committed on July 26, 1991. (State's Ex. 66) Judge Limas

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[61] Although unadjudicated prior offenses may be admissible at a capital sentencing hearing, *Gentry v. State*, 770 S.W.2d 780, 792–93 (Tex. Crim. App. 1988), cases so holding do not apply here because these charges were adjudicated and the result was that Mr. Velez was convicted *only* of battery. State's Ex. 66. *See Jackson*, 608 So.2d at 954–55 (to avoid injection of arbitrary factors into capital sentencing proceedings, "evidence of the original charge when the conviction is for a lesser offense" is prohibited). *Cf. Johnson v. Mississippi*, 486 U.S. 578 (1988) (finding admission of vacated conviction to violate the Eighth Amendment).

improperly allowed Deputy Crisman to state that Mr. Velez had initially been charged with aggravated battery, dangerous use of a weapon, and disorderly conduct. (20 RR 55) By contrast, the State alleged in its notice that Mr. Velez was convicted of a Wisconsin battery committed on July 27, 1991. (2 CR 259) The notice makes no mention of the original charges and refers to the wrong date. Consequently, the State failed to provide proper notice under Texas Rule of Evidence 404(b).[62] Judge Limas erred in admitting this evidence over the objection of defense counsel.

Judge Limas's error in admitting this evidence violated Mr. Velez's right to due process of law and violated his Eighth Amendment right to a fair and reliable capital sentencing procedure. The State's evidence of future dangerousness was, at best, incredibly thin. The erroneous admission of this "prior offense" evidence, whether considered singularly or cumulatively, could very well have made the difference between a sentence of life or death. These errors are not harmless under any standard.

Judge Limas also admitted documents that were not properly authenticated, specifically, State's Exhibits 66C and 66D. (20 RR 43, 53–54, 58–62, 65) The State introduced these exhibits, a list of minor Wisconsin offenses from 1991 to 1998 and an altered fingerprint card, through Deputy Crisman, who had been involved in the 1991 arrest of Mr. Velez. (20 RR 43, 53–54) Deputy Crisman, however, did not purport to have taken any part in creating the exhibits and did not have personal knowledge about them. Instead, she testified that she worked in the Sauk County jail and that the exhibits had come from that jail and that she was generally familiar with booking procedures and documents like them. (20 RR 58–59) This testimony, as defense

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[62] Article 37.071, Section 2 incorporates the notice requirements of Article 37.07(3)(g), which in turn incorporates the notice requirements of Rule 404(b). *See also Gentry*, 770 S.W.2d at 792–93 (requiring notice of unadjudicated offenses as prerequisite to admission).

counsel argued, was clearly insufficient to authenticate these documents, and Deputy Crisman was not a competent witness to introduce such exhibits.

As a threshold matter, the State failed to establish the documents as business records under Texas Rule of Evidence 803(6). There was no testimony that (a) the documents reflected observations "made at or near the time by, or from information transmitted by, a person with knowledge," (b) that the documents were "kept in the course of regularly conducted business activity," and (c) that "it was the regular practice to make" these records. TEX. R. EVID. 803(6); *see also* TEX. R. EVID. 902(10)(a) (incorporating requirement of Rule 803(6) for document authentication). The State also failed to establish "evidence sufficient to support a finding" that the documents were what the State claimed them to be. TEX. R. EVID. 901(a). Deputy Crisman, the only witness asked about these documents, testified that she had never seen them and took no part in creating them.[63] Exhibit 66D, the fingerprint card, appears to have been altered—the name was changed from Angler to Velez by some unidentified person at some unknown time. Because Deputy Crisman was not able to authenticate the card or the altered portion of the card, it was not admissible and Judge Limas clearly erred by admitting it. Finally, the nonconfronted testimonial hearsay assertions in these documents were inadmissible under the Confrontation Clause of the Sixth Amendment. *See Melendez-Dias*, 129 S. Ct. at 2532 (applying *Crawford*, 541 U.S. at 54); *see also Smith v. State*, 297 S.W.3d 260, 276 (Tex. Crim. App. 2009) (finding

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[63] *See Ronk v. Parking Concepts of Texas, Inc*., 711 S.W.2d 409, 416 (Tex. App.—Fort Worth 1986, *pet ref'd*) (finding police documents inadmissible because sponsoring witness testified the documents "appear to be copies that are on file in our division, but I have not seen them before" and stated he "could not testify that the documents in this exhibit are true and accurate copies of documents on file in the Fort Worth Police Department"); *Hope v. State*, No. 05-91-245-CR, 1991 WL 290548, at *2 (Tex. App.—Dallas Dec. 19, 1991, *pet ref'd*) (not designated for publication) (finding error in admission of jail record because State failed to show that it was "made by a person with knowledge of the facts or events recorded").

admission of non-confronted testimonial hearsay in jail record to violate Confrontation Clause), *cert. denied*, 130 S. Ct. 1689 (2010).

Admission of these documents also violated Texas law and the Eighth and Fourteenth Amendments. The State's evidence of future dangerousness was, at best, paper thin. The erroneous admission of these documents, whether considered singularly or cumulatively, could very well have made the difference between a sentence of life or death. These errors are not harmless under any standard.

2. The State improperly presented evidence of "aliases" allegedly used by Mr. Velez.

The State also claimed that Mr. Velez had used aliases and fake dates of birth (20 RR 86), although the only evidence offered was State's Exhibits 66C and 66D and the testimony of Deputy Crisman and Luis Carlos de Leon, an investigator for the Cameron County District Attorney's Office. State's Exhibit 66C lists "aliases," but neither the admitted document nor the testimony of Deputy Crisman or Mr. de Leon explain where or how the "aliases" were allegedly used by Mr. Velez. Further, Deputy Crisman was unable to explain why in State's Exhibit 66D the fingerprint card read "Joe Angler" in three places; but was crossed out twice. (20 RR 66) Not only did Deputy Crisman admit that she had no personal knowledge about whether or not Mr. Velez used any aliases (20 RR 66), no one with any personal knowledge testified as to any improper use of these "aliases." Indeed, "Meme" is a nickname that Mr. Velez was often called by friends and family.

The witnesses testified that an alias may be used as an attempt to avoid identification (20 RR 84–85), though no testimony was offered that Mr. Velez had ever actually used any of these names in an attempt to avoid identification or otherwise. Nor was there any evidence that Mr. Velez had ever used "alias" dates of birth or social security numbers, but Mr. de Leon

nevertheless was allowed to testify that his "research" indicated various "alias" dates of birth and multiple social security numbers, which he said a person would use to "avoid detection or identification." (20 RR 84–87) In fact, nothing in the Wisconsin or Texas records indicates Mr. Velez used false dates of birth or Social Security numbers. The State had no legitimate reason to introduce testimony about the use of aliases. Although the State represented that it was offering the testimony to tie the aliases into some of the convictions (20 RR 85), it never attempted to do so. Instead, the alias testimony served no purpose other than to unfairly and improperly prejudice the jury.

Judge Limas violated Mr. Velez's rights under Texas law and the Eighth and Fourteenth Amendments when he admitted prejudicial evidence that Mr. Velez had previously used an alias numerous times, and that "people" use aliases to "avoid detection or identification." (20 RR 84–87) Testimony about aliases had nothing to do with the special issues before the jury. That Mr. Velez may or may not have used an alias has absolutely no "tendency to make . . . more probable," TEX. R. EVID. 401, "that [Mr. Velez] would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 § 2(b)(1). Judge Limas erred by admitting this alias evidence that injected an arbitrary factor into the punishment phase of Mr. Velez's trial. *State v. Jackson*, 608 So.2d 949, 954-55 (La. 1992).

3. The State improperly presented testimony about Mr. Velez's tattoos.

The State similarly introduced prejudicial testimony describing tattoos on Mr. Velez. Over defense counsel's objection, Judge Limas admitted inflammatory evidence during the punishment phase that Mr. Velez had what was described as a "low rider tattoo," which depicted a "playboy bunny" atop a human form along with another tattoo that said, "El Meme." (20 RR 91–92) Despite the State's representation that it wanted to introduce evidence of the tattoos to link Mr. Velez to past crimes, the State made no effort to do so, and the tattoos had no

connection to any past crime. (20 RR 90–92) It is clear from the record that Mr. de Leon had no issue identifying Mr. Velez or connecting him to the misdemeanor convictions about which he testified. Nor were the tattoos connected to the special issues or to Mr. Velez's character or to the nature of the crime. *See Conner v. State*, 67 S.W.3d 192-201 (Tex. Crim. App. 2001); *Robles v. State*, AP-74726, 2006 WL 1096971, at **7–8 (Tex. Crim. App. April 26, 2006) (not designated for publication) (admission of tattoo at capital sentencing trial was error where there was no connection or nexus between the type of tattoo and the nature of the crime or the motive behind the crime).

The State introduced Mr. de Leon's testimony about tattoos merely as a way to prejudice the jury by giving Mr. de Leon an opportunity to describe a tattoo on Mr. Velez of a playboy bunny. (20 RR 91) Not satisfied with just that description, the State went on to ask Mr. de Leon to further describe the tattoo—"it looks like a human form but with the head of a rabbit on it. It's almost a low rider tattoo." (20 RR 92) If there were any doubt of the State's motivation to prejudice the jury, one just has to look at the next question after painting Mr. Velez as a low rider or playboy:

Q. "Sir, based on your field work is battery a crime of violence?"

A. "Yes, sir."

(*Id*.) Absent any tie to an attempt to identify Mr. Velez, the State's gratuitous questions about Mr. Velez's tattoos immediately followed by a question about a crime of violence, could only have been intended to unfairly prejudice the jury against Mr. Velez. The tattoo evidence was unfairly prejudicial and served only to inflame the jury by suggesting Mr. Velez was a "playboy" or "low rider." Judge Limas violated Texas law and the Eighth and Fourteenth Amendments by admitting testimony about Mr. Velez's tattoos.

D. The State Improperly Questioned Leticia Velez Concerning Details Of An Incident That Did Not Occur.

The defense called Leticia Velez, Manuel's sister, as a character and mitigation witness. (20 RR 94) During cross-examination, the State asked Leticia if she remembered a violent incident from 1993 between Manuel and his mother: *"You don't remember witnessing Manuel Velez pulling your mother out of a truck and dragging her on the ground?"* (20 RR 106) (emphasis added) The State went on to assert in the guise of another question to Leticia that, according to the police, she had witnessed this purported incident. (*Id.*) Leticia responded that she had never seen anything of the sort. (*Id*.) The State concluded this questioning by noting that Leticia wasn't denying that the incident had occurred, which, of course, would be impossible for her to do. (20 RR 107)

Such "have you heard" questions propounded to character witnesses at the punishment phase of a trial may be asked only if "the prosecutor had a 'good faith belief that the act actually occurred.'" *Starvaggi v. State*, 593 S.W.2d 323328 (Tex. Crim. App. 1979) (en banc) (quoting *Brown v. State*, 477 S.W.2d 617, 620 (Tex. Crim. App. 1972)). Therefore, in order to ask Leticia these questions, the prosecutor must have had a good faith belief that Mr. Velez had actually pulled his mother from a truck and dragged her across the ground.

The State appears to have been relying on an "Offense/Incident" report dated May 2, 1993, which was contained in the DA's files but not shared with the jury. (5/2/93 Offense Incident Report [Appx 84]) The report includes the following: "On arrival this officer contacted victim, Consuelo Velez. She stated that [Manuel Velez] had <u>*threatened*</u> to 'drag' her out of her residence by force and take her to Mexico." There is no mention of actual violence in the report, and certainly no basis for the State's claim that Mr. Velez had pulled his mother from a truck and dragged her on the ground.

Thus, the State did not have a good faith basis for this line of questions. And the baseless accusation made through the State's questions had its intended effect of causing the jurors to wrongly believe that Mr. Velez had a history of violence, as shown by the Declaration of Juror Frank Steven Peterson [Appx 46]:

> In the penalty phase, after finding Mr. Velez guilty, I would have liked to have heard more evidence of violence in his past. The prosecutor did ask a witness questions about a violent incident between Mr. Velez and his mother, but I would have liked to have heard more testimony of the facts of that incident.

Of course, "the facts of that incident" are that it never happened. The State's questioning Leticia Velez about a contrived dragging incident without a good faith basis that the incident ever actually occurred constitutes prosecutorial misconduct, violates Mr. Velez's rights under the Eighth and Fourteenth Amendments, and mandates reversal of Mr. Velez's death sentence.

E. The State Violated Velez's Constitutional Rights By Referencing Velez's Decision Not To Testify.

The only proper subjects for the prosecution's closing argument are: (1) a summation of the evidence; (2) a reasonable deduction from the evidence; (3) a response to an opponent's argument; or (4) a plea for law enforcement. *Gomez v. State*, 704 S.W.2d 770, 771 (Tex. Crim. App. 1985); *see also Harris v. Crockrell*, 313 F.3d 238, 245 (5th Cir. 2002) (noting habeas relief is appropriate when the prosecutor's improper remarks are so prejudicial that they render the trial fundamentally unfair).

In the guilt/innocence phase of trial, one of the prosecutors, Gabriella Garcia, impermissibly referenced Velez's right to remain silent when she pointedly referred to something "the defendant didn't want to talk about in his statement." (18 RR 107) Similarly, another prosecutor, Mr. Saenz, expressed his disgust with Mr. Velez's decision not to testify: "You know, we have talked about consistently and repeatedly about the defendant's right to this and

the defendant's right to that. I'm sick and tired of that. How about talking about baby Angel's right. How about talking about baby Angel's right to live, to be happy, to grow up." (18 RR 141) He again referenced Mr. Velez's silence in his summation during the punishment phase, telling the jury:

> And just like he had his opportunities to comply with probation and parole, he said the hell with it. I don't care. I'm Manuel Velez. Big guy that he is, huh? **Big guy that he is and yet he . . . brings his child to speak on his behalf. The epitome of a coward.**
>
> . . . .
>
> **To bring a 10 year old to speak for him**.

(20 RR 155–56) (emphasis added).

The "Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids [] comment by the prosecution on the accused's silence. . . ." *Gongora v. Quarterman*, 2008 U.S. App. LEXIS 22164 (5th Cir. 2008) (citing *Griffin v. California*, 380 U.S. 609 (1965) (emphasis omitted)); *see also Newtown v. Quarterman*, 272 Fed. Appx. 324, 329 (5th Cir. 2008) ("Comments by a prosecutor on a defendant's exercising his Fifth Amendment right not to testify are, of course, constitutionally impermissible."). Here, the State's multiple comments on Mr. Velez's exercise of his constitutional right cannot be considered harmless "where an inference of guilt from silence is stressed to the jury as a basis for conviction." *Anderson v. Nelson*, 390 U.S. 523, 524 (1968). The State's statements regarding Mr. Velez's exercise of his constitutional right are laden with the inference of guilt. The State, when discussing Mr. Velez's statement, implied to the jury that Mr. Velez "refused" to tell them what happened to Angel, and therefore, Mr. Velez must be guilty of capital murder. Such an inference by the State is constitutionally improper and

caused a "substantial and injurious effect of influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) citation omitted).

F. The Prosecution's Pattern Of Misconduct Infected The Integrity Of The Penalty Phase And Had An Injurious Influence On The Jury.

The State's misconduct in the punishment phase of Velez's trial was rampant: the State sponsored false, highly misleading, and unconstitutional testimony from its one expert witness, A.P. Merillat, to show that (violent and nonviolent) crimes can occur in prison; the State relied on remote, non-convicted acts, including irrelevant testimony concerning tattoos and aliases, to support a finding of future dangerousness; through cross-examination of a defense witness, the State told the jury of a violent, non-convicted, dragging incident allegedly occurring between Mr. Velez and his mother that it did not have a good faith basis to believe occurred, and in fact was contrary to the police report in its possession; and the State infringed on Mr. Velez's right not to testify by calling him a "coward" for having his young son testify on his behalf.

Accordingly, the State's misconduct was "of sufficient significance to result in the denial of the defendant's right to a fair trial," in violation of the Fourteenth Amendment. *Greer v. Miller*, 483 U.S. 756, 765 (1987) (internal quotation marks omitted); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Indeed, the State's actions constitute deliberate and egregious errors, in combination with a pattern of prosecutorial misconduct that infected the integrity of Mr. Velez's trial, and warrants habeas relief. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993).

G. Ineffective Assistance of Counsel Permitted the State to Present False and Highly Prejudicial Evidence and Argument to Attempt to Prove that Mr. Velez Posed a Future Danger to Society.

As in the culpability phase, Villarreal's conduct in the punishment phase of trial was grossly inadequate. If anything, his performance deteriorated into incoherence. Instead of arguing with abundant evidentiary support that Mr. Velez was a loving father and husband, with no history of abusing children, and in fact, a track record of caring deeply for his own children and the children of others, who was raised in a single-parent home with extreme poverty and minimal education, Villarreal failed to provide one reason why Mr. Velez should be spared from the death penalty. He instead focused on his own suffering and his own integrity, agreed with the prosecution that prison was a place without rules, and made rambling, incoherent statements presumably to convince an already death qualified jury that the death penalty was generally not an appropriate punishment for the State to pursue. As one of the jurors put it, "I don't think defense counsel made a clear argument as to why Mr. Velez should not be sentenced to death based on the evidence that was presented or how the evidence that was presented related to the specific questions we were asked to answer." (Johnson Decl. ¶ 10 [Appx 44]).

Villarreal's opening statement, which included no references to specific facts to be proved to assist the jury in answering the two questions at issue, foretold of his performance throughout the punishment phase, and constituted a failure to provide meaningful assistance that falls far below the competency required by the Sixth and Fourteenth Amendments. He then failed to effectively prohibit or otherwise object to numerous judicial and prosecutorial errors, and failed to properly cross examine the State's witnesses. Indeed, he exacerbated the harm by eliciting testimony from the State's one expert, Merillat, offering justification for executing Mr. Velez.

The performance of Mr. Velez's counsel during the punishment phase of his trial fell far below the competency required by the Sixth and Fourteenth Amendments, and violated Mr. Velez's constitutional right to effective assistance of counsel. Danalynn Recer, an attorney and expert experienced in the defense of capital cases in Texas who also has considerable experience as a mitigation specialist and defense investigator, has reviewed the transcript of the punishment phase of the trial and other material described in her attached Affidavit [Appx 13]). It is her carefully explained expert opinion "that Mr. Velez did not receive effective assistance of counsel as guaranteed by the Sixth Amendment, due the acts and omissions of counsel described" in her Affidavit. (¶ 15 at p. 10). Ms. Recer's Affidavit describes those acts and omissions in detail, with extensive evidentiary and legal support.

Trial counsel's errors most directly bearing on Special Issue No. 1 are discussed in the remainder of this Section II immediately following, and then those errors relating to Special Issue No. 2 (mitigating circumstances) will be addressed in Section III below.

1. Villarreal failed to object to improper comments during the State's opening statement.

Villarreal failed to object to improper, non-record based, statements by the prosecutor as to why the State was seeking a death sentence. These statements merely constitute the opinions of the prosecutor, and are not proper in an opening statement. *United States v. Herberman*, 583 F.2d 222, 229 (5th Cir. 1978) ("[A]n attorney may not express his personal opinion concerning the merits of the case.").

Here, the prosecutor injected his opinion as to the purported uniqueness of this case, compared to other crimes the State prosecutes, and implied that the State rarely seeks the death penalty:

> Not ordinary [sic] do we see children treated in this manner. It's been difficult because of what we're asking you, the jury, to do

> which is impose death. It's not a decision taken very lightly. It's not one that we do very often.

(20 RR 8:4-8)

This statement improperly implies at least two facts on which no evidence was presented: the uniqueness of the crime, and how often the State seeks a death sentence. By injecting his personal opinion as to how this case compares to others he claimed to have seen and prosecuted, the prosecutor invited the jury to consider facts outside of the trial. The harm is particularly clear where, as here, the argument (1) concerns highly prejudicial opinions as to the death of a child, and (2) contains misleading characterizations as to the crime at issue by asserting that Mr. Velez had harmed multiple children.

Villarreal also failed to object to highly prejudicial statements concerning what the State contended it had proved during the guilt/innocence phase of the trial. The State argued that the evidence of abuse, including "the fractures to the skull, cigarette burns on the feet and buttocks, the skin tear, the blunt force trauma," warranted the death penalty. (20 RR 8:18–22) As explained in Section II(c)(6), *supra*, at 149, the evidence presented at trial did not connect Mr. Velez to any of this abuse, and instead merely established that Mr. Velez was present in the house when Angel became non-responsive on October 31, 2005. Only by highly circumstantial testimony (and no physical evidence), if at all, did the prosecution show that he had injured the child. Indeed, other testimony attributed the burn mark on Angel's foot to Acela Moreno, the child's mother. Mr. Velez's statement to police represented the only evidence presented at trial as to who was responsible for other injuries to the child, and that evidence pointed to Moreno; and there was no evidence of any "cigarette burns on the … buttocks." Villarreal's failure to object to the State's mischaracterization of the proof allowed the jury to believe that the State

had in fact established that Mr. Velez caused these injuries, and necessarily influenced the jury's ultimate punishment decision.

2. Villarreal's opening statement was incoherent and wholly ineffective.

Villarreal made himself the central focus of his opening statement, instead of disputing the false claims of the prosecution in its opening statement and attempting to persuade the jury that his client's life should be spared:

> I've been living this case for quite sometime [*sic*]. Capital murder trial lawyers are few and far between and they take chunks out of us. You know, we live them, we sleep them, we give up families, we give up a lot to do what we do. We don't sleep nights. We worry.… We put on front [*sic*] at times that doesn't mean that we don't cry but it's like I have told you, my young associate who has been with me off and on for eight years, nine years, we don't lose the right to feel. We lose the right to show our feelings.
>
> . . . .
>
> And you're going to hear a little bit of questioning on my part. Not much. I haven't lied to you yet. I'm not going to start now. A lawyer has two things to sell; his time and his word. I have given you my word and I firmly believe that I've complied with it. My time is not relevant. I will do whatever it takes. If it takes 15, 17, 20 years. This case will be fought. I'm not suggesting to you that we are above it all. You all are above it and I'm going to ask you to think about the effects of what you're being asked to do. They're going to be asking you to kill that man. I'm asking you not to. So do what you want.

(20 RR 10:11–25, 12:11–24)

Inexplicably, Villarreal also told the jury that he would not present evidence concerning the unique restrictions in prison on capital murderers, and instead stated that he agreed with the only expert testimony that the State intended to present: "I want you to listen to their expert on the prison system. That's a whole different culture. In the prison system there's only one rule; there are no rules." (20 RR 11:7–10) As explained in Section II(A) above, the State's expert testifying about prison conditions and classification, A.P. Merillat, testified falsely as to the

restrictions that would be applicable to Mr. Velez as an inmate convicted of capital murder. Instead of preparing the jury to discount or question Merillat's testimony, Villarreal essentially instructed the jury to accept it.

Rather than identifying mitigating facts concerning Mr. Velez specifically, in an incoherent rambling statement invoking Matt Dillon and a "little old lady," Villarreal appeared to attempt to prepare the jury to consider evidence against the death penalty generally:

> I've always—and I've constantly continuously said we cannot change the past, but we can affect the future and killing someone may not be the right solution because that will be the ultimate result of what you all decide. No matter how much you think that person needs to—this is not Matt Dillon times. The little old lady to begin—the old lady at the beginning and she runs out and bangs him on the chest and says you killed my son, you murdered him. And he looks down at her and says, ma'am, I never killed anybody that didn't need killing. The question then becomes do we need killing to show that we are a civilized society?

(20 RR 11:13–12:1)

This strategy—assuming Villarreal gave any thought to his opening statement before he spoke—was almost certain to fail. The jury members had already been questioned concerning their belief in the death penalty as a proper punishment and their ability to follow the law as the Court instructed. Each juror had been approved to sit on a death penalty jury, and each had agreed that she or he could impose a death sentence if the law and facts required. Therefore, Villarreal's argument appearing to request that they change their views on the death penalty as a whole, instead of as it applied to Mr. Velez under the unique facts of his life and this case, cannot reflect a sound trial strategy.

Villarreal's complete failure to address facts relevant to the two special issues to be determined by the jury, and instead focus his argument on irrelevant, and at times bewildering, issues, cannot be rationalized. In fact, Villarreal's only reference to the special issues at hand

was in a sentence that has no coherent meaning or purpose: "Maybe the prison system is effective, maybe not for rehabilitation, maybe not as deterrence, but maybe it can educate us as to how it does affect an inmate and you do have those two special issues." (20 RR 12:8–11) By completely failing to give the jury Mr. Velez's side of the future dangerousness and mitigation issues, trial counsel's performance fell below the acceptable standard and caused Mr. Velez to have a constitutionally deficient punishment phase trial under the Sixth and Fourteenth Amendments.

3. Villarreal did not object to improper testimony by A.P. Merillat.

Villarreal never made the argument, or presented evidence, that prison is so restrictive that Mr. Velez would not pose a danger to others if sentenced to life without parole. Nevertheless, the State presented the testimony of A.P. Merillat to establish that Mr. Velez could commit violent acts, and thus could pose a danger to society, if so sentenced. Failing to object to Merillat testifying at all constitutes ineffective assistance of counsel under the Sixth and Fourteenth Amendments because the testimony constituted improper rebuttal testimony, was not relevant to any contested issue, and thus could not assist the jury in reaching its verdict.

Merillat's testimony was inappropriate in the State's case-in-chief because it is only admissible, if at all, as rebuttal testimony after the defendant asserts that he could not pose a danger due to the nature of his confinement. In addition, Merillat has admitted that he is used by the State to "rebut[] defense testimony and theories that if a capital murderer is given a life sentence, the restrictions placed upon him would make it nearly impossible for him to continue a course of violence after arriving at prison." (A.P. Merillat, *Texas Bar Journal*, "The Question of Future Dangerousness of Capital Defendants," Sept. 2006 [Appx 107]) Merillat confirmed that he is a rebuttal expert in his testimony in the *Quintero* and *Chanthakoummane* cases, where the State argued for Merillat's testimony as a rebuttal witness (*Quintero* Transcript at 69 [Appx

111]; *Chanthakoummane* Transcript at 55 [Appx 112]: "If I'm not here as rebuttal, I don't know why I'm here.").

Mr. Velez never opened the door to Merillat's testimony because he never said that offenders could not be violent in prison, or that capital murderers never commit crimes once incarcerated. The issue of classification might have been considered within the proper scope of rebuttal, were the defense to challenge the system. Moreover, Merillat proved himself unqualified to do so. As discussed in Section II(A) above, Merillat presented, and the State allowed, false and highly misleading information that a so-called "expert" on classification should have known. Merillat's testimony on classification did not rebut; instead, it provided the jury with erroneous information.

Moreover, defense counsel should have objected to Merillat's testimony as irrelevant. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. Even if relevant, expert testimony must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. TEX. R. EVID. 403; *Holloway*, 613 S.W.2d at 502 (applying rule to expert testimony). Merillat's hyperbolic accounts of violent incidents in the Texas prison system shed no light on the likelihood that Mr. Velez himself would present a continuing threat to society. Merillat admitted that he was not qualified to testify about how Mr. Velez would act in prison. (20 RR 34) He also admitted that he could not say whether Mr. Velez would be violent in prison. (20 RR 35)

Merillat emphasized his, or anyone's, inability to predict future dangerousness in his article for the Texas Bar Journal: "[T]he Texas prison system is a place where the opportunities to be violent are presented to any inmate, regardless of the sentence or type of conviction he or she has received." (*Texas Bar Journal* (Sept. 2006) [Appx 107]) Merillat continued, stating that

"[p]rison inmates have abundant opportunities to commit criminal acts, including acts of violence. . . . Whether or not a convicted killer will avail himself of the opportunities cannot be stated to 100 percent accuracy; neither can the prediction that he will never be violent in the future be so stated." (*Id*.)

Yet this is exactly what the State uses Merillat to attempt to prove. Just as the mere fact that a capital offense was committed is by itself insufficient to prove future dangerousness, *see Dinkins v. State*, 894 S.W.2d 330, 358 (Tex. Crim. App. 1995), Merillat's own admissions call into question the relevance of his testimony, as the mere opportunity to commit crimes does not prove future dangerousness. If the purpose of Merillat's testimony was to prove there are opportunities for prison violence at any level of classification, including the most restrictive setting on death row, then it bears no probative value to whether Mr. Velez would present a future danger. Merillat's generalized testimony that violence can and does happen anywhere within the prison system provided no information to assist the jury in determining whether Mr. Velez, as opposed to prisoners generally, poses a threat of future danger.

Merillat's testimony served only to associate Mr. Velez with the most violent, antisocial offenders in the entire Texas prison system over the last few decades, many of whom had extensive criminal records prior to their arrest on capital murder charges, gang affiliations, and had committed murder against multiple victims, and as such would fall into higher risk categories for future violence than Mr. Velez. Moreover, Merillat further linked these notorious murderers to Mr. Velez by testifying that two convicted capital murderers, Noe Beltran and Rogelio Kennedy, were, like Mr. Velez, from Cameron County. (20 RR 20:2–12) Merillat testified that they were not given the death penalty, and thus were allowed to murder again in the general prison population. (20 RR 20–21) Merillat's testimony concerning the alleged actions of Noe Beltran was particularly prejudicial and confusing:

> Beltran, Noe Beltran first got a death sentence from Cameron County and his sentence was commuted by the appellate court from the future dangerousness issue is what we are talking about now. And so he got a life sentence after his death sentence, that's when he killed the other inmate so he was in fact a future danger. And he wasn't eligible then death for the death penalty because he'd already been reversed from that one, he got a life sentence.

(20 RR 20:14–23)

Merillat and the State obviously were attempting to frighten the jury into returning a death sentence for Mr. Velez by comparing him to another convicted capital murderer from Cameron County. But Merillat did not tell the jury that Beltran's original crime occurred in 1981. *Beltran v. State*, 728 S.W.2d 382, 384 (Tex. Crim. App. 1987) (*en banc*). In 1987, the Court of Criminal Appeals reformed the trial court's death sentence to life, after finding insufficient evidence supporting the jury's finding of future dangerousness. In 1989, Beltran was convicted of capital murder for remuneration for the killing of another inmate in prison. The Court of Criminal Appeals reversed that conviction, finding insufficient evidence of remuneration. *See Beltran v. State*, 99 S.W.3d 807, 809 (Tex. Crim. App. 2003). After the Court of Criminal Appeals reversed the capital murder for remuneration conviction, the State re-indicted Beltran for murder. He was again convicted, and sentenced to 50 years in prison. *Id.* Contrary to Merillat's testimony, the reversal of the first death sentence had nothing to do with whether Beltran was "eligible" for a death sentence for his second conviction.

In addition, a crime in prison that occurred prior to 1988 is wholly irrelevant to Merillat's purported expert opinion—that the current prison classification system allows for violence in prison. Villarreal should have objected to this testimony as irrelevant, remote, and highly prejudicial, and in violation of the Texas Rules of Evidence and the United States Constitution.

Likewise, Merillat's testimony concerning the crimes of Rogelio Kennedy was improper. Merillat appears to have specifically researched convicted capital murderers from Cameron

County who committed further violent acts in prison in order to present the jury with the most prejudicial and unfair testimony possible. Merillat's clear implication to the jury, without ever meeting Mr. Velez and admittedly being unable to predict his future conduct, was that if they did not return a death verdict, Mr. Velez would kill in prison because two others from Cameron County had done so.

As a result, Mr. Velez was sentenced to death based on the acts of others and the location of his birth in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Under the shield of expertise, the State was allowed to present this otherwise inadmissible hearsay evidence. By associating Mr. Velez with the violent acts of others, Merillat's testimony violated the foundational principles of the modern death penalty scheme that mandate individualized sentencing determinations and heightened reliability. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976).

Merillat also testified concerning violence and other crimes allegedly committed by inmates on death row. (20 RR 19–20) These claimed acts were particularly irrelevant, as they offer no probative weight to the jury's determination of Mr. Velez's future dangerousness. The jury needed only to evaluate whether Mr. Velez would be a continuing threat in prison society outside of death row, not whether he will be a continuing threat on death row. If an inmate is housed on death row, a jury has already decided that he was a continuing threat to society, so one would expect to see violence there. The fact that the prison system does not witness rampant violence on death row means that either the jury got it wrong for those defendants, or the prison system can handle their risk level and has adjusted their restrictions appropriately. In this respect, Merillat's claims were circular and self-serving: he posited that inmates pose a threat of future danger—and therefore should be sent to death row—because death row is a violent place, where there are opportunities for inmates to commit violent acts. This testimony could not

logically assist the jury in answering Special Issue No. 1, and trial counsel's failure to object deprived Mr. Velez of a constitutionally sound punishment trial.

Even more tenuous than Merillat's testimony concerning death row inmates is Merillat's testimony concerning non-inmate crimes. Merillat testified that his office has prosecuted guards, wardens, and civilians for alleged crimes inside the penitentiary. (20 RR 21) It is unclear how the acts of non-inmates, who are not subject to the restrictions of convicted capital murderers, can possibly be relevant to whether Mr. Velez would pose a future danger in prison. As Merillat testified, "inside the penitentiary, guards or inmates or civilian employees can commit crimes just like they can in the free world." (20 RR 21–22) This unremarkable point bears no relevance to whether Mr. Velez constitutes a threat of future dangerousness to society, and trial counsel was ineffective in not objecting to it as irrelevant and highly prejudicial.

Moreover, defense counsel should have objected to Merillat's use of unconfirmed statistics, as well as his testimony concerning alleged "prosecutions" instead of actual convictions. On multiple occasions, Merillat rattled off supposed statistics concerning the number of "prosecutions" conducted by the Special Prosecution Unit, including prosecutions for violent felonies (20 RR 19), contraband cell phones, and drug cases, prosecution of "hundreds" of guards, and even the alleged prosecution of five wardens (20 RR 21). The Rules of Evidence do not permit the impeachment of witnesses with non-convicted acts. TEX. R. EVID. 609. Merillat never testified whether these "prosecutions" led to actual convictions. By failing to object to this testimony, trial counsel allowed the State to effectively impeach Mr. Velez through the non-convicted bad acts of others. Not only did this testimony deprive Mr. Velez of a constitutionally mandated individualized sentence, but it also violated the Texas Rules of Evidence.

Furthermore, effective cross-examination would have shown that Merillat's testimony was not based on official records of the Special Prosecution Unit. Merillat, for example, testified that they have prosecuted 94 convicted capital murderers for violent felony crimes in the last four years. (20 RR 19)[64] The cross-examination in the *Quintero* case demonstrates that effective counsel show that the "data" upon which Merillat relies is highly suspect. There, Merillat testified that he keeps track of alleged crimes that the Special Prosecution Unit investigates. (*Quintero* Tr. at 71:9–23 [Appx 111]) Not all of these cases are tried. Indeed, not all of these cases are even brought to a grand jury. And, Merillat does not follow all the cases to see if they result in convictions. Therefore, the statistics Merillat tells the juries are the true "facts" about crime in prison are in reality just whether someone has been accused of a crime. (*Id*. at 72:2–9) Also in *Quintero,* Merillat admitted that he only keeps track of alleged murders. (*Id*. at 75:24–76:1) And, by keeping track of this information, Merillat was referring to a list that he keeps based on information that comes into his office. Therefore, although Merillat testified that he does not keep a list of alleged violent crimes or felonies, he purports to know that they have prosecuted 94 capital murderers for violent felonies in the last four years. (*Id*. at 77:1–3: "Q: You don't keep a list of other violent crimes or felonies? A: No ma'am.") This testimony is highly suspect.

Mr. Velez's trial counsel could have obtained the same information, and should have cross-examined Merillat on the complete data, and shown that the numbers Merillat testifies to

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[64] *But see State v. Quintero*, Harris Co. Case 1085704, Merillat Test., Pretrial Mot. Hr'g Tr. 1: 61:9–13, March 12, 2008 [Appx 111] (Merillat testifying that "from 2003 to 2006, there were 82 convicted capital murderers who were doing life sentences that were prosecuted by our office for committing felonies after they got to the penitentiary"). Merillat's testimony also differs on the number of cases the Special Prosecution Unit has prosecuted. In *Chanthakoummane*, Merillat testified that it was about 15,000 (*Chanthakoummane* Tr. at 66:22 [Appx 112]), but five months later in *Quintero,* Merillat stated that they had prosecuted "over 20,000 cases." (*Quintero* Tr. at 77:1–3 [Appx 111])

actually represent a very small percentage of crime, given the population. Without any effective cross-examination, Merillat was able to distort the level of violence committed by capital murderers serving life sentences to the jury, to the great prejudice of Mr. Velez.

Merillat did not present the highly specialized knowledge contemplated under TEX. R. EVID. 702 or 705 for expert testimony. Instead, he reported dubious and misleading facts regarding isolated incidents in Texas prisons and erroneous information regarding the classification system. Hearing Merillat's ominous stories of prison violence without context served to inflame the jury, not educate them.

4. Villarreal failed to conduct a reasonable cross examination of A.P. Merillat.

Instead of minimizing the impact of Merillat's testimony, or correcting the many false and highly misleading facts asserted by Merillat, Villarreal invited Merillat to provide the jury a reason to execute Mr. Velez:

> Q. Can you give this jury one logical reason for execution?
>
> A. That's out of my purview, but if I'm allowed to say I'll be glad to.
>
> Q. I'm asking the question. You can answer it if you want.
>
> A. Yes, sir. Thank you. If a man, if a man chooses to commit a violent, heinous, cold blooded act against an innocent human being, and I know very little about this case, but I know I wouldn't be here if it wasn't capital murder, and I know that you folks based upon his decision because not because it's some kind of accident, if he has made a choice to commit a heinous violent, a cold blooded killing against an innocent individual, he deserves to pay for that crime. There's how I believe. I'm convinced and I believe I'm correct and I'm a Christian man and I believe that is God's precept that he could have chosen not to do that. He could have chosen to do it. Obviously, he chose to do it.…

(20 RR 37:25–38:19)

Even though Merillat knew "very little" about Mr. Velez's case, and previously testified that he could not give an opinion on whether Mr. Velez would pose a future danger in prison, Villarreal again invited Merillat to advocate for Mr. Velez's execution:

> Q. Then why does the state of Texas kill?
>
> A. They do it based upon legislatures that have determined. They are our representatives and they have determined the public in the state of Texas, the taxpayers who comprise this state's population have let their legislatures know that we believe is proper. Under the guidelines of Constitutionality and the law and the laws of evidence, courtroom procedures, that is legitimate to take the life of someone who has committed murder in certain parameters. When you all were selected as a jury they told you what was capital murder not just shooting someone is capital murder. There are certain things that make it capital murder and our government has decided in Texas that that deserves the ultimate punishment. And I remind you it takes a majority I mean, it takes a unanimous verdict for you folks to find him guilty. It takes a unanimous verdict of you folks to let the death penalty follow. This takes all these appeals processes. He is not going to be executed next Thursday. There is going to be years of appeals, people looking at this trial, looking as what I've said and seeing that he's been given area [sic] fair shake. It's not like you just decide let's kill that guy because he doesn't look good. It's the factors that he brought here. His actions made us come here and made me come here, made you guys come here.

(20 RR 40:14–41:16)

Villarreal did nothing to attempt to neutralize Merillat's explanation for executing Mr. Velez. Indeed, this testimony that Villarreal elicited was so harmful to Mr. Velez that the State used it in the State's closing: "I think AP Marilock [*sic*] said it best. . . . But my point in saying that . . . he's the one that put us here. We're here because of Manuel Velez. He's the one that made the choices." (20 RR 153:7–18) There can be no plausible professional reason that a competent defense counsel would have for allowing the State's expert to advocate for administering the death penalty.

Indeed, Villarreal's conduct rises to the level of ineffective assistance that is objectively below the competency level required by the Sixth and Fourteenth Amendments. Texas law does

not allow parties to make general arguments for or against the sentence of death. *See Rogers v. State*, 774 S.W.2d 247, 256–57 (Tex. Crim. App. 1989) (en banc), *overruled on other grounds by* 106 S.W.3d 72 (Tex. Crim. App. 2003) (finding arguments for and against sentence of death to be improper unless the arguments pertain to the issues given to the jury and answered under the facts of the case); *Franklin v. State*, 606 S.W.2d 818, 826 (Tex. Crim. App. 1979) (finding testimony for and against the general wisdom of the death penalty to be irrelevant because it neither relates to the issues submitted to the jury nor contains information about defendant). Simply, arguments for and against the death penalty must pertain to the particular defendant and the particular facts introduced into evidence. *See Rogers*, 774 S.W.2d at 256–57; *Franklin*, 606 S.W.2d at 826. Trial counsel's cross examination of Merillat invited Merillat to advocate in favor of Texas having the death penalty. Merillat's testimony was completely unrelated to Mr. Velez or the specific facts of the case, highly prejudicial to Mr. Velez, and it improperly influenced the jury's ultimate punishment decision. If the prosecution had elicited this testimony, it would have been improper and highly prejudicial. *See Rogers*, 774 S.W.2d at 256–57; *Franklin*, 606 S.W.2d at 826. For Villarreal to invite, in fact demand, Merillat to provide this improper testimony was, therefore, objectively improper, and necessarily caused harm by providing the jury with an explanation on why the death penalty is in the law as a proper sentence.

As previously noted, Villarreal failed to object to Merillat's testimony concerning alleged crimes committed by inmates on death row, even though those crimes could not be relevant to the future dangerousness of Mr. Velez if he is not given a death sentence. Consistent with this failure, trial counsel questioned Merillat concerning inmates who are on death row but have not committed violent crimes. (20 RR 33–34) This confusing line of questioning could not possibly meet Mr. Velez's need to rebut the State's claim that he would pose a future danger if sentenced

to life without parole. Instead, Villarreal's questions only supported the notion that death row can protect society from convicted capital murderers, a theory that supports the death sentence.

Furthermore, had Villarreal properly investigated the subject of Merillat's testimony—violence in prison—he could have obtained data that would have effectively undermined Merillat's testimony. For example, Merillat provided detailed testimony on violent crimes committed by convicted capital murderers:

> Merillat: We have in the last three and a half, four years have prosecuted for felony, violent felony crimes about 94 convicted capital murderers serving life sentences who committed those crimes.

(20 RR 19:2–6) This testimony is false, as an open records request to Merillat's employer, the Special Prosecutions Unit, reveals:

> Item 5: Number of violent, felony crimes committed in the Texas prison system by convicts serving life sentences that were prosecuted by the SPU between October 24, 2004 and October 24, 2008 and the number of those that ultimately resulted in convictions:
>
> SPU: 17 cases prosecuted and 12 convicted.

(Special Prosecution Unit Response to Open Records Request [Appx 122]) Merillat's testimony is even more egregious considering the slightly different wording of the question posed to the Special Prosecutions Unit and Merillat's testimony. While Merillat testified about "convicted *capital murderers* serving life sentences," the open records request concerned all "*convicts* serving life sentences." In all likelihood, Merillat's testimony is even more incorrect than the available data shows.

Even though criminal activity occurring on death row is irrelevant to the issue before the jury concerning Velez's future dangerousness if sentenced to life without parole, the data available from the Special Prosecutions Unit would have cast doubt on other statistics Merillat presented to the jury:

Merillat: There have been many guard assaults, stabbings, primarily stabbings of guards by condemned capital murderers on death row even though they are locked inside cells alone 23 hours a day . . . .

(20 RR 19:15–18)

Item 6: Number of assaults on guards by convicted capital murderers while on death row [in the Texas prison system] that were prosecuted by the SPU and the number that ultimately resulted in convictions:

SPU: 8 cases prosecuted and 6 convicted.

(Special Prosecution Unit Response to Open Records Request [Appx 122]) It is difficult to equate "many" with "six" convictions, especially considering that the request to the Special Prosecutions Unit was not limited by date. Similarly:

Merillat: We prosecute a lot of drug cases on death row, methamphetamines, cocaine, marijuana.

(20 RR 19:21–22)

Item 7: Number of drug cases on death row in the Texas prison system that were prosecuted by the SPU and how many of those cases resulted in convictions:

SPU: Total of 10 Prohibited Substance in a Correctional Facility cases have been prosecuted and 2 convicted.

(Special Prosecution Unit Response to Open Records Request [Appx 122]) The SPU noted that this number includes all prohibited items (drugs, alcohol, money, tobacco, cell phones). (*Id*.) Again, Merillat's testimony of "a lot" of cases presented, compared to the real facts—10 convictions—presents a highly misleading picture of crime on death row.[65]

Villarreal's actual questioning of Merillat does not appear to have been intended to prove any relevant point helpful to the defense. It makes no sense for defense counsel to have asked

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65 The information obtained from the Special Prosecutions Unit also shows that Merillat spoke falsely on how testifying intersects with his employment: "This is not part of my job, as a matter of fact. I'm on vacation today." (20 RR 32:18–19) In fact, although Merillat took vacation time for the three previous days, the records show that no vacation time was taken for October 24, 2008, the day Merillat testified at Velez's trial. (A.P. Merillat Time Taken During 2008 [Appx 122])

many of his questions, the answers to which were at best irrelevant, and often supported the State's theory that prison is a violent place:

- So it would be an accurate statement to say that not only is society within the prison when workers or specialists or vendors or doctors or nurses go in there, you know, and that's part of regular society but there's a subculture society within the prison system itself, isn't that true? (20 RR 35:23–36:3)

- A lot of times they make their own rules that you don't cross? (20 RR 36:5–6)

- You know, like we don't sanction – as a matter of fact, last night there was an article – sorry, a piece on the news about gangs here in the Valley. That's also – there are gangs within the jail? (20 RR 36:8–12)

- And [the gangs] affect – the subculture within the penitentiary affects society on the outside? (20 RR 36:16–18)

- Have you ever heard of an individual by the name of Mr. Pena who managed to unite the gangs and turn them around in one particular penitentiary? (20 RR 36:22–24)

- But again, you know, [the gangs] have a way of controlling them, you know, their own people within the walls? (20 RR 37:1–3)

- Have you ever wondered why we don't study why people kill? (20 RR 40:6–7)

- And Texas has executed more people than any other state in the country hasn't it? (20 RR 42:12–13)

Defense counsel's performance in failing to conduct any meaningful cross-examination of the State's only expert witness, and instead allowing the State's expert to opine why Mr. Velez should be executed—an opinion that would have been improper had the State attempted to elicit it—constitutes ineffective assistance of counsel, and violated Mr. Velez's constitutional rights under the Sixth and Fourteenth Amendments.

5. Villarreal failed to refute Merillat's testimony by introducing correct evidence of the Texas prison classification system.

As explained in Section II(A) above, Merillat falsely testified that a convicted capital murderer serving life without the possibility of parole is treated under the classification system the same as all other inmates. This testimony is not true. Faced with this testimony, no reasonably competent defense attorney could have missed the opportunity to demonstrate that the State's expert did not know the topic on which he was a purported expert. In addition, Villarreal could have used the State's own words against it by introducing a TDCJ article explaining the restrictions that Mr. Velez would face if sentenced to life without parole. This information constitutes precisely the type of evidence counsel is required to investigate and find in a capital case under the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) and the Texas counterparts. There is no plausible professional reason for failing to conduct a basic investigation, determine the correct TDCJ classification policy, and present that evidence to the jury. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

6. Defense counsel failed to adequately object to testimony concerning prior convictions.

Villarreal could have and should have significantly undermined the case the State put forward at the punishment phase. His second chair, Rene Flores, admits that little or no time was spent preparing for the punishment phase. (Flores Aff. ¶ 21 [Appx 14]) Specifically, full investigation of the prior offenses presented by the State—all misdemeanors, except for a 1984 forgery—would have revealed that Mr. Velez had only one conviction for a violent crime prior to his conviction in this case, and that conviction was for misdemeanor battery involving a bar fight over fifteen years prior. A full investigation would have allowed defense counsel to be

more prepared for what the State was likely to attempt to present and should have resulted in more forceful and effective objections.

Villarreal chose to object only twice to remoteness, and instead asked the Court to agree to a running objection to all testimony concerning convictions over ten years old. The objection was ineffective and resulted in significant testimony about irrelevant, nonviolent and prejudicial past convictions. Villarreal did make two nonsensical and wholly ineffective statements that "without waiving any of my client's rights, they stand mute" as a response to the admission of prior, remote, and irrelevant testimony. (20 RR 76:19–21, 84:4–5)

7. Defense counsel failed to object to the use of aliases and tattoos.

Villarreal not only failed to effectively object to the use of aliases and tattoos as proof of future dangerousness of Mr. Velez, but he unwittingly elicited such testimony himself. The State presented two witnesses who testified about Mr. Velez's alleged use of aliases. As discussed above, neither had personal knowledge about any use of aliases by Mr. Velez, and the State represented that the testimony was being used to tie Mr. Velez to prior crimes. No attempt was made to make such a tie, and defense counsel relied solely on relevance and best evidence objections. Testimony during the punishment phase about the use of aliases could only have been intended to improperly prejudice the jury against Mr. Velez. Further illustrating defense counsel's ineffectiveness, testimony about the use of the alias Joe Angler was elicited from Deputy Crisman by Mr. Velez's own counsel. (20 RR 65:23–66:2)

Villarreal also failed to effectively object to the State's improper introduction of testimony about Mr. Velez's tattoos. As discussed above, such testimony was an attempt to paint Mr. Velez as an unsavory and violent individual. The State represented that it was introducing the evidence to link Mr. Velez to a crime. In fact, all the State did was have the witness describe the tattoo in detail as a "low rider tattoo" which apparently depicted a "playboy bunny" head

atop a human form. The State then immediately followed the description with a question about whether battery is a crime of violence. (20 RR 90–92) Defense counsel relied solely on a relevance objection, never objected to the question of whether Mr. Velez had tattoos, never objected that testimony about tattoos was unduly prejudicial, and made no objection at all to the gratuitous and misleading final question about battery. (20 RR 91–92)

H. The State Relies On Villarreal's Failures In Seeking to Uphold the Death Sentence on Direct Appeal.

As it did in connection with the culpability phase of trial, the State in its brief on direct appeal identified additional errors by defense counsel in the punishment phase by which the State seeks to avoid scrutiny of its own and the Court's errors at trial.

The additional errors of defense counsel identified by the State include:

- **Failure to object to irrelevant and unduly prejudicial evidence at the sentencing proceeding.** The State claims that Mr. Velez's counsel failed to object or failed to raise the proper objection to several pieces of evidence at the sentencing phase, including a battery conviction from 17 years prior, and testimony regarding Mr. Velez's tattoos and prior use of aliases. (State's App. Br. at 132–33) This irrelevant and unduly prejudicial evidence was, therefore, considered by the jury in sentencing Mr. Velez to death.

- **Failure to object to testimony from the mitigation witnesses that they did not know where the victim was buried.** The State argues that Mr. Velez's counsel failed to appropriately object at trial to irrelevant and unfairly prejudicial testimony, namely the prosecutor eliciting from two mitigation witnesses that they did not know where the victim was buried. (*Id*. at 134)

- **Failure to object to evidence of a prior crime for which the State had not provided notice.** During the sentencing phase, the State improperly admitted evidence of a prior crime by Mr. Velez for which it had not provided Mr. Velez proper notice. (20 RR 55–57) But the State contends Mr. Velez has waived his complaint about this improper evidence because his counsel failed to raise the proper objection at trial and, when the objection counsel did raise was overruled, counsel failed to request a continuance to allow him to prepare for cross-examination of the State's witness. (State's App. Br. at 135–37)

- **Failure to properly object to prosecutorial misconduct in the sentencing-phase summation.** During the sentencing-phase summation, the State violated Mr. Velez's constitutional rights through repeated misconduct and inflammatory and inappropriate comments. Yet, as the State points out, "[o]ut of all the instances of alleged prosecutorial misconduct during the prosecution's punishment phase closing argument that Appellant points to in issue thirty-four, Appellant only objected once." (*Id*. at 140) And, even as to that one instance, the State contends that Mr. Velez's objection is waived because his counsel failed to make the right objection at trial. (*Id*.)

The State's assertions of waiver by defense counsel amount to an admission by the State that Villarreal provided ineffective assistance in both phases of Mr. Velez's trial, which compels a writ of habeas corpus.

III. SPECIAL ISSUE NO. 2: MITIGATING CIRCUMSTANCES

The jury's negative answer to Special Issue No. 2, whether "taking into consideration all of the evidence, including the circumstances of the offense, *the defendant's character and background*, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed," was the result of ineffective assistance of Mr. Velez's trial counsel. Villarreal called only the three witnesses whose brief testimony is discussed in Section I above to show the mitigating circumstances that Special Issue No. 2 directed the jury to consider in deciding whether or not to spare Mr. Velez's life, and he failed entirely to present testimony of a mental health expert. This constitutionally deficient performance enabled the prosecutor to conclude his closing argument by saying to the jury:

> There is not sufficient mitigating evidence. There's not enough. They didn't bring you anything. . . . [T]here's nothing mitigating in his background.

(20 RR 159:4–6; 160:7–8)

There was, however, a compelling mitigation case to be made. As shown below, and in the Affidavit of Danalynn Recer [Appx 13], there were many witnesses of diverse ages and backgrounds prepared to testify from a variety of perspectives to the difficult background through which Mr. Velez persevered, and to his good character and lifelong care for children. The jury having found Mr. Velez guilty of killing a baby, Mr. Velez's life literally depended on his counsel's effective presentation to the jury of those "compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), to enable the jury to "'make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'" *Turner v. Murray*, 476 U.S. 28, 33–34 (1986) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985)). Instead, when the jurors burdened with sentencing Mr. Velez gathered together to consider his life, they did not have the information most relevant to their decision—the quality and nature of the life they were being asked to take. Juror Jennie Johnson no doubt spoke for all the jurors in saying "I would have wanted to hear more about Mr. Velez's background and how that might be considered by the jury in deciding what sentence to give." (Johnson Decl. ¶ 11 [Appx 44])

The evidence that would have saved Mr. Velez from a death sentence was readily available. Trial counsel could have developed Mr. Velez's life history of poverty, mental illness, and dysfunction, and presented it together with evidence of his good character and compassion and care for others, particularly children, as the basis for a sentence less than death. Inexplicably, they failed to do so. At the punishment phase of Mr. Velez's trial, his counsel presented no mental health expert, only a miniscule part of the mitigating evidence that was available, and no coherent explanation why the jury should spare Mr. Velez's life.

A. Governing Legal Standards.

During the punishment phase of a death penalty case, defense counsel bears the responsibility of thoroughly investigating the defendant's background and the State's case. The United States Supreme Court has long recognized that "before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263–64 (2007). A jury cannot "perform its function" of weighing the "aggravating and mitigating factors" relevant to the defendant's fate if defense counsel fails in this task. *Loyd v. Whitley*, 977 F.2d 149, 160 (5th Cir. 1992); *see also Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985) ("[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."). As Justice O'Connor has explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (citation omitted); *see also Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (evidence of a "turbulent family history . . . is particularly relevant" to an individualized sentencing determination).

In capital cases "defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002) (*en banc*). Counsel must carefully investigate the defendant's background, because "[m]itigating evidence concerning a particular defendant's character or

background plays a constitutionally important role in producing an individualized sentencing determination that the death penalty is appropriate in any given case." *Moore v. Johnson*, 194 F.3d 586, 612 (5th Cir. 1999). The United States Supreme Court has noted with approval that "[t]he ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original); *see generally* ABA Guidelines at 1021–23, 1024 (describing categories of mitigation investigation: (1) medical history, (2) family and social history, (3) educational history, (4) military service, (5) employment and training history, (6) prior juvenile and adult correctional experience, and (7) family interviews).

The failure to collect and present available mitigating evidence, without sufficient reason, is ineffective assistance of counsel under the standards of *Strickland*. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel ineffective for failing to "conduct a thorough investigation of the defendant's background" in preparation for sentencing) (citing 1 ABA STANDARDS FOR CRIMINAL JUSTICE § 4-4.1 & Commentary, § 4-55 (2nd ed. 1980)); *Rompilla v. Beard*, 545 U.S. 374, 374 (2005) (counsel ineffective for deciding to forego looking at material that the prosecution would probably rely on, even though interviews with the capital defendant and members of his family suggested no mitigating evidence was available). Mitigation evidence plays a constitutionally protected role of individualizing the defendant, and giving the jury the opportunity to see him as a unique, if flawed, human being whose life is worth sparing:

> The presentation of mitigation evidence affords an opportunity to humanize and explain—to individualize—a defendant outside the constraints of the normal rules of evidence. Indeed, in capital cases, where the need for individualized sentencing is most critical, the right to present mitigating evidence to the jury is constitutionally protected. *Williams v. Taylor*, [529 U.S. 362] (2000). *See also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("The

> need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). We are therefore compelled to insure the sentencing jury makes an individualized decision while equipped with the "fullest information possible concerning the defendant's life and characteristics," and must scrutinize carefully any decision by counsel which deprives a capital defendant of all mitigation evidence. *Lockett*, 438 U.S. at 603 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

Mayes v. Gibson, 210 F.3d 1284, 1288 (10th Cir. 2000); *see also Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992) ("Mak's defense counsel never placed Mak in the community nor portrayed Mak as a human being who was a devoted son with family members who loved him. Mak was depicted by the prosecution as a killing machine, and the defense presented no humanizing evidence whatsoever to offset that picture. Absent tactical purpose or risk, such performance is deficient within the meaning of *Strickland*.").

B. Mitigation Evidence Presented to the Jury.

Mr. Velez's trial counsel did little more than go through the motions of presenting a mitigation case before Mr. Velez was sentenced to death. Villarreal told his co-counsel that "he thought preparing for punishment before the verdict on guilt would make him less effective in the guilt-innocence phase of trial." (Flores Aff. ¶ 21 [Appx. 17]) Villarreal called just three witnesses for brief testimony. Leticia Velez, Velez's sister, testified (i) that the Velez family's father left when Velez and his six siblings were children, leaving their mother to raise them (20 RR 94:19–95:24); (ii) that Velez did not finish high school, could not read or write much English, and attended special classes in school (*id.* at 99:2–100:4); (iii) that Velez worked and used his money to buy clothing, take his mother out to eat, and buy food for the family (*id.* at 100:5–12); and (iv) that she never saw Velez fight anyone when he was growing up or get thrown out of school for fighting, and she never heard of him hurting anyone (*id.* at 101:14–23).

Maria Hernandez, Mr. Velez's ex-wife, merely testified that during 1998 to 2004, when she lived with Mr. Velez, she never saw Mr. Velez strike their two children or other children she had from a previous relationship. (*Id.* at 109:22–110:10). Finally, Jose Manuel Velez, Mr. Velez's nine-year-old son, testified that he missed his father (*id.* at 119:12–21, 121:13–19), that he never saw Mr. Velez hit any of his children (*id.* at 120:15–17), and that he would visit Mr. Velez in the penitentiary and write letters to him (*id.* at 122:6–20).

C. Available Expert Mitigation Testimony Not Presented to the Jury.

Defense counsel could have presented powerful expert testimony on the mitigation issue, but failed to do so.

1. Dr. Michael Rabin.

Villarreal presented no mitigation evidence from a forensic psychologist or any other mental health expert at the punishment phase. During the first phase of the trial, Villarreal called licensed clinical psychologist Michael Rabin, Ph.D., but only to testify on the narrow issue of whether Velez had the cognitive ability to understand and waive his constitutional rights. (17 RR 152–204; Rabin Aff. ¶ 4 [Appx 9]) Defense counsel did not ask Dr. Rabin to evaluate Mr. Velez's case for mitigation evidence or develop opinions for presentation at the punishment phase. (Rabin Aff. ¶ 7; Flores Aff. ¶ 18 [Appx 17]) Villarreal refused to call Dr. Rabin again, despite the urging of his co-counsel, only because, in Villarreal's words, "the jury already heard him." (Flores Aff. ¶¶ 18, 21)

Dr. Rabin is a licensed clinical psychologist with decades of experience performing thousands of forensic evaluations, including evaluations of more than two thousand individuals accused of capital crimes. (Rabin Aff. ¶ 3 [Appx 9]) Dr. Rabin had testified dozens of times in other proceedings regarding mitigating factors that weigh against sentencing an accused

defendant to death, including low intelligence, organic brain impairments, likelihood of future dangerousness, potential adjustment to prison, and other factors. (*Id*. ¶ 3) Dr. Rabin could have provided substantial mitigating evidence that Mr. Velez should not be put to death. (*Id*. ¶¶ 8–9) Yet Villarreal confined Dr. Rabin's evaluation and testimony to Mr. Velez's ability to read and comprehend the written English statement he signed and to understand the English-language *Miranda* warnings the police claimed he waived.[66] (17 RR 153–56; 172–78)

As detailed in Paragraph 8 of the Affidavit of Dr. Rabin contained in the Appendix to this Application, if Villarreal had asked Dr. Rabin to testify at the punishment phase, Dr. Rabin would have provided the following testimony based on his training, education, knowledge, and experience, and his evaluation of Mr. Velez, which included a psychological interview of Mr. Velez and extensive psychological and neuropsychological testing (Rabin Aff. ¶ 6 [Appx 9]).

- Mr. Velez's limitations in intelligence, memory and learning—as demonstrated by the testing performed by Dr. Rabin—negatively affects his decision-making and impulse control. In other words, because of Mr. Velez's extremely low intelligence, he possesses poor "executive functioning," or the ability to plan, organize, and carry out activities. Accordingly, Mr. Velez will seek hasty, simple solutions to his problems, impulsively acting without understanding the totality of the situation. He lacks the capacity to think things through and tends to make quick decisions to avoid the stress of worrying about his problems. Mr. Velez processes information in a simplistic

[66] As previously discussed in this Application, Dr. Rabin also testified at a pretrial suppression hearing in which Mr. Velez's lawyers sought to demonstrate that he did not knowingly and intelligently waive his *Miranda* rights before police elicited a statement during custodial interrogation. (8 RR 163–229) The trial court denied that motion. (12 RR 66–67)

manner, and has limited ability to recognize complex relationships between events. Combined with his narrowed frame of reference, Mr. Velez's tendency to oversimplify situations and his deficient information processing leads to impulsive behavior when faced with a more complicated situation than he can absorb. (Rabin Aff. ¶ 8(c) [Appx 9])

- Mr. Velez's ability to respond in a crisis is severely limited by his low cognitive functioning and his poor executive functioning. If the situation is simple and straightforward, he will be able to take appropriate action, but if the situation is complicated, he will lack the capacity to figure out a solution. (*Id*. ¶ 8(d))
- The testing on Mr. Velez indicates emotional, psychological, and cognitive immaturity. Although he can anticipate and establish close and supportive interactions with others, Mr. Velez is limited by his social ineptness and tendency toward emotional constriction. He is a relatively unmotivated, undemanding, and easily satisfied individual who tends to remain bland, unconcerned, and unemotional even in unwelcome circumstances. He has an avoidant coping style, and being the kind of person who approaches life with a narrow frame of reference and a preference for simplifying his experience. He displays emotional and cognitive immaturity and tends to be dependent and passive in his interactions with others. (*Id*. ¶ 8(e))
- Because of Mr. Velez's personality, he should be able to make an acceptable adjustment to incarceration and would be unlikely to be a disciplinary problem. The testing reveals that Mr. Velez has adequate reality testing and sufficient self-insight to benefit from psychotherapy and that he was amenable to treatment. Cognitive-behavior therapy or reality therapy could improve his coping skills. Mr. Velez does

not display any indications of psychosis or severe character defects and he appears to be a good prospect for rehabilitation. (*Id*. ¶ 8(f)-(g) [Appx 9])

- Mr. Velez does not display the characteristics associated with violent behavior. The social histories gathered further support that he is not a violent man, and does he not seek confrontation or have difficulty controlling his temper under most circumstances. Specifically with respect to children, the social histories gathered revealed that he was never harsh, unkind, or physically threatening to children. (*Id*. ¶ 8(h))
- Mr. Velez does not display any indications of an antisocial personality disorder, and does not display the features of a psychopathic/sociopathic personality. There are no indications of a childhood conduct disorder, which is the necessary pre-requisite for these diagnoses, and he does not display any signs of significant psychopathy. He does not appear to have anger management problems, and instead displays indications that he inhibits and internalizes his emotional responses. (*Id*. ¶ 8(i))

Villarreal made no attempt to investigate or present forensic psychological evidence that might dissuade a jury from sentencing Mr. Velez to death, even though he had in Dr. Rabin a highly qualified expert ready, willing, and able to provide such testimony. Dr. Rabin's opinions are relevant to both of the special issues posed to the jury. His opinions regarding Mr. Velez's intelligence, impulse control, and immaturity provide evidence that Mr. Velez should be considered less culpable because of his low intelligence and limited cognitive ability. Likewise, Mr. Velez's generally peaceful personality and mental characteristics would provide evidence that, even if the jury had found Mr. Velez's actions satisfied the elements of the charged offense, Mr. Velez did not have true intent to cause lethal harm to Angel. Dr. Rabin's opinions regarding

Mr. Velez's lack of violent personality and psychopathy, combined with Mr. Velez's ability to adjust to incarceration and benefit from treatment, would have provided evidence that Mr. Velez did not pose a significant risk of future dangerousness. Furthermore, Dr. Rabin's opinions regarding Mr. Velez's inability to cope in a crisis and his unemotional and bland affect in stressful circumstances would directly rebut the State's theory that Mr. Velez was callous and uncaring due to an apparent lack of concern when police and emergency services arrived in response to the call about Angel. Because of Villarreal's ineffective assistance, the jury never heard this readily available and compelling evidence.

2. Dr. Antolin Llorente.

In addition to the testimony readily available to defense counsel from Dr. Rabin, additional investigation into the mental deficiencies of Mr. Velez would have yielded further influential mitigation evidence. Dr. Antolin M. Llorente, Ph.D., Associate Professor, Department of Pediatrics and Director of Neuropsychology, Mount Washington Pediatric Hospital, Baltimore, Maryland, conducted a neuropsychological evaluation of Mr. Velez post-conviction. Dr. Llorente has significant experience testing and evaluating Spanish speaking patients. The results of Dr. Llorente's clinical evaluation (*see* Llorente Report [Appx 10]), revealed the following:

- Mr. Velez was raised in extreme poverty that may have been consistent with neglect, and he entered the workforce at an age that may be considered statutory child abuse.
- Mr. Velez clearly demonstrates difficulties from a cognitive and academic standpoint, his occupational and work history never required significant skill, and he never worked an extended period of time at the same workplace. This information suggests the presence of adaptive delays.

- A review of Mr. Velez's school records shows academic difficulties early in his academic history, particularly long before he had significant absences, which frequently is not only the result of academic difficulties but more complex difficulties such as cognitive limitations. This information, particularly his difficulties with functional academics, is consistent with adaptive delays.
- Mr. Velez was run over by a car when he was age seven or eight, and was unconscious for an unknown but much extended period of time. This is an important and critical marker in traumatic brain injury. This injury impacted Mr. Velez cognitively to the extent that things had to be explained in detail for him to understand.
- Mr. Velez has an overall intellect within the lowest possible score within the Low Average range of intellectual skills. Mr. Velez's overall score suggests that he does not possess normal (average) intellect at this time. The scatter of scores that emerged in Mr. Velez's profile is consistent with an organic brain condition. The significant variability in brain functions supporting neuropsychological performance, including on intellectual subtest scores, is a sign consistent with abnormal functioning, and additionally support the presence of organicity (brain abnormality) when other potential etiologies, such as aberrant, biased response patterns are ruled-out, such as was the case with Mr. Velez. The repercussions of Mr. Velez's intellectual profile are poor judgment, and poor social reasoning. It is probable that Mr. Velez's subaverage intellectual profile has been at this level since childhood.

- Mr. Velez's difficulties or impairments, including his history of probable traumatic brain injury at an early age, alcohol abuse and probable dependency, as well as other risk factors including abuse, neglect, and malnutrition, and within the context of his psychosocial history (impoverished background with little stimulation at an early age, limited education), argue in favor of a hypothesis supporting the presence of encephalopathy (organic brain damage). The presence of organic brain dysfunction is also supported by Mr. Velez's test scores on selected neuropsychological domains.

Dr. Llorente's clinical evaluation would have been powerful mitigation evidence, particularly the findings consistent with traumatic brain injury, encephalopathy, or organic brain injury. Because of Villarreal's ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, the jury never heard this available evidence.[67]

D. Available Lay Mitigation Testimony Not Presented to the Jury.

Had Mr. Velez's trial counsel investigated his life, they would have discovered extensive evidence confirming the psychological evaluations of Drs. Rabin and Llorente, and compelling an affirmative answer to Special Issue No. 2. Mr. Velez was raised in a single-parent home in extreme poverty and was poorly educated. He had no history of ever abusing children, and in fact, a long record of caring deeply for his own children and the children of others. There were at least 25 witnesses, whose affidavits are included in the Appendix to this Application, available

[67] The jury noted the absence of any punishment-phase evidence of Mr. Velez's mental capacity. (*See* Johnson Decl. ¶ 12 [Appx 44] ("I do not remember Mr. Velez's mental capacity being an issue during the sentencing phase of the trial. There was no explanation from defense counsel as to how evidence of a low level of mental functioning could have related to what sentence should be imposed."); Quintanilla Decl. ¶ 8 [Appx [47] ("Defense counsel never explained to the jury why it would be important that Mr. Velez was mentally low functioning even if he was not mentally retarded."))

to testify to these and other facts demonstrating Mr. Velez's good character and deprived background sufficient to warrant a sentence of life imprisonment without parole rather than death. However, due to trial counsel's ineffective assistance, the sentencing jury never heard the following testimony and did not spare Mr. Velez's life.

1. Mr. Velez's Background.

The sentencing jury should have been told of Mr. Velez's "life history and emotional and psychological make-up through an inquiry into [his] childhood, upbringing, education, relationships, friendships, [and] formative and traumatic experiences." *Valdez v. Johnson*, 93 F. Supp. 2d 769, 780-81 (S.D. Tex. 1999), *aff'd in part and vacated in part sub nom. Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001) (internal quotation marks omitted; citation omitted). *See also* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (sentencing decision is to "tak[e] into consideration . . . the defendant's character and background"). Instead, the only testimony they heard about Mr. Velez's background was the brief testimony of his sister Leticia Velez described above.

There is much more to his story. The following witnesses, whose Affidavits are presented in the Appendix to this Application,[68] could have been, and should have been, called to testify during the punishment phase of Mr. Velez's trial about his "childhood, upbringing, education, relationships, friendships, and formative and traumatic experiences":

a. Consuelo Velez (mother).

Mr. Velez's mother, Consuelo Velez, could have testified that, to support herself and the seven children she raised without their father, she made tamales and sold them door to door. She

[68] The following summaries of available lay mitigation testimony are taken from the Affidavits included in the Appendix.

also worked in a shrimp packing plant, but that work depended on the season's catch. Manuel cooked, cleaned, and made the beds while his mother was working. The family depended on food stamps and welfare to live, and also contributions from earnings of the children, including Manuel, when they were old enough to work. [Appx 32]

When Manuel was young, he was run over by a car and badly injured. He had to have pins in his legs, was in a cast from his legs to his waist, and had to learn to walk again.

b. Wenceslao Velez (father).

Manuel's father, Wenceslao Velez, also could have testified about Manuel's being run over by a car when he was a child. He was run over twice—once, and then the driver of the car put it in reverse and ran over him again. As Mr. Velez recalls, Manuel broke both legs, and was in a cast from his chest to his feet for more than six months; he could not move until the cast was removed. Manuel still has pins in his legs. [Appx 40]

c. Elmita Velez (older sister).

Elmita Velez is Manuel's older sister. She remembers that their father was hardly there when she was a child. "He would pop up and get my mother pregnant and leave." [Appx 33]

Their mother tried to support the family. She needed whatever money was there for food. The food was always the same: beans, tortillas and rice. Sometimes they had noodle soup, and sometimes they ate cactus that Ms. Velez believes her mother may have grown. There was never any meat until after the family started getting food stamps. Other people would give them used clothes or her mother would get clothes from church pantries.

Their mother engaged in vicious gossip that divided her siblings. She also behaved irrationally: there were times when she would get angry and throw stones at strangers' cars. At different times their mother threw her children out of the house.

Manuel and Ms. Velez were very close and their other siblings were the "little brothers and sisters." Ms. Velez remembers her parents charging her with taking care of Manuel when he was a small child, and if she did not take proper care of him, she would be beaten. She recalls having been beaten by her father with a garden hose as punishment for failure to have taken proper care of Manuel.

Ms. Velez recalls that when Manuel was about ten years old, he was in a bad car accident. He was hit by a car and was taken to the hospital in Harlingen. Both of his legs were broken and he had to wear a cast from his waist to his feet for about six months. After the accident, Manuel complained of pain in his back and in his legs. Ms. Velez helped care for him.

After Manuel's car accident, there was an insurance settlement. Their mother began to receive not only a monthly check from the insurance settlement, but food stamps and welfare. She bought a piece of land on which the family built a one-room house, with no doors or windows—just sheets of plastic covering holes in the structure. But it let their mother become less dependent on their father.

Ms. Velez went to school in Brownsville but quit in the 6th grade. After Ms. Velez quit school, she went with her uncles to work in New Mexico, doing farm work in the fields.

Manuel did not like school and did not go to school often. The Brownsville education system never required Manuel to learn to read or write. Students were advanced to the next grade even though they had not learned anything. Ms. Velez doesn't remember Manuel doing homework. Both of their parents are illiterate and could not help them with school work.

The neighborhood kids would make fun of Manuel because he wore broken shoes. Kids would steal things from Manuel, like marbles and a baseball cap, and she would have to get them back.

In early adolescence, she and Manuel skipped school and drank beer together. She remembers her father drinking beer and take them cruising in the car, and giving them both beer. Ms. Velez is pretty sure their father often gave Manuel beer when Manuel was a child. Their father drank beer all the time.

As an adolescent, Manuel began to work for a man named Manuel Escobedo at his roofing business rather than go to school. He would bring back his earnings to their mother to help her support the family. Manuel liked making money for the family.

Ms. Velez believes that Manuel does not know how to read or write because, as an adult, he would bring letters or job applications to her or a family friend, Francisca Garcia (whose affidavit is discussed below), to read to him. She thinks Manuel has learned to read or write a little bit in jail.

As a child, Manuel had speech problems. It was difficult for him to pronounce Spanish words. He would never read, but would ask Ms. Velez to read things to him from the newspaper. In adulthood, Manuel never read from a menu. He would make mistakes about what the names of foods were. He would refer to *huevos rancheros as huevos del rancho*.

Manuel got most of his jobs through Manpower or people outside the unemployment office. He would often take off for several months to work before returning home. Ms. Velez once went with Manuel to Georgia to work in a factory where tomatoes were packed into boxes.

Ms. Velez doesn't think Manuel ever had a bank account or an ATM card. Although he can distinguish between 25, 10, and 5 cent pieces and different dollar denominations, she doesn't think he could make sure he was given correct change if he bought something at the store. If Manuel was having a good time, he would spend all his money on other people.

d. Virginia Velez (sister).

Virginia Velez, who is 44 years of age, is a sister of Manuel Velez. She recalls that their father was a drinker. He and their mother separated when their mother was pregnant with their sister Marisol. [Appx 38]

Their mother supported the family with food stamps and Medicaid. Ms. Velez remembers her mother getting up early in the morning to make tamales in order to earn extra money, and selling the tamales while the children were at school. Their mother would sell her food stamps to have money to pay bills and to buy materials to make tamales to sell. Ms. Velez does not remember having any toys or dolls. There were no holiday or birthday parties or celebrations. Their mother spent all the money she had on rent, food, utilities, and things the children needed for school.

Ms. Velez left home at the age of 20 to become a seasonal migrant worker. A family from Brownsville took her to Florida to pick tomatoes. Her sister Elmita was already in Florida but they did not work together. For most of the time since then, Ms. Velez has worked as a seasonal migrant worker, picking onions, tomatoes, cauliflower, cucumbers, and celery in different states including Michigan, Indiana, and Florida. She has lived in Georgia for the past three years.

Ms. Velez says that Manuel was a good brother, who played with his brothers and sisters. He did not get into fights. She remembers that Manuel and Bernardo Duran (discussed below) were friends.

Ms. Velez remembers Manuel's being run over by a car, which she believes happened when we were in middle school. When Manuel came home from the hospital, he was in a cast from his torso to his feet, with pins in his two broken legs. As she recalls, Manuel was in cast for about six months.

e. Marisol Velez (youngest sister).

Marisol Velez is the youngest of Manuel's seven siblings. She does not remember a time with all of her brothers and sisters were living at home, and does not remember their father coming around much at all when she was a child. [Appx 37]

Ms. Velez remembers their mother being very violent: one time she broke a large ceramic figurine over her sister Vicky's head; she cut off all of her sister Leticia's hair when she discovered Leticia had head lice; she beat her brother Rafael with a rubber hose. Sometimes Ms. Velez ran away from her mother to avoid being beaten. Her mother was very aggressive toward Ms. Velez. She withheld food and soap from her, and wouldn't let her wash her clothes. Ms. Velez recalls that a girlfriend took her under her girlfriend's wing, and she would come home and get into huge arguments with her mother. Her mother threw various of her children out on the street on different occasions, including Ms. Velez and her brother Rafael.

When Ms. Velez was about fifteen or sixteen, she became pregnant with her son, Cesar, and left school. She moved around a lot, sometimes staying with her siblings, but eventually moved back in with her mother.

Ms. Velez says Manuel sometimes does not understand when she talks to him and she has to explain what something means. It feels to her as though he is not quite paying attention. Sometimes he confuses words. She doesn't think Manuel could follow instructions on how to get somewhere.

When she was a teenager, Manuel would drive her and her friends around all night, taking them wherever they asked. They would keep coming up with different places they wanted to go until Manuel ran out of gas. He never got mad at them. She recalls Manuel driving a minivan and leaving a girl he had just met inside the vehicle with the keys in the ignition while he went into a store; the girl took off with the van and did not return it.

Ms. Velez doesn't remember Manuel ever reading a menu in a restaurant. He would go to fast food restaurants where he could order food from photographs or to restaurants where he might know what to order because people told him what the specialties are. She remembers seeing Manuel leaf through magazines, but never read them. She believes he was probably looking at the pictures. Before he went to jail, she never saw Manuel write anything other than his name. She thinks Manuel is learning to read and write in jail because he now sends letters, but his letters are very repetitious and she doesn't always understand them.

Ms. Velez doesn't remember Manuel ever counting his change when buying something at a store. He would just put the change in his pocket. She doesn't think Manuel ever had a bank account.

f. Roberto and Eunice Zamora (neighbors).

Roberto and Eunice Zamora are in their mid-fifties. They have known the Velez family as neighbors and friends since 1982. [Appx 41 & 42]

They remember the Velezes as poor. Ms. Zamora recalls that they ate a lot of cactus. Cactus grows wild, and is a staple of the diet of the poorest of the poor.

The Zamoras remember that Manuel helped his mother with his earnings. Mr. Zamora remembers that Manuel's mother was in danger of losing her house because she could not pay property taxes, and that her children and church people helped her save the house. Manuel's father was rarely there.

Ms. Zamora remembers Manuel's mother as having "so many problems, with kids and grandkids all over the place. She seemed mistreated by life. There wasn't enough money for her personal care—say, creams for her skin."

g. Esmeralda Mata (family friend).

Esmeralda Mata grew up with Manuel. They attended school together and Manuel often came to visit her family's house. She remembers Manuel as a "nice kid" and "happy" but also a "slow learner" who stuttered a lot. Manuel's brothers, Wenceslao and Rafael, also were very slow mentally, and Ms. Mata thinks that all three probably suffered from learning disability. Manuel attended school only irregularly. [Appx 26]

Ms. Mata recalls Manuel having had to wear a brace around his legs and hips following the accident in which he was hit by a car. She recalls that he could not walk, and had to hobble around on crutches.

h. Bernardo Duran (childhood friend).

Bernardo Duran, who is seven years older than Manuel, met Manuel when they were in their youth. For a time, Mr. Duran visited the house in which the Velez family lived nearly every day. Manuel looked up to him, and Mr. Duran says Manuel "loved me like a brother." [Appx 18]

Mr. Duran remembers Manuel's mother, brothers and sisters, and that his father was hardly ever around. He remembers that Manuel and his family were very poor.

Mr. Duran recalls Manuel's having been run over by a car, and that it had left him unable to walk; he thinks that a schoolteacher, driving under the influence of alcohol, hit him. Mr. Duran remembers that after the accident, he carried Manuel piggyback to the woods where he hunted rabbits, and that Manuel could stand but not walk. Manuel wanted to learn to hunt, and Mr. Duran recalls telling him, "If you want to learn to hunt, you have to walk first." He taught Manuel to walk as if he were a baby; he remembers holding Manuel's hands as he took his "first" baby steps, and that it hurt him to walk. With Mr. Duran's help, eventually Manuel was able to walk again.

i. Francisca Garcia (Velez family friend).

Francisca Garcia works as a home health provider and is a longtime friend of the Velez family who has known some members of the Velez family for more than 20 years. She also has known Margarita Velez, who is an ex-wife of Wenceslao Velez, Jr., a brother of Manuel Velez for a long time. She has known Manuel for about 14 years. [Appx 22]

Ms. Garcia has observed that Manuel is slow mentally. She remembers him not understanding things she said to him and her having to repeat herself. Manuel would also have trouble expressing himself; he would mix up words, meaning to say one thing but saying another.

Ms. Garcia never saw Manuel read before he went to jail. She recalls him asking her to help him fill out a paper, perhaps an application or a tax form. She asked him whether he understood it, and he told her "*Soy bien pendejo. No se leer ni escribir*," which means, "I'm a real idiot. I don't know how to read or write."

According to Ms. Garcia, Manuel lived day to day and did not plan for the future. She remembers him cooking, but never anything complicated. Usually he would just put meat in a pan with oil and perhaps tomatoes, onions and chile.

Other members of the Velez family, including Manuel's brother Wenceslao, Jr. and his mother, also are slow mentally. Jonathan Velez, who is the son of Wenceslao, Jr., is in special classes. Throughout the 20 years that Ms. Garcia has known Manuel's mother, Manuel's mother has tended to repeat things, and often she does not understand things.

j. Olga Martinez (neighbor).

Olga Martinez knows the Velez family from having lived near them for a long time. Also, her daughter Brenda had two children with Manuel's brother, Wenceslao Velez, Jr. [Appx 25]

Ms. Martinez recalls that Manuel's mother Consuelo was bad to her children. On one occasion when Manuel's sister Virginia (who went by Vicky) was at her house, Consuelo came after her with a stick and chased her, ultimately beating Vicky on her back all the way home. She also saw Consuelo beat Vicky's brother Rafael. Though she did not personally witness any other beatings, she believes this is how Consuelo treated her children regularly.

k. Margarita Velez (sister-in-law).

Margarita Velez was married to Wenceslao Velez, Jr., Manuel's brother. She first met Manuel after she was married to his brother in 1991. [Appx 36]

Sometimes when Ms. Velez talked with Manuel, his eyes would dart around and it seemed like he did not grasp what she had said. Manuel could not remember jokes; sometimes he would tell a joke poorly and would need to be corrected. He mispronounced words. For example, instead of saying "frijoles," he would say "frifoles."

Ms. Velez never saw Manuel read, not even a menu in a restaurant. He would eat in a Mexican restaurant where he already knew what was on the menu. She also never saw Manuel write. She remembers her sisters, Elmita and Marisol, helping Manuel fill out forms.

When Manuel cooked, he never used measuring cups or recipes, and sometimes he would include too much salt, flour, lard or chile in a dish. Sometimes his food turned well, but other times it did not. His kitchen was clean, but lacked order, and things were not where Manuel thought they were and he would have to search for them. One time he opened up a can of food without a label, heated it up, and ate it. It turned out it was a can of dog food.

Manuel never made plans and rarely made decisions. He took whatever job was offered to him. He often bought clothes that did not fit.

2. Mr. Velez's good character, and his care for family and children.

Texas Code of Criminal Procedure article 37.071 § 2(e)(1) provides that the sentencing jury was to have "tak[en] into consideration … the defendant's character" in deciding whether to sentence Mr. Velez to life imprisonment without parole or death. However, Mr. Velez's trial counsel presented virtually no evidence of Mr. Velez's character or personality.

A wealth of credible character evidence, in the form of testimony from the 22 witnesses whose Affidavits on this subject are summarized immediately below and included in the Appendix to this Application, was readily available and should have been presented. Had they been called to testify, these witnesses would have told the jury of Mr. Velez's good character and lifelong history of compassion for others, including children, as set forth in their affidavits:

a. Conseulo Velez (mother)

Mr. Velez's mother, Consuelo Velez, recalls that Manuel cared for other women's children as his own, and that children all loved Manuel. She remembers that he would bring them food, and bathe them and put them to bed. [Appx 32]

b. Wenceslao Velez (father)

Manuel's father, Wenceslao Velez, remembers that Manuel "was always playing with kids. He loved to play. He never insulted or spoke harshly to anyone. He would give away food even if it meant he didn't eat himself." [Appx 39]

c. Elmita Velez (older sister)

Manuel's older sister, Elmita Velez, recalls that Manuel often picked girlfriends who already had children. He always wanted to help them. He gave them money, he cooked, cleaned, and babysat their children. Ms. Velez believes that is "implanted" in him, due to the way he helped his mother when he was growing up. [Appx 33]

d. Marisol Velez (younger sister)

Manuel's youngest sister, Marisol Velez, left her children with Manuel and they got along well with him. He liked to play with them. When Manuel was married to Maria Hernandez, he helped take care of the four children that Ms. Hernandez brought to the marriage as well as the two children they had together. Ms. Hernandez would go out dancing and leave Manuel to stay with the children. Other women, including Ivonne Salazar (whose affidavit is discussed below), also left their children with Manuel. [Appx 37]

e. Ana Garcia (sister-in-law)

Ana Garcia is the sister of Manuel's ex-wife, Maria Hernandez. She regularly stayed with her sister and Manuel during visits to Brownsville. She recalls that Manuel was very attentive to the four children that Ms. Hernandez brought to their marriage. He would take them out to lunch and shopping. Ms. Garcia trusted him. [Appx 21]

Although Ms. Hernandez's children were "very rebellious," especially when they came home after visiting their father, Manuel never laid a hand on them. For instance, if they were fighting, and he told them to stop, they might say, "You're not my father." If they did something wrong, he would tell Ms. Hernandez, but never hit them. He might scold them if they talked back to Ms. Hernandez, telling them that they should respect their mother.

Ms. Garcia later lived with Manuel and Ms. Hernandez for two years. This was after their first son was born, and while Ms. Hernandez was pregnant with their second. Ms. Garcia observed that Manuel adored his children. "He never even looked at them funny." She remembers that Manuel got up early to wake all the children and make sure they got to school. Manuel always took care of the them, buying them food or taking them shopping.

When Ms. Garcia's first child, who is handicapped, was born, Manuel was extremely generous to her, offering her rides to and from the doctor, and lending her money.

f. Margarita Velez (sister-in-law)

Margarita Velez was Manuel's sister-in-law, married to Manuel's brother Wenceslao Jr. Manuel struck Mrs. Velez as "always cheerful." He liked to grill meat over charcoal outdoors, or cook chicken and rice. He was never disrespectful or rude. He liked to share with others.

Ms. Velez and her husband would sometimes fight because he liked to go out drinking with friends, and also showed interest in other women. Manuel would sometimes intervene, telling his brother, "I lost Julia [his first wife] because of acting like you."

Manuel babysat for Ms. Velez's children. He would say that they should study hard so they would not end up like him, not knowing how to read. He would buy them snacks, such as Cheetos and popsicles.

Ms. Velez observed that Manuel was a good and cautious father. He sometimes visited her and her husband with his children and former wife Maria Hernandez. He was very attentive to them. He loved the children that Ms. Hernandez brought to their marriage as if they were his own.

g. Josephina Camacho (sister-in-law)

Josephina Camacho was married to Rafael, Manuel's youngest brother. She observed that Manuel took good care of his children, Benita and Manuel Jr. Manuel also took good care of Ms. Camacho's four children, with whom she trusted Manuel completely. [Appx 16]

At times Manuel lived with Ms. Camacho and her husband, and during those times she would leave Manuel to care for her children, including changing diapers and preparing bottles. Manuel took her children to the park, and shampooed and braided her girls' hair. As the children grew older, Manuel gave them good advice. When he had money, he would give it to her children, or buy popsicles, ice cream, and other sweets or food for them. He was never careless with children. If he had a cigarette, he would put it out when children were around. Manuel

loved Ms. Camacho's children, and in turn they loved Manuel. Ms. Camacho says Manuel "took such good care of my kids."

Ms. Camacho found Manuel to be a good person—gentle, respectful, responsible, and a hard worker. He wanted to be a solid citizen, with a home, a car, and a job.

h. Enrique Gomez (brother-in-law)

Enrique Gomez is a brother-in-law of Manuel Velez (he is married to Manuel's sister, Marisol). Mr. Gomez has known Manuel for at least ten years. [Appx 23]

Mr. Gomez recalls that Manuel was a happy man who liked to cook chickens on a grill. He liked small intimate groups, usually comprised of family, wives, and kids. For the ten years he knew Manuel, he never saw him behave violently. Nor did he ever see Manuel have any problems with children. With Mr. Gomez's children, Manuel was a good uncle. He never hit or screamed at them. If they misbehaved he might say "stop that," but the kids were just as likely to ignore Manuel as follow his instructions. They were never scared of him.

Mr. Gomez recalls going to visit Manuel and Maria Hernandez when they lived in Los Fresnos. He did not even realize that Maria Hernandez's children were not also Manuel's, because he was like a father to them. From his observations, Mr. Gomez believes that Manuel is incapable of harming a child.

i. Cesar Velez (nephew)

Cesar Velez, age 17, is Manuel's nephew (he is the son of Manuel's sister Marisol Velez). He remembers seeing Manuel at cookouts and family events about every two weeks and describes him as "cool." Manuel took Cesar fishing and crabbing in canals in Los Fresnos, Texas, next to Brownsville. Manuel bought ice cream, chips, and snacks for him, his brother, and the other "kids." [Appx 31]

j. Jonathan Velez (nephew)

Jonathan Velez, age 15, is another of Manuel's nephews (he is the son of Manuel's brother Wenceslao Velez, Jr.). Although he was only ten years old when Manuel went to jail, Jonathan has happy memories of his uncle. [Appx 34]

When Jonathan was a small child (three to five years old), Manuel would babysit for him. "He always treated us well. If we were hungry he would fix us something to eat. At bedtime he would tell us a story. He never scolded or screamed at us or hit us." Manuel might have harsh words if the boys were doing something wrong but this was along his general lines of protecting them. "Like when we were playing in the dirt," Jonathan recalls, "he would say, 'don't play in the dirt, you can get sick.'"

He remembers Manuel taking him and his older brother fishing. They would go for walks by the river. Manuel would tell Jonathan and his brother stories about how and where he used to go fishing, and he taught them how to fish and how to fix rods. They would go to a place called Puente de Lobos and catch what Jonathan calls "cherry fish" from the pier.

From the time of his early childhood, he remembers Manuel giving him advice, including advice not to drink, smoke, fight with women, or treat his future wife or girlfriends badly. He feels Manuel tried to set a good example for him. "If you have a girlfriend, don't fight with her," Manuel would say. "Have a nice life with her. Take her to the movies." He remembers Manuel taking him to the mall and to the movies.

Jonathan says Manuel liked to roast meat over charcoal. He would also fix rice, pico de gallo, and various other food.

He never saw Manuel angry. Manuel was always happy. Jonathan observed Manuel taking care of his own baby son, and says that "he took good care of him, he was a good father."

k. Amanda Velez (niece)

Amanda Velez, age 19, is Manuel's niece (she is the daughter of Manuel's brother Rafael Velez and Josephine Camacho). She remembers that from early childhood, Manuel bathed and changed the diapers of her younger siblings. At the time, her parents fought frequently, including several times while driving. Her father would leave the family on the side of the road and her mother would call Manuel to pick them up. Manuel then took them to the store and bought hot dogs, burgers, and chips to feed them. [Appx 30]

When Amanda's mother worked nights, Manuel often babysat her and her siblings. He would cook dinner for them, and buy them ice cream. He was not a sophisticated cook, and would prepare prepackaged noodle soups and chicken.

Amanda remembers visiting Manuel when he worked in the Sunrise Mall. He described him as a nice guy who was loving and caring. If she or other children were crying, Manuel would go to the store and buy them candy so they would stop crying and not be sad. He was never violent, and always calm.

When she and her siblings were disobedient, she remembers that Manuel would say, "That's not right, I'm going to tell your Mom." But he would never hit them or scream at them. She remembers visiting Manuel around other children and he behaved the same way with them.

l. Esmeralda Mata (family friend)

Esmeralda Mata, who as discussed above has known Manuel since childhood, remembers Manuel taking care of his own and other people's children. When children were with him, they obeyed Manuel because they loved him. He never raised his voice to them. He would not let them run off or get out of his sight. Ms. Mata recalls that Manuel took care of the children of his brother Rafael and wife Josefina Camacho. [Appx 26]

According to Ms. Mata, Manuel was a good person who always tried to help others. She found him to be honest, sensitive, and kind-hearted.

m. Ivonne Salazar (friend)

Ivonne Salazar was once a good friend of Acela Moreno, and introduced Ms. Moreno to Manuel. She also knew Manuel through Manuel's brother Rafael, and remembers that he treated his children well and took good care of them. Manuel played soccer with Ms. Salazar's seven children, and took them with him to stores when he went shopping—he would say, "Get in the pickup! Whoever fits can go to the store with me!" At the store he would buy them sweets. Ms. Salazar never saw Manuel do anything in any way wrong or inappropriate toward a child. [Appx 28]

Ms. Salazar also remembers that Manuel's trial counsel came to see her before his trial. They seemed "fishy" to her and she could not believe they were lawyers. They were laughing, and spoke Spanish to her and English between themselves. Despite the helpful testimony she had to offer, they did not call Ms. Salazar to testify at the punishment phase of Manuel's trial.

n. Yaritza Salazar (daughter of Ivonne Salazar)

Yaritza Salazar, the daughter of Ivonne Salazar, met Manual Velez when her mother was dating Manuel's brother, Rafael Velez. She recalls that Manuel was always friendly and that he was cheerful and laughed a lot. He enjoyed cooking meat on a grill. [Appx 29]

She remembers seeing Manuel play with the children. He would gently toss Angel in the air and catch him. This was always done in the spirit of play and the baby liked it. Angel never screamed or cried when Manuel played with him. She never saw Manuel angry with the baby or any of the children or with any intention whatsoever of harming them—a stark contrast to Acela. When Acela would scream at her children and cry in desperation over them, Manuel would tell her to pay attention to them.

o. Gina Salazar (daughter of Ivonne Salazar)

Gina Salazar, age 17, is another daughter of Ivonne Salazar. She met Manuel when she was nine or ten years old, and her mother was dating Manuel's brother, Rafael Velez. She recalls that Manuel was always friendly. He would take her and other children to the store and buy them sweets. She remembers that after Acela Moreno and her children moved in with Manuel, Manuel cooked for and fed Acela's children, and took good care of them. [Appx 27]

She also remembers seeing Manuel feed Angel with a bottle. She does not recall seeing the baby cry when he was with Manuel, but he cried all the time when Acela was taking care of him. She never saw Manuel do anything to harm Angel

p. Bernardo Duran (childhood friend)

Mr. Duran, Manuel's childhood friend whose information about Manuel's background is summarized above, also recalls youthful conversations with Manuel about what would happen in the future, and about wanting to find work that would be well paying. Manuel wanted to earn money to help his family. [Appx 18]

Mr. Duran married Felicitas Duran (whose potential testimony is discussed below), to whom he has remained married for more than 30 years. They have five children, and Manuel knows all of them. Mr. Duran recalls that Manuel "loved my kids like they were his brothers, or his own kids." He recalls also that Manuel would not let him hit his kids, saying "let them play, they're kids."

q. Felicitas Duran (wife of childhood friend Bernardo Duran)

Felicitas Duran is the wife of Bernardo Duran, and as such has known Manuel for most of his life. She recalls that Manuel and her husband were like brothers, with her husband having the role of "older brother." [Appx 19]

Ms. Duran was often rude to Manuel and did not treat him as he deserved (because she was angry that one of Manuel's sisters had been involved with her husband for a time). Despite this, Manuel never said a bad word to her, even when she provoked him with unkind words and behavior.

He was never resentful. He would try to make friends with Ms. Duran and ignore the mean things she said. If he saw her on the street he would try to make conversation to win her over. He was always respectful to her.

Ms. Duran's husband, when he was young, sometimes hit her. She remembers Manuel standing up for her. "Don't hit her," he would say. "She takes cares of you, she cooks your meals." If Mr. Duran spoke to her roughly, Manuel would also admonish him for that. Despite the fact that people were afraid of Mr. Duran, Manuel would always stand up to him in defense of Ms. Duran.

The Durans have five children. Manuel was particularly friendly with the three eldest. Mr. Duran would at times hit his children and Manuel would get angry with him for that. "Don't do that," he would say, "they're little kids." The Durans' children loved Manuel.

Ms. Duran recalls that one of Maria Hernandez's children was born with a serious deformity. Ms. Hernandez would make sometimes make fun of the deformity, and Manuel would respond by defending the child. "Don't discriminate against him," he would say. "Let him grow up."

Ms. Duran remembers giving Manuel the advice to find a woman who would take care of him. Instead, he seemed always to find women who needed to be taken care of themselves.

Sometimes the Durans had cookouts with Manuel. He would often cook or help to cook, and he would help to pay for food or charcoal or drinks.

r. Bernardo Duran III (son of Bernardo and Felicitas Duran)

Bernardo Duran III is the 32-year-old son of Bernardo and Felicitas Duran. He remembers Manuel as "always around," because he was good friends with his father. Manuel was always friendly and never aggressive. [Appx 20]

"He would tell us never to drink or to fight. I last saw him when I was 24 or 25 and he invited me over. It was at the Stripes store in a Valero gas station getting gas."

Mr. Duran does not drink or smoke. Although he attributes much of this positive behavior to his mother, who does not drink or smoke either, he says Manuel was a good influence on him and encouraged him not to take up those habits.

"He was here a lot. He was very respectful to my mother. He was very affectionate with us. When we were little kids he would give us hugs and call us 'amiguito.' He played ball or hide and seek or chased us around. He would get in the middle if Dad fought with us."

s. Roberto and Eunice Zamora (neighbors)

Roberto and Eunice Zamora have known the Velez family as neighbors and friends since 1982. Their potential testimony about Manuel's background is described above. [Appx 41 & 42]

They also could have testified regarding Manuel's character, and would have told the jury that Manuel was always calm and easy going; docile, never aggressive. There were always a lot of children around, including the Zamora children, and the Zamoras trusted Manuel with them. Mr. Zamora says "you know from your instincts from the beginning, when you meet someone, whether you can trust them or not."

Mr. Zamora remembers Manuel as hard working, and that he would work at whatever he could. He recalls Manuel working for a while on a turkey farm, and also picking fruit during

harvests. Mr. Zamora recalls also that Manuel would spend his entire paycheck on sweets and ices for younger children.

The Velez family came over to the Zamora house for piñata parties. During those parties Manuel played with the Zamoras' children and babysat them.

t. Esther Chavez (neighbor)

Esther Chavez, who is 67 years of age, knows the Velez family from having lived down the street from them. She recalls that Manuel was "friendly and a very nice guy." He was helpful to her and her husband, and would come over to visit. Ms. Chavez recalls also that Manuel used to play with her children and grandchildren, and that he was always very good to them. [Appx 17]

u. Olga Martinez (neighbor)

Olga Martinez, introduced above, remembers that Manuel was always respectful to her entire family. Both he and his brother Wenceslao, Jr. always behaved well around her family. Manuel was friendly with her husband Marlin, and they liked to talk to each other. [Appx 25]

Ms. Martinez remembers Manuel with his nieces and nephews on his lap. She never saw him get angry with them or do anything to hurt them.

3. Mr. Velez's work history.

There also were available to trial counsel witnesses who could have testified that, although Mr. Velez was not capable of more than menial labor, he was a good and hard worker:

a. Wenceslao Velez, Jr. (brother)

Wenceslao Velez, Jr. is a younger brother of Manuel Velez. He worked with Manuel, and found him to be a hard worker. For about three years when he was about 18 and Manuel was about 22, they worked together for a roofing company called the American Roofing Company, with offices in San Antonio and Brownsville. Manuel's job was to keep a boiler

heated to 250 degrees. He had to be the first to arrive to the job site, at 7:00 a.m., before the rest of the workers showed up, and turn on the boiler, add tar and heat it up. The boiler always had to be full of tar, because if it ran out, the workers had to begin a four-hour process of starting the boiler up again. Manuel's other responsibility was to keep the boiler at 250 degrees at all times, because if it overheated, it could explode. That is all that Manuel did for the three years they worked together. During that time Wenceslao, Jr. worked as a roofer – he would strip a roof, cover it with tar and felt, and lay shingles. [Appx 40]

Wenceslao, Jr. and Manuel also worked together on motels in South Padre Island. Wenceslao, Jr. recalls working with Manuel on a motel called Bridge Point. They worked for between six months and a year scraping paint off the walls of the motel, so that later new paint could be applied.

b. Enrique Gomez

Enrique Gomez, Manuel's brother-in-law whose testimony regarding Manuel character and care for children is described above, worked together with Manuel in Memphis in part of September and October 2005. They were employed by Easley Contractors to work on remodeling of houses that had burned down. They went to Memphis because Mr. Gomez had lived there briefly with his first wife and their daughter, and he sometimes returned there to work. [Appx 23]

Mr. Gomez was a carpenter and a "lead man" on three- or four-men crews of construction work. On the Memphis job in 2005, he led a crew consisting of his friend Jose Ramirez, Jose's father, and Manuel. Mr. Gomez got to Memphis first and then called Manuel and told him to come. In the time that Manuel was there they worked one or two jobs. One was a large three-story mansion in very bad shape that needed a lot of work, and as such occupied most of the time that Manuel was there.

They were the carpentry team. Before they arrived, a demolition team cleaned the debris. The carpentry team then looked around at what had been burned, and begin to tear it down so new construction could start. They began with the roof, tearing it off and replacing it with new wood. Wood had to be cut to size and replaced in one area of the roof at a time.

According to Mr. Gomez, Manuel's greatest virtues as a worker were his physical strength and energy. He was willing to work very hard for ten-hour days. He would arrive first and plug in compressors, air hoses and pneumatic guns so they would be ready to go when the rest of the crew arrived. He did not use any of these tools himself except for the simple use of an air gun to nail two by fours. He was a very hard worker and willing to do whatever was needed.

Manuel followed instructions. Mr. Gomez recalls telling him "do it this way, nail it over there." Although Manuel could not do anything without supervision, since he and Mr. Gomez worked closely together, Mr. Gomez could keep an eye on Manuel and supervise him constantly. Manuel could not be counted on to figure things out by himself, but always did what he was told.

c. Margarita Velez (sister-in-law).

Margarita recalls that Manuel worked for a roofer named Manuel Escobedo, who is now dead. Manuel remained an assistant at roofing sites, because he never could learn how to be a roofer. In contrast, Margarita's husband, Wenceslao Velez, Jr. (Manuel's brother), picked up roofing skills fairly quickly. Manuel would need to call Wenceslao Jr. to help Manuel fix his car and do other mechanical things.

IV. DEFENSE COUNSEL'S FAILURE TO OBJECT TO JURY CHARGE ERRORS ON PUNISHMENT WAS INEFFECTIVE ASSISTANCE

After the close of evidence at the punishment phase, the Court and counsel took up the Charge of the Court on Punishment (the "Punishment Charge"). (20 RR 124–127) Defense

counsel requested an instruction directing the jury not to weigh Mr. Velez's decision not to testify against him, which was granted and included. (20 RR 125) Defense counsel also requested an instruction that Mr. Velez's prior offenses and bad acts could not be considered by the jury unless they were proven beyond a reasonable doubt, which the Court denied. (20 RR 125–26) Defendant counsel made no other requests or objections. (20 RR 126)

As with the Charge for the culpability phase of the trial, defense counsel did not request several important instructions that should have been in the Punishment Charge, and failed to object to the exclusion of necessary instructions and the inclusion of improper instructions in the Punishment Charge. This was ineffective assistance that violated Mr. Velez's Sixth and Fourteenth Amendments right to effective assistance of counsel, as explained below and in the Affidavit of Danalynn Recer [Appx 13]).

A. Trial Counsel Did Not Request the Trial Court to Instruct the Jury That Residual Doubt About Guilt Constitutes Mitigating Evidence, and Failed to Object to the Trial Court's Failure to Do So.

The court erred by not charging the jury that it could consider any residual doubt about Mr. Velez's guilt as a mitigating circumstance. (3 CR 434–38) The Supreme Court recently left open whether capital defendants have a constitutional right to argue residual doubt evidence at sentencing. *See Oregon v. Guzek*, 546 U.S. 517, 525-26 (2006).[69] Given "abundant evidence

[69] The Texas Court of Criminal Appeals has cited the plurality opinion in *Franklin v. Lynaugh*, 487 U.S. 164, 173–76 (1988), for the proposition that the "federal constitution does not require reconsideration by capital sentencing juries of 'residual doubts' about a defendant's guilt." *Blue v. State*, 125 S.W.3d 491, 502 (Tex. Crim. App. 2003) (*citing Franklin*). The *Blue* decision was before the Supreme Court in *Guzek* clarified that "*Franklin* did not resolve whether the Eighth Amendment affords capital defendants such a right." *Guzek*, 546 U.S. at 525. Moreover, in *Blue*, the admissibility of residual doubt evidence and counsel's ability to argue it was not at issue because the defendant in that case was permitted to do both. 125 S.W.3d at 502–03.

accumulated in recent years" of exoneration of death-row inmates,[70] "the evolving standards of decency that mark the progress of a maturing society," *Roper v. Simmons*, 543 U.S. 551, 561 (2005), demand that jurors be permitted to consider residual doubt before imposing the ultimate sentence. *See* U.S. CONST. AMENDS. VI, VIII, XIV. This rule, moreover, is constitutionally required where, to secure a sentence of death, Texas must prove future dangerousness, *i.e.*, "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 § 2(b)(1). Any evidence offered by the defense tending to disprove such future dangerousness—including evidence that the defendant was not guilty—would certainly be relevant and admissible and the jury should have been so instructed. *Skipper*, 476 U.S. at 5 n. 1; *see also Ward*, 592 F.3d at 1181 (considering weak nature of evidence of guilt in finding sentencing error prejudicial). Trial counsel failed to request a residual doubt instruction and failed to object to the trial court's failure to give such an instruction.

B. Trial Counsel Failed to Object to Inclusion in the Charge of the Unconstitutional Provisions of the Texas Statutory Death Penalty Scheme.

The Charge incorporated the Texas statutory sentencing scheme, which, as shown in Part Four, *infra*, includes several provisions in conflict with the United States Constitution. Trial counsel failed to object to the charge on these grounds. (18 RR 74–77; 20 RR 125–26) Instead, trial counsel asserted numerous constitutional objections to the Texas capital sentencing scheme under Article 37.071 in a pretrial motion (1 SCR3 82–89), which has been held not to preserve charge errors. *See DeBlanc v. State*, 799 S.W.2d 701, 709 (Tex. Crim. App. 1990). To the extent trial counsel failed to properly preserve error regarding defects in the charge, trial counsel

[70] *See Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) ("Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses.").

failed to protect Mr. Velez's fundamental rights and permitted the State to convict Mr. Velez and obtain a death sentence under an unconstitutional statutory scheme.

C. Trial Counsel Failed to Object to the Trial Court's Unconstitutional Charge That a "Yes" Vote to Special Issue No. 2 Required Ten Votes.

Special Issue No. 2 of the charge of the trial court on punishment asked:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed. . . . . You may not answer Special Issue Number 2 "Yes" unless ten (10) or more jurors agree.

(3 CR 435–36, 440; 20 RR 137–38)

The trial court's charge that at least ten jurors must agree to answer the mitigation special issue "yes" violated the Sixth, Eighth, and Fourteenth Amendments which require that "each juror . . . be allowed to consider all mitigating evidence … [and that] such consideration … may not be foreclosed by one or more jurors' failure to find a mitigating circumstance." *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) (*citing Mills v. Maryland*, 486 U.S. 367 (1988)); *but see Rousseau v. State*, 855 S.W.2d 666, 687 n.26 (Tex. Crim. App. 1993) (rejecting this claim).

D. Trial Counsel Failed to Object Properly to the Trial Court's Instruction Presuming a Death Sentence.

The trial court instructed the jury to answer the second special issue by deciding whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." (3 CR 435 (tracking Art. 37.071 § 2(e)(1))) The statute violates the Eighth Amendment by requiring the defendant to disprove a death sentence is warranted, instead of requiring the State to prove a sentence is warranted beyond a reasonable doubt. Under this scheme, once future dangerousness has been

established under the first special issue, Art. 37.071 § 2(b)(1), "death is to be deemed the appropriate penalty unless the defendant proves otherwise," creating a "'presumption of death' in violation of the Eighth Amendment."[71]

E. Trial Counsel Failed to Object to the Trial Court's Instructing the Jury to Consider Mitigating Evidence in Its Future Danger Decision.

In accordance with the statute, Art. 37.071 § 2(d)(1), the trial court instructed the jury, in its decision on future dangerousness, to "consider all evidence admitted at the guilt or innocence [phase] and the punishment [phase], including *evidence of the defendant's background or character, or of the circumstances of the offense, that militates for or mitigates against the imposition of the death penalty*." (3 CR 434–35 (emphasis added) (tracking the statute)) The future dangerousness issue is distinct from the mitigation issue. Although a lack of future dangerousness mitigates, *McKoy*, 494 U.S. at 441, not all mitigating evidence bears on future dangerousness. By instructing the jury to consider such evidence in connection with this special issue, the Court injected confusion and the strong possibility that the jury factored any perceived lack of mitigation evidence into its future dangerousness inquiry. Thus, the instruction renders unreliable the future danger inquiry used to narrow the class of murders eligible for the death penalty,[72] producing an arbitrary, capricious, and disproportionate result. U.S. CONST. AMENDS. VI, VIII, XIV.

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[71] *Walton v. Arizona*, 497 U.S. 639, 686 (1990) (Blackmun, J., dissenting), *overruled by Ring*, 536 U.S. at 589, 609; *see also Kansas v. Marsh*, 548 U.S. 163, 203–11 (2006) (Souter, J., dissenting) (similar); U.S. Const. amends. VI, VIII, XIV. *But see Matchett v. State*, 941 S.W.2d 922, 935 (Tex. Crim. App. 1996) (rejecting this argument and relying on *Walton* majority).

[72] *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 440 (2008) (citing "future dangerousness" inquiry as narrowing function).

F. Trial Counsel Failed to Object Properly to the Trial Court's Unconstitutional Instruction on Special Issue No. 1 (Future Dangerousness).

The State must prove beyond a reasonable doubt a "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 § 2(b)(1). (*See* 3 CR 434) This instruction diluted the reasonable doubt standard. When non-lawyer jurors are faced with an illogical instruction like the one mandated by Article 37.071, they would naturally focus on the more familiar concept of probability, to the detriment of a less familiar, legal term of art like "reasonable doubt." Moreover, non-lawyer jurors (and many lawyers) would find it impossible to figure out how they were to determine if they were persuaded beyond a reasonable doubt that something is more likely than not. Indeed, determining beyond a reasonable doubt that something is more likely than not is an oxymoron. The end result is a reasonable likelihood that jurors would answer yes to the future danger special issue if they were merely persuaded that it was more likely than not that the defendant would be a danger in the future.

In *Cage v. Louisiana*, 498 U.S. 39, 41 (1990), the Supreme Court held that jury instructions violate due process when they dilute the state's burden of proving every element beyond a reasonable doubt. The proper inquiry with respect to the future dangerousness instruction given in Mr. Velez's case is whether there is a reasonable likelihood that the jury applied it unconstitutionally. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Given the illogical and confusing nature of the instruction, the answer is yes.

V. MR. VELEZ WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF HIS COUNSEL DURING THE PUNISHMENT PHASE.

At the punishment phase, the relevant inquiry is whether "there is a reasonable probability that at least one juror would have struck a different balance" in deciding punishment. *Wiggins v. Smith*, 539 U.S. at 537; *Lockett v. Anderson*, 230 F.3d 695, 716 (5th Cir. 2000) (discussing the requirement of unanimity among all jurors to impose the death penalty under Mississippi law and stating that if "a juror could have reasonably concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established"). The inquiry does not focus on the jury as a whole, but on the "possible effect of the evidence upon each individual juror." *Woods v. Thaler*, 2010 WL 4272751, *12 (5th Cir. 2010) (relying on *Cone v. Bell*, 556 U.S. 449 (2009)).

Texas law requires jurors to agree unanimously to both punishment-phase questions in order to hand down a death sentence, and the failure of a jury to reach a unanimous agreement results in the automatic imposition of a life without parole sentence. *See* art. 37.071. Therefore, the proper prejudice analysis is whether one juror would have chosen either to vote "no" to the first punishment phase special issue or "yes" to the second issue had constitutional error not occurred. *See, e.g.*, *Motley v. Collins*, 18 F.3d 1223, 1227 & n.3 (5th Cir. 1994) (citing *Landry v. Lynaugh*, 844 F.2d 1117, 1120 (5th Cir. 1988)). The harm standard does not require Mr. Velez to demonstrate that the outcome of the punishment phase of his trial would have been different in the absence of constitutional error; it requires only a showing that the error "undermined confidence in the outcome" of the trial. *Strickland v. Washington*, 466 U.S. at 693–96.

Further, in measuring whether trial counsel's deficiencies prejudiced Mr. Velez, the Court must consider the cumulative effect of all the alleged deficiencies taken together, rather

than judging the effect of each in isolation. *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) ("the question [under *Strickland*] is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable"); *Livingston v. Johnson*, 107 F.3d 297, 308–09 (5th Cir. 1997) (noting that district court correctly considered whether habeas petitioner had suffered cumulative harm from various claimed instances of deficient attorney performance); *see also, e.g., Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995) ("a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]"); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions"); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (finding that "significant errors . . . , considered cumulatively, compel affirmance of the district court's grant of habeas corpus"); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (observing that "prejudice may result from the cumulative impact of multiple deficiencies").

In sum, Mr. Velez has shown that his counsel performed deficiently and these deficiencies were harmful. Had counsel conducted an appropriate and timely investigation, they could have raised a host of questions about the reliability of the State's punishment phase proof, and presented a wealth of powerful mitigating evidence that would have led the jurors to find Mr. Velez to be a person whose life history, character, and mental limitations calls for a sentence less than death. Counsel's performance denied Mr. Velez his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments. *See also* Affidavit of Danalynn Recer (¶ 15 [Appx 13]) ("Mr. Velez did not receive effective assistance of counsel as guaranteed by the Sixth Amendment, due the acts and omissions of counsel" detailed in her Affidavit).

VI. MR. VELEZ'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED AS A RESULT OF JUROR MISCONDUCT.

Both the United States Constitution and the Texas state constitution provide for a defendant's right to an impartial jury. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. A jury should make its decisions regarding guilt or innocence and punishment "using information obtained in the courtroom." *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). Violating the mandate that the juror's decision be based purely on the evidence presented raises issues of bias. *See id.* Therefore, engaging in conversation with unauthorized individuals or consulting materials outside the evidence may affect a juror's impartiality, offending a defendant's Sixth Amendment right. *See id.*; *Perez v. State*, No. 03-10-00265-CR, 2011 Tex. App. LEXIS 6368 at *8 (Tex. App.—Austin Aug. 12, 2011, pet. filed) (holding that a trial court's questioning of jurors regarding receipt of alleged "other evidence" was appropriate in ensuring defendant received a "fair and impartial" trial).

Under the Texas Rules of Evidence, a juror is prohibited from testifying "as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment." TEX. R. EVID. 606(b). But a juror may testify regarding outside influences brought upon the jury. *Id.* An outside influence must be an influence that comes from neither the jury nor the individual jurors. *Williams v. State*, No. 05-10-00464-CR, 2011 Tex. App. LEXIS 8433 at *3 (Tex. App.—Dallas Oct. 24, 2011, no pet. h.).

A. Mr. Velez's Constitutional Right to a Fair and Impartial Jury Was Violated When a Juror Engaged in Conversation With an Unauthorized Person.

The Texas Code of Criminal Procedure provides strict guidelines on unauthorized conversations with jurors: "No person shall be permitted to be with a jury while it is deliberating. No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court." TEX. CODE CRIM. PROC. art. 36.22. Conversations with unauthorized non-jurors during the course of trial raises the possibility that a juror might be influenced by the conversation and thus, biased. *See Ocon*, 284 S.W.3d at 884. This is such a serious concern that the Texas Rules of Appellate Procedure provide that "[t]he defendant must be granted a new trial, or a new trial on punishment … when a juror has talked with anyone about the case." TEX. R. APP. P. 21.3(f).

Generally, juror misconduct requires proof of (1) the misconduct itself and (2) harm resulting from the misconduct. *Kinnett v. State*, No. 2-03-292-CR, 2004 Tex. App. LEXIS 6119 at *18 (Tex. App.—Fort Worth July 8, 2004, pet. ref'd). But where there is conversation with an unauthorized person, the injury to the defendant is presumed and the defendant may be entitled to a new trial. *Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997). To be entitled to the presumption, the defendant must show "the communication involved matters concerning the defendant's trial" but does not need to show that the conversation involved specifics of the case. *Bokemeyer v. State*, No. 01-10-00564-CR, 2011 Tex. App. LEXIS 3612 at *7 (Tex. App.—Houston [1st Dist.] May 12, 2011, no pet.). The State then carries the burden to rebut this presumption of harm. *Garcia v. State*, No. 04-03-00404-CR, 2004 Tex. App. LEXIS 11187 at *45 (Tex. App.—San Antonio Dec. 15, 2004, pet. ref'd).

Juror Frank Steven Peterson has acknowledged in a written statement that, after the guilt/innocence phase and before the punishment phase, he "consulted with [his] pastor about the

rightness or wrongness of the death penalty." (Peterson Decl. ¶ 4 [Appx 46]) Pursuant to the Texas Code of Criminal Procedure, this consultation was prohibited and constitutes juror misconduct, satisfying the first requirement. *See* TEX. CODE CRIM. PROC. art. 36.22; *see also Quinn*, 958 S.W.2d at 401.

Further, Mr. Velez is entitled to the presumption of harm for several reasons. First, Mr. Peterson stated that he discussed the death penalty with his pastor after finding Mr. Velez guilty, but before sentencing him. Only one day stood between the guilt/innocence phase and the sentencing phase. (*See* 3 CR 455–56) Therefore, the question was timely with the trial and was regarding the punishment phase. *See Bokemeyer*, 2011 Tex. App. LEXIS 3612 at *7. Mr. Peterson also stated that discussing the issue with his pastor "made [him] feel better about giving Mr. Velez the death penalty." (Peterson Decl. ¶ 4) The conversation was undoubtedly prejudicial toward Mr. Velez because it led Mr. Peterson to be comfortable with the more severe penalty, thereby influencing Mr. Peterson's decision. *Cf. Garcia*, 2004 Tex. App. LEXIS 11187 at *46 (stating that the State may rebut the presumption of harm by showing that the statement did not influence the juror's verdict decision).

Another way the defendant may be harmed is when the juror shares the communication with other jurors. *See id.* Mr. Peterson "spoke with other jurors about these issues," likely influencing them as well, and harming Mr. Velez. (Peterson Decl. ¶ 4) Therefore, Mr. Velez is entitled to relief because a juror conversed with an unauthorized person and it caused Mr. Velez harm.

B. Mr. Velez's Constitutional Right to an Impartial Jury Was Violated When the Jury Considered Evidence Not in the Record.

Texas Rule of Appellate Procedure 21.3 provides that "[t]he defendant must be granted a new trial, or a new trial on punishment … when, after retiring to deliberate, the jury has received

other evidence." TEX. R. APP. P. 21.3(f). To show that the jury improperly considered "other evidence," the defendant must show that (1) other evidence was actually received by the jury and (2) that the evidence was "detrimental or adverse to the defendant." *Bustamante v. State*, 106 S.W.3d 738, 743 (Tex. Crim. App. 2003). To prove that the jury received the evidence, the jury must have viewed the evidence—a factual determination. *Bryant v. State*, No. 14-09-00946-CR, 2010 Tex. App. LEXIS 9824 at *3 (Tex. App.—Houston [14th Dist.] Dec. 14, 2010). This factual determination involves analyzing the context and extent to which the jurors viewed and discussed the evidence. *Clark v. State*, No. 05-07-00127-CR, 2007 Tex. App. LEXIS 9452 at *4 (Tex. App.—Dallas Dec. 4, 2007, pet. denied). Further, the character of the other evidence before the jury is a paramount consideration. *Perez*, 2011 Tex. App. LEXIS 6368 at *10.

Juror Frank Peterson states that, after the guilt/innocence phase, but prior to sentencing, his pastor "gave [him] Methodist materials to review." (Peterson Decl. ¶ 4 [Appx 46]) Mr. Peterson further said, "Those materials did not state that the death penalty was inconsistent with [his] religious faith." *Id.* Mr. Peterson's review of the materials "made [him] feel better about giving Mr. Velez the death penalty." *Id.* at 4. In addition, Mr. Peterson discussed these issues with other jurors. *Id.* These Methodist materials were outside evidence because Mr. Peterson received these materials from a non-juror, considered them, and that consideration encouraged Mr. Peterson to vote for the death penalty, thus harming Mr. Velez.

The Court's consideration of Mr. Peterson's Declaration is appropriate because the religious materials were provided by a non-juror. Thus, the influence came from a source outside of the jury and the jurors. *See Mathis v. State*, No. 05-05-01119-CR, 2006 Tex. App. LEXIS 4645 at *21, *27 (Tex. App.—Dallas May 31, 2006, no pet.) (holding that a juror who collects information and shares with other jurors does not constitute an outside influence, but suggesting that if the information came from a non-juror, it would be an outside influence).

Because Mr. Peterson considered this detrimental outside evidence, Mr. Velez was denied his right to a fair and impartial jury in violation of the Sixth and Fourteenth Amendments.

PART THREE

IMPOSING CAPITAL PUNISHMENT ON VELEZ IS UNCONSTITUTIONAL.

I. APPLYING THE DEATH PENALTY TO MR. VELEZ IS UNCONSTITUTIONAL UNDER THE SUPREME COURT'S HOLDING IN *ATKINS V. VIRGINIA*.

The execution of individuals with disabilities in the areas of reasoning, judgment, control of impulses, or other cognitive deficiencies violates the Eighth Amendment of the United States Constitution. *See Atkins v. Virginia*, 536 U.S. 304, 319–21 (2002) (barring the execution of mentally retarded individuals as cruel and unusual punishment). Moreover, such impairments can jeopardize the reliability and fairness of capital proceedings against impaired defendants. *See id.* (applied to mentally retarded defendants). Whether a punishment is excessive to the crime is judged by "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

Manuel Velez has significant limitations in intelligence, memory, and learning, which negatively affect his decision-making and impulse control. (Rabin Aff. ¶ 8 [Appx 9]) He is emotionally, psychologically, and cognitively immature. (*Id.*) Mr. Velez has adaptive delays from a cognitive and academic standpoint, suffered a probable traumatic brain injury as a child, has had a subaverage intellectual profile since childhood. (Llorente Report at 4–5 [Appx 10]) Mr. Velez has difficulties or impairments, including his history of probable traumatic brain injury at an early age, alcohol abuse and probable dependency, as well as other risk factors including abuse, neglect, and malnutrition, and within the context of his psychosocial history (impoverished background with little stimulation at an early age, limited education), and

functions consistent with encephalopathy or organic brain damage. (*Id.* at 2–6) Mr. Velez may suffer from mental retardation.

Due to Mr. Velez's diminished capacities, his execution would violate the Eighth Amendment of the United States Constitution as cruel and unusual punishment.

Moreover, Villarreal's failure to raise an *Atkins* claim either in a pre-trial motion or during trial constitutes ineffective assistance of counsel. Had Villarreal presented an effective *Atkins* claim, he would have precluded the jury from even being able to decide whether Mr. Velez should receive the death penalty. *See Ex Parte Blue*, 230 S.W.3d 151, 161 (Tex. Crim. App. 2007) (stating that when an *Atkins* claim is proven at trial, the jury would not even receive the special issues to consider the death penalty). Nonetheless, Villarreal unreasonably failed to present the claim to the trial court and failed to sufficiently investigate Mr. Velez's capacity and further failed to present the necessary evidence. Mr. Velez was harmed by this failure when the jury sentenced him to death.

II. TEXAS'S CAPITAL SENTENCING SCHEME DEPRIVED MR. VELEZ OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY PERMITTING A JURY TO FIND FACTS BY A STANDARD OF LESS THAN BEYOND A REASONABLE DOUBT.

The Texas Code of Criminal Procedure permits admission of "evidence of an extraneous crime or bad act that is ***shown beyond a reasonable doubt by evidence*** to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act" in the sentencing phase of a defendant's trial. TEX. CODE CRIM. PRO. ANN. (West 2006) § 37.07(3)(a)(1). The statute further requires that "[a]fter the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary . . . ." *Id.* § 37.07(3)(b).

Although that is the express statutory requirement, the Texas Court of Criminal Appeals does not require that the judge instruct the jury that the State must prove prior crimes and bad acts beyond a reasonable doubt before they may be considered in the sentencing. *See Garcia v. State*, 57 S.W.3d 436, 442 (Tex. Crim. App. 2001). Therefore, the jury decides whether to consider the crimes or bad acts in sentencing a defendant without any guidance on a standard of proof in violation of a defendant's Sixth, Eighth, and Fourteenth Amendment rights.

A. By Not Requiring Proof Beyond A Reasonable Doubt, The Scheme Is Not Narrowly Tailored To Fit A Compelling Governmental Purpose In Violation Of The Fourteenth Amendment.

The right to life is a fundamental right. U.S. CONST. AMEND. XIV; *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). When a State statute imposes restrictions on a person's fundamental rights, the State must have a compelling interest with narrowly tailored means. *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627 (1969). Here, Texas law requires proof beyond a reasonable doubt, but does not mandate that the jury be instructed on the standard. *See* TEX. CODE CRIM. PRO. § 37.07(3)(a)(1). In order for the statute to be narrowly tailored, the judge should be required to instruct the jury that the state must prove all previous bad acts beyond a reasonable doubt before the jury may consider them in its sentencing of the defendant.

The trial court in Velez's case did not instruct the jury as to the proof required for prior bad acts—it only stated that, in determining Special Issue One, all evidence of defendant's background or character could be considered. (20 RR 136–37) The trial court's conduct and the Texas statute violate the Fourteenth Amendment. Velez's conviction must be reversed on these grounds.

B. The Lack Of Instruction Creates An Arbitrary And Capricious Application Of The Death Penalty, Violating The Right To Life Under The Fourteenth And Eighth Amendments.

The Supreme Court held that a State sentencing procedure "that creates a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner" will violate the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). The Court continued, "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 309-310 (1972) (Stewart, J., concurring)). The Constitution forbids jury discretion that leads to an arbitrary and capricious application of the death penalty. *See id.* at 189.

Under the Texas statute, the jury has full discretion to decide if it wants to consider prior bad acts of the defendant for sentencing—no instruction limits the jury's consideration of defendant's alleged prior bad acts. The result necessarily is an arbitrary and capricious application of the death penalty. Because the jury is given no guidance as to when it is appropriate to consider prior bad acts (*i.e.*, when they are proven beyond a reasonable doubt) and when it is not appropriate, a jury in some instances might consider a prior bad act in determining the sentence, while another jury on the same evidence may not, resulting in arbitrary action. The result violates the Eighth and Fourteenth Amendments and must result in reversal.

C. The Sixth Amendment And Supreme Court Precedent Require That The State Prove Prior Bad Acts Beyond A Reasonable Doubt.

The Sixth Amendment does not permit a defendant to be "expose[d] to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (quoting *Apprendi v. New Jersey*,

530 U.S. 466, 483 (2000)). The Supreme Court held that when the State "makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602.

In *Ring v. Arizona*, the jury found Ring guilty of felony murder. *Id.* at 592. Under Arizona's statute, Ring could not receive death unless further findings of an aggravated circumstance were made. *Id.* Arizona permitted the judge, without a jury, to determine whether or not there was an aggravating circumstance that would justify a sentence of death instead of life imprisonment. *Id.* The Supreme Court noted that the aggravated circumstance finding that was required elevated the punishment to which Ring was exposed. *Id.* at 604. Because of the elevated punishment, Ring was entitled to a jury determination of the aggravating circumstance and the standard of proof required was beyond a reasonable doubt. *Id.* at 602. The Court further stated that whether the increase in punishment was two years more than the statute allowed, or whether the increase in punishment was death, the defendant had the right to have it decided by a jury beyond a reasonable doubt. *See id.* at 602, 609.

In Texas, the statutory capital sentencing scheme requires the finding of future dangerousness beyond a reasonable doubt. TEX. CODE CRIM. PRO. § 37.071(b)-(c). During sentencing, the State may offer evidence of prior bad acts of the defendant that the jury may choose to consider in its determination of future dangerousness. However, despite the express language of § 37.07(3)(a)(1), (b), the jury is not instructed (and was not instructed in this case) that these prior bad acts must be proven beyond a reasonable doubt. *See Garcia*, 57 S.W.3d at 442.

The jury's consideration of prior bad acts most certainly has a bearing on the question of future dangerousness, thereby potentially increasing a defendant's sentence. Because the prior bad acts have the potential effect of increasing the defendant's punishment from a life sentence

to death, nothing less than an explicit instruction requiring proof beyond a reasonable doubt is sufficient. Because no such instructions were provided, Velez's Sixth Amendment rights were violated, and the conviction and sentence must be reversed.

D. The Lack Of Instruction Violates The Eighth Amendment's Requirement Of Heightened Reliability In Death Penalty Cases.

The death penalty is obviously the most serious punishment. The United States Supreme Court recognizes the severity of the death penalty and has determined that heightened reliability is required in death penalty cases. *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983). In Texas, the State has the ability to introduce evidence of prior bad acts and the jury is free to consider the acts in assessing punishment without any standard of reliability. The jury may decide to consider prior bad acts in its future dangerousness assessment, even when the State had very little evidence to support the alleged bad acts. Without a jury instruction requiring proof beyond a reasonable doubt for prior bad acts, this heightened standard requirement is meaningless. Because the jury was not properly instructed to apply the heightened reliability requirement set out by the Supreme Court, Velez's conviction should be reversed on these grounds.

Mr. Velez did not receive a jury instruction that prior bad acts must be proven beyond a reasonable doubt before the jury could consider them in its future dangerousness inquiry. (20 RR 136–37) The instructions, over defense counsel's objection, merely allowed the jury to consider "all the evidence admitted" in determining future dangerousness. (20 RR 125–26, 136–37) The lack of instruction constitutes structural error of the trial mechanism, requiring automatic reversal. *See Jiminez v. State*, 32 S.W.3d 233, 237 n.12 (Tex. Crim. App. 2000). Alternatively, the lack of instruction is reversible constitutional error that "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 622, 638 (1993). This faulty instruction—or lack of any instruction whatsoever—failed to

protect Mr. Velez's Sixth, Eighth, and Fourteenth Amendment rights. Mr. Velez's conviction should be reversed.

III. THE TEXAS "12-10 RULE," WHICH PROHIBITS INFORMING JURORS THAT A SINGLE HOLDOUT JUROR WILL CAUSE THE IMPOSITION OF A LIFE SENTENCE, VIOLATED MR. VELEZ'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

As discussed above, the Texas Code of Criminal Procedure provides that the jury in a death penalty case, if it answers "yes" to the "future dangerousness" question, must answer a special issue regarding mitigating circumstances. TEX. CODE CRIM. PRO. § 37.071(e)(1). The jury must determine

> [w]hether taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Id. Then, pursuant to the rules, the jury shall be instructed that they "may not answer the issue 'no' unless it agrees unanimously," which would impose the death penalty. *Id.* at § 37.071(f)(2), (g). Furthermore, the jury shall be instructed that they "may not answer the issue 'yes' unless 10 or more jurors agree," which would permit an imposition of a life sentence instead. *Id.* at § 37.071(f)(2), (g).

Based on these instructions, the jury could reasonably conclude that they have only two options—they must either answer "no" unanimously, or ten jurors must answer "yes." *See id.* at § 37.071(f)(2). The jurors are led to believe that they must have at least ten people agree that mitigating circumstances warrant a life sentence instead of a death sentence. But the Texas Code of Criminal Procedure also states that if the jury is "unable to answer any issue submitted under Subsection . . . (e), the court shall sentence the defendant to confinement . . . for life imprisonment without parole." *Id.* at § 37.071(g). Therefore, in reality, *a single holdout juror*

will prevent a death sentence. *See id.* The jury is not informed that a single holdout will impose a life sentence on the defendant, which violates the defendant's rights under the Eighth and Fourteenth Amendments.

A. The Texas 12-10 Rule Violates The Eighth Amendment.

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. U.S. Const. Amend. VIII. When a state statute prevents each juror from considering mitigating evidence, that statute necessarily violates the Eighth Amendment. *Locket v. Ohio*, 438 U.S. 586, 605 (1978).

In *Mills v. Maryland*, 486 U.S. 367, 375-76 (1988), the Supreme Court made clear that it is not the State's interpretation of the juror verdict forms that is relevant; rather, it is what a reasonable juror may interpret the verdict form to mean that is relevant. In *Mills*, the sentencing instructions could have indicated to a reasonable juror that "they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." 486 U.S. at 384. The Court determined that there was a "substantial probability" that the jurors would incorrectly interpret the sentencing form.

Similarly, under the Texas sentencing instructions to jurors, there is a substantial probability that a reasonable juror could believe it requires ten jurors to agree that there are mitigating circumstances in order to impose a life sentence. In reality, a single holdout juror will result in a life sentence. The Texas jury instructions do not correct this reasonable jury misunderstanding; therefore, the Texas jury instructions are unconstitutional.

B. The Texas 12-10 Rule Violates The Due Process Clause Of The Fourteenth Amendment.

The Fourteenth Amendment protects against the deprivation of life, liberty, or property without due process of law. U.S. CONST. AMEND. XIV. The U.S. Supreme Court has held that

> a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty

in violation of the Fourteenth Amendment. *Lockett*, 438 U.S. at 605. Each juror must be able to consider mitigating evidence when the juror is making the decision between life and death for a defendant. *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990). When one "juror is able to prevent the other [eleven] from giving effect to mitigating evidence," the system violates the Fourteenth Amendment. *See id.* at 440 (citing *Mills v. Maryland*, 486 U.S. 367, 374 (1988)). Further, when there is a "substantial probability that reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all [twelve] jurors agreed" then the statute is unconstitutional. *Mills*, 486 U.S. at 384.

Here, the Texas statute causes reasonable jurors to believe that they may not consider mitigating circumstances unless ten jurors agree to do so, and there is no instruction to the contrary. *See* TEX. CODE CRIM. PRO. § 37.071(f)(2)-(g). The Velez jury received the statutory instruction that the jury "may not consider [sic] Special Issue No. 2 yes unless 10 or more jurors agree." (20 RR 138:6–7) This instruction created a substantial probability that the jury thought they may not consider mitigating evidence to impose a life sentence unless ten jurors agreed; thus, the Texas 12-10 rule violates the Eighth and Fourteenth Amendments.

The misleading instructions constitute structural error, requiring automatic reversal. *See Jiminez*, 32 S.W.3d at 237 n.12. Alternatively, the misleading instruction is reversible

constitutional error that "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 622, 638. This Court should reverse Mr. Velez's conviction on these grounds.

IV. THE DEATH PENALTY AS ADMINISTERED BY THE STATE OF TEXAS CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Although the Supreme Court upheld Texas's death penalty system in *Jurek v. Texas*, 428 U.S. 262, 276 (1976), the time has come to overturn precedent. The death penalty, as administered by the State of Texas, is unconstitutional.

The Eighth Amendment is a fluid standard and "has not been regarded as a static concept." *Gregg*, 428 U.S. at 173. Citing Chief Justice Warren, the U. S. Supreme Court adopted the principle, "[T]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* It has been thirty-five years since the Court's decision in *Jurek*. The evolving standards of decency now require that *Jurek* be overturned and Texas's death penalty system be held unconstitutional.

A. The Jury's Instruction On Special Issue One Is Unconstitutional.

Under Special Issue One, the jury is charged that the State must prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PRO. § 37.071(b)(1). The State is constitutionally required to prove Special Issue One beyond a reasonable doubt because it potentially increases the maximum penalty for the crime. *See Apprendi*, 530 U.S. at 476.

The Texas instruction, however, improperly lowers the standard of proof. Mr. Velez's jury received this faulty instruction. (20 RR 136) The instruction requires proof of a *probability*

beyond a reasonable doubt, which apparently means that there is no reasonable doubt that the defendant is slightly more likely than not to present a future danger. Instead of focusing on the proof beyond a reasonable doubt, jurors will almost certainly focus on the more familiar "probability" language instead, impermissibly reducing the State's burden. Because the burden of proof was impermissibly lessened by the language of the instruction, Mr. Velez's conviction should be reversed automatically as structural error, or in the alternative, as constitutional error because it substantially influenced the jury's verdict. *See Brecht*, 507 U.S. at 622, 638; *see also Jiminez*, 32 S.W.3d at 237 n.12.

B. Texas's Statutory Special Issue System Requires The Jurors To Presume That Death Is Appropriate For The Defendant, Impermissibly Shifting The Burden To The Defendant To Show Mitigating Circumstances.

The Texas special issue system requires that the jurors answer two questions to determine whether a defendant will get the death penalty. TEX. CODE CRIM. PRO. § 37.071(b). If the first question (future dangerousness) is answered in the affirmative, then only the finding of sufficient mitigating circumstances will preclude the imposition of the death penalty. *Id.* at 37.071(e)(1). Therefore, the Texas statute first *presumes death* and then shifts the burden to the defendant to prove sufficient mitigating circumstances to reverse that presumption and give life imprisonment. *See id.*

In the guilt phase of a trial, the State bears the burden of proving every element of the crime beyond a reasonable doubt and that burden cannot be shifted to the defendant. *See Francis v. Franklin*, 471 U.S. 307, 326 (1985). Similarly, the state must prove any fact that increases the maximum penalty for a crime beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476. This burden cannot be transferred to the defendant. By presuming death first and then permitting a life sentence only if the defense proves sufficient mitigating circumstances, Texas

unconstitutionally permits the state to shift some of its burden to the defendant. Mr. Velez's jury received this unconstitutional instruction (20 RR 136–37), and thus, his conviction must be reversed as structural error, or in the alternative, as constitutional error. *See Brecht*, 507 U.S. at 622, 638; *see also Jiminez*, 32 S.W.3d at 237 n.12.

C. Texas's Future Dangerousness Inquiry Is Unconstitutional.

The Texas statute does not provide a coherent standard for determining a threat of future dangerousness and creates the risk that the death penalty will be arbitrarily applied. A statute that creates a "substantial risk" that the death penalty will be applied in an "arbitrary and capricious manner" violates the Eighth Amendment. *Gregg*, 428 U.S. at 188. The Supreme Court has stated that the Constitution will not tolerate statutes that "wantonly and so freakishly" apply the death penalty. *Id.* In order to be in compliance with the Eighth Amendment, the jury's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189. A judge must give the jury guidance through careful instructions to make sure there is consistency in the manner in which the death penalty is imposed. *Id.* at 192.

The Texas statute requires an instruction for the jury to consider possible mitigating evidence in its determination of future dangerousness. Not only is the statute without a coherent standard, but it also misapplies the use of mitigation evidence. Mitigation is an entirely separate consideration from future dangerousness. Considering mitigation evidence in the context of future dangerousness allows the jury to consider the possible lack of mitigation evidence as affirmative evidence of future dangerousness. This misapplication of mitigation evidence confuses the jury and adds to the arbitrariness with which the death penalty is applied in violation of the Eighth Amendment. Mr. Velez's jury received the jury instruction that

mitigation should be considered with the future dangerousness inquiry. (20 RR 136) Thus, his conviction should be reversed as structural error, or in the alternative, as constitutional error because the instruction substantially influenced the jury's verdict. *See Brecht*, 507 U.S. at 622, 638; *see also Jiminez*, 32 S.W.3d at 237 n.12.

D. Texas's Lack Of Instruction On Residual Doubt Is Unconstitutional.

The Texas jury instructions do not contain an instruction on residual doubt. *See* TEX. CODE CRIM. PRO. § 37.071. While the Supreme Court has recently held that a defendant does not have a constitutional right to enter *new* evidence on the issue of guilt at the sentencing phase of a trial, the Court left open the question of whether evidence *already introduced* may be entered during the sentencing phase as residual doubt. *Oregon v. Guzek*, 546 U.S. 517, 523 (2006). Moreover, "the evolving standards of decency that mark the progress of a maturing society," *Gregg*, 428 U.S. at 173, mandate that jurors be permitted to consider residual doubt before imposing the ultimate sentence. Any evidence offered by the defense tending to disprove future dangerousness—including evidence that the defendant was not guilty—would be relevant and admissible during sentencing, and the jury should have been so instructed.

Failure to instruct the jury on residual doubt evidence, because it may also serve to undercut the State's evidence of future dangerousness and as mitigating evidence, is unconstitutional and is reversible error. Because no instruction on residual doubt was provided, Mr. Velez's conviction should be reversed as structural error, or in the alternative, as constitutional error. *See Brecht*, 507 U.S. at 622, 638; *see also Jiminez*, 32 S.W.3d at 237 n.12.

E. Texas's Failure To Charge A Defendant With Special Issue One In The Grand Jury Indictment Is Unconstitutional.

In order for the defendant to receive the death penalty in a capital case in Texas, the jury must answer Special Issue One in the affirmative, finding that the defendant will commit criminal acts in the future, or that the defendant constitutes a continuing threat to society. TEX. CODE CRIM. PRO. § 37.071(b)(1). The Supreme Court has spoken directly on this issue, holding that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (2000)). The Texas Constitution also requires that "no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury." TEX. CONST. art. 1 § 10.

The finding of future dangerousness in Texas is a fact that, if found, will increase the maximum penalty for a crime from life in prison to the death penalty. In *Ring*, the Supreme Court held that aggravating circumstances must be determined by a jury beyond a reasonable doubt, *Ring*, 536 U.S. at 602, and as a result, many courts now find that a grand jury must indict on aggravating circumstances. *See, e.g., United States v. Allen*, 406 F.3d 940, 943 (8th Cir. 2005) (*en banc*). Therefore, the question of future dangerousness should be included in the indictment and charged to the grand jury. Because Texas does not require such a charge and Mr. Velez did not receive such a charge, the system is unconstitutional and requires a reformation of the sentence to life without parole, or in the alternative, remand to require the State to obtain a new indictment.

Because of the numerous fundamental and unconstitutional flaws with the Texas death penalty system, including violations of the Sixth, Eighth, and Fourteenth Amendments, Velez's conviction should be reversed.

V. DEATH BY LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT THAT VIOLATES THE EIGHTH AMENDMENT.

As set forth above, the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg*, 428 U.S. at 173. Thus, "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment." *Id.* However, "public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). At the least, punishment may not be "excessive," meaning the punishment must not involve "the unnecessary and wanton infliction of pain" and the punishment "must not be grossly out of proportion to the severity of the crime." *Id.*

In Texas, those sentenced to death are executed by "intravenous injection of a substance or substances in lethal quantity sufficient to cause death." TEX. CODE CRIM. PRO. § 43.14. The procedure is "to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice ("TDCJ")." *Id.* Although the U.S. Supreme Court upheld lethal injection as a constitutionally permissible form of execution in *Baze v. Rees*, 553 U.S. 35, 52 (2008), the time has come to eliminate the objectively intolerable risk of harm and declare the three-drug lethal injection protocol unconstitutional.

As of March 2011, the Texas lethal injection procedure involves the successive administration of pentobarbital (a sedative often used to euthanize animals, intended to anesthetize the prisoner), pancuronium bromide (which paralyzes the prisoner and stops his breathing), and potassium chloride (which stops the prisoner's heart). TDCJ Death Row Facts,

http://www.tdcj.state.tx.us/death_row/dr_facts.html. The TDCJ implemented pentobarbital in response to a shortage of sodium thiopental, which previously had been the sedative of choice.

Dr. David Waisel, an expert anesthesiologist and Harvard Medical School Professor testifying in an Oklahoma lawsuit challenging the use of pentobarbital in executions, stated in an expert report submitted to the Western District of Oklahoma:

> The use of pentobarbital as an agent to induce anesthesia has no clinical history and is non-standard. Because of these significant unknowns, and a lack of clinical history related to using pentobarbital to induce anesthesia, using pentobarbital as a part of a 3-drug lethal injection protocol puts the inmate at an undue risk of suffering.

See Pavatt v. Jones, No. CIV-10-141-F (W.D. Okla.) (Expert Report of David B. Waisel, MD, Doc. 89, Ex. 1 at 3). Moreover, the paralytic effect of the second drug, pancuronium, could mask the suffering of a conscious prisoner when the third drug, which causes severe pain, is administered. Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*. 35 FORDHAM URBAN L.J. 817, 819 (2008), available at http://ssrn.com/abstract=1109258 ("Because pancuronium paralyzses the inmate during the execution process, the inmate may experience excruciating pain and suffereing but be unable to cry out or even blink an eyelid to let anyone know if the anesthesia has failed."). The pain and suffering that an inmate would experience if not properly anesthetized is extreme. *Id.* "The third drug, potassium chloride, causes excruciating pain that has been likened to the feeling of having one's veins set on fire. Experts who have testified in lethal injection cases have unanimously agreed that it would be unconscionable to inject either drug into a person who was not anesthetized." *Id.* at 819–20.

There are no statutory dosage-to-weight guidelines for administration of anesthesia in the three-drug protocol. In addition, litigation on behalf of death row inmates has exposed problems

at every step of the process, including the mixing of the drugs, the setting of the IV lines, the administration of the drugs, and the monitoring of their effectiveness. Thus, effective measures are not in place to ensure that the prisoners are properly anesthetized when the second and third drugs are administered. Such a procedure creates a substantial risk that there is an "unnecessary and wanton infliction of pain," particularly if the drugs are not administered in the appropriate order and amount, in violation of the Eighth Amendment. This method of punishment should be declared unconstitutional.

VI. THE CUMULATIVE EFFECT OF THE ERRORS IN MR. VELEZ'S TRIAL DENIED HIM FUNDAMENTAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

Mr. Velez has presented to this court numerous and serious errors, each of which gives rise to its own violation of Mr. Velez's rights under the U.S. Constitution. The errors, considered in their entirety, violated Mr. Velez's due process rights under the Fourteenth Amendment and require a new trial. *See Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999) (citing *Stahl v. State*, 749 S.W.2d 826, 832 (Tex. Crim. App. 1988) (considering cumulative effect of errors)); *see also Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir. 1991).

CONCLUSION

This case presents an unusual, perhaps unique, combination of shockingly ineffective assistance of counsel, misconduct by law enforcement and the prosecution, and a trial conducted by an admitted corrupt judge who himself made egregious mistakes, intentional or otherwise, in the course of the trial. If the constitutional rights to due process and the effective assistance of counsel **mean anything** under the United States Constitution, then this conviction must be vacated. In any run-of-the-mill criminal case, the errors that occurred here would warrant relief, but as the United States Supreme Court has repeatedly noted, "death is different." *Ford v.*

Wainwright, 477 U.S. 399, 411 (1986); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). In this capital case, there can be no question that Manuel Velez is entitled to relief.

This Court should make findings and conclusions detailing the host of grounds on which Mr. Velez's conviction and sentence constitute or reflect violations of the Constitutions and the laws of the State of Texas and the United States, including, but not limited to:

a. Mr. Velez is actually innocent, which makes his conviction a violation of due process under the Fifth and Fourteenth Amendments to the United States Constitution;

b. Mr. Velez was wholly deprived of his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution by the many acts and omissions of trial counsel described above;

c. Mr. Velez was convicted in violation of his constitutional rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution;

d. The State's misconduct in pretrial and trial violated Mr. Velez's constitutional rights to due process under the Fifth and Fourteenth Amendment to the United States Constitution, including but not limited to the prosecution of the case by a special prosecutor who should have been disqualified from representing the State, the State's withholding of material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the State's improper commenting on Mr. Velez's decision not to testify, the State's creation of multiple versions of Mr. Velez's voluntary statement and then improperly accusing Mr. Velez or his counsel of fraudulently creating one of them, and the State's presentation of false testimony in both culpability and punishment phases of trial;

e. Due to the trial judge's corruption and judicial errors, Mr. Velez was denied a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

f. Mr. Velez's constitutional right to a fair and impartial jury were violated as a result of juror misconduct in violation of the Sixth and Fourteenth Amendments to the United States Constitution and art. 1 § 10 of the Texas Constitution; and

g. The Texas statute under which Mr. Velez was prosecuted and sentenced to die violated Mr. Velez's Sixth Amendment, Eighth Amendment and Fourteenth Amendment rights under the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, because of the errors set forth above, Mr. Velez prays that this Court:

1. Issue a writ of habeas corpus, returnable to the Court of Criminal Appeals, pursuant to TEX. CODE CRIM. PROC. art. 11.071 § 6(a); and

2. Make written findings of fact and conclusions of law pursuant to art. 11.071 § 8(c) that Mr. Velez's conviction and sentence of death were imposed in violation of the Constitution and laws of Texas and the United States and must be vacated and Mr. Velez released or, alternatively, that the conviction be vacated and a new trial ordered.

3. Further, pursuant to art. 11.071 § 9,

   a. Enter an order designating all issues of fact to be resolved, including, specifically, the effect of former Judge Abel Limas having accepted bribes and the extent to which Limas's corruption may have affected the trial; the source and creation of the two statements apparently signed by Mr. Velez that were admitted at trial; and any issues of fact the District Attorney may dispute in the response to this Application for Writ of Habeas Corpus;

   b. Order an evidentiary hearing, permitting the full and fair development and presentation of Mr. Velez's claims;

   c. Grant full and complete discovery, including the right to take depositions, issue interrogatories, and to subpoena witnesses and documents as necessary to the resolution of Applicant's claims and including those matters identified in Paragraph 3(a) above; and

   d. Upon the conclusion of such hearing, make the findings of fact and conclusions of law as set forth in paragraph 2, above.

4. Grant such other relief as law and justice require.

Respectfully submitted this 25th day of January, 2012.

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COUNSEL FOR APPLICANT MANUEL VELEZ

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Application for a Writ of Habeas Corpus was served by sending same via hand delivery on this 25th day of January, 2012, addressed to:

Armando R. Villalobos
Rene B. Gonzales
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