Habeas Cause No. 07-CR-721-WR
Trial Cause No. 07-CR-721-G

EX PARTE	*	In the 404th District Court
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Manuel Velez, Applicant	*	Cameron County, Texas

The Court carefully reviewed the original trial record, the Application, Appendix of affidavits and documentary evidence in support of the Application, the State's Answer in Opposition (filed July 19, 2012), and Mr. Velez's Reply (filed August 3, 2012). The Court identified numerous disputed issues of fact material to the validity of Mr. Velez's conviction and then conducted a five-day evidentiary hearing which took place from December 11-17, 2012, at which Mr. Velez and the State had an opportunity to present evidence in accordance with Texas Code of Criminal Procedure art. 11.071 § 9. At the hearing, the Court carefully listened to the testimony and examined the evidence presented by Mr. Velez, including cross-examination by the State. As part of this hearing, the Court personally reviewed the videotaped depositions of three experts presented by Mr. Velez, including the State's cross-examination of those witnesses. The State had the opportunity to present rebuttal evidence but elected not to do so (three of the expert witnesses called by Mr. Velez at the hearing worked on the State's behalf at the trial). Based on the evidence presented, including close analysis of the reliability and credibility of the largely consistent testimony of the nine expert and five lay witnesses who testified at the hearing, the Court hereby makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

On or about August 1, 2005, Acela Moreno and her children moved in with Manuel Velez. Manuel Velez is not the father of any of Acela Moreno's children. They lived together until September 10, 2005 the date Manuel Velez moved to Memphis, Tennessee to go work. He returned to Brownsville, Texas on October 14, 2005. (Since Manuel Velez was out of town from September 10, 2005 through October 14, 2005, any injury to Angel during this time was not at the hand of Manuel Velez.)

On October 31, 2005, the only two adults with access to Angel Moreno were Acela Moreno and Manuel Velez. When Angel stopped breathing, he was rushed by ambulance to a hospital. He died two days later.

Mr. Velez and Ms. Moreno were both charged by indictment with intentionally or knowingly causing Angel's death by striking Angel's head with a hand or an unknown object or against a hard surface on or around October 31, 2005 in cause no. 07-CR-721-G.

Prior to the trial of Mr. Velez, Ms. Moreno accepted a plea bargain offer from the State of Texas and pled guilty to the lesser-included offense of intentionally or knowingly causing bodily injury to Angel by striking his head with her hand, object, or surface, and was sentenced to serve ten years in prison. Part of Ms. Moreno's plea bargain agreement with the State of Texas was that she would testify for the State against Mr. Velez. She testified at the trial, but did not testify that Mr. Velez had struck Angel on October 31, 2005. In her videotaped interview with the police on November 1, 2005, Ms. Moreno said Mr. Velez had never struck Angel.

Following a 19-day jury trial (including 12 days of jury selection), Mr. Velez was convicted of capital murder and sentenced to death pursuant to a Judgment entered by Judge Limas in this Court on November 18, 2008. Mr. Velez pursued a direct appeal, and on June 13, 2012, the Court of Criminal Appeals reversed Mr. Velez's sentence and affirmed his conviction. *Velez v. State*, No. AP-76,051, 2012 Tex. Crim. App. Unpub. LEXIS 607 (Tex. Crim. App. June 13, 2012, rehearing denied) ("CCA Op.").

Mr. Velez filed his Application for Writ of Habeas Corpus timely, on January 25, 2012, challenging his conviction for capital murder and sentence to death pursuant to article 11.071 of Texas Code of Criminal Procedure. The Court of Criminal Appeals' reversal of his death sentence moots the request for habeas relief on sentencing, unless and until Mr. Velez receives a new sentence. His conviction, however, remains subject to habeas challenge in this Court.

The Court finds Applicant should be GRANTED A New Trial on the Grounds of Ineffective Assistance of Counsel because of the actions and conduct by both Hector Villarreal and O. Rene Flores: The Court's Findings of Fact and Conclusions of Law Regarding this issue are stated herein below:

The applicant was represented at trial by Hector Villarreal and O. Rene Flores. Hector Villarreal is deceased and was obviously not available to testify at the habeas hearing. O. Rene Flores testified at the habeas hearing.

Defense Theory at 2008 Trial: Blame the Victim's Mother

Since Mr. Villarreal is deceased and therefore unavailable to testify at the habeas hearing the court's findings and conclusions of law regarding Mr. Villarreal's trial theory is based on the 2008 trial record: transcript and exhibits, and the testimony at the habeas hearing of O. Rene Flores, also trial counsel. Applicant has proven that his counsel, Hector Villarreal's and O. Rene Flores', performance was deficient and, his defense counsel's, performance fell below an objective standard of reasonableness in light of prevailing professional norms. Below are objective examples which confirm the actions of Hector Villarreal and O. Rene Flores were ineffective assistance of defense counsel.

The defense theory at trial was to place the blame for the death of Angel on the other adult with access to Angel, his mother, Acela Moreno. The argument to the jury was: (1) Mr. Velez did not have the opportunity to cause Angel's fatal injuries, and (2) Acela Moreno was a drug abuser who was responsible for Angel's death.

In his opening statement, trial counsel, Hector Villarreal told the jury:

> [W]hat it all boils down to is who done it, who had the opportunity, who had the means, who had the drug problem. ....
>
> . . .
>
> The question [is] who had access to the child during that . . . time line. If you If you weren't around, . . ., it couldn't have been you. . . [T]he evidence is going to show that Ms. Moreno was available, that Ms. Moreno . . . had a little drug problem . . . .

The theory was stated but there was no follow through to justify the proposition to the jury. The real problem was that Mr. Villarreal and Mr. Flores, the defense attorneys, failed to present any substantial evidence to support the assertions, and did nothing to show that any of Angel's injuries occurred when Moreno, but not Mr. Velez, had "access to the child."

INTRODUCTION

The habeas application before this Court raises persuasive claims that defense counsel, Hector Villarreal and O. Rene Flores, failed to provide Manuel Velez the effective assistance of counsel to which he is constitutionally entitled, resulting in his capital murder conviction in connection with the death of a child. The State convicted Mr. Velez on a circumstantial theory that he must have caused the child's fatal injuries because all the child's injuries were inflicted in the two-week period after Mr. Velez returned from a job in Tennessee and moved into a house with the child's mother. Mr. Velez has now shown that, at the time of his 2008 trial, compelling medical evidence was available to refute the theory on which he was convicted. His trial counsel, Hector Villarreal and O. Rene Flores, inexplicably failed to develop and present to the jury this exculpating evidence. These failures were not the result of sound trial strategy. For this reason and additional grounds stated below, this Court recommends that the Court of Criminal Appeals grant the relief requested and reverse Mr. Velez's capital murder conviction.

PROCEDURAL BACKGROUND AND STATUS

On October 31, 2005, Manuel Velez was living in a house in Brownsville with Acela Moreno and her three children, including one-year-old Angel Moreno. When Angel stopped breathing, he was rushed by ambulance to a hospital. He died two days later. Mr. Velez and Ms. Moreno were both charged by indictment with intentionally or knowingly causing Angel's death by striking Angel's head with a hand or an unknown object or against a hard surface on or around October 31, 2005. Prior to trial, Moreno pled guilty to the lesser-included offense of intentionally or knowingly causing bodily

injury to Angel by striking his head with her hand, object, or surface, and was sentenced to serve ten years in prison.

Mr. Velez was represented at trial by Hector Villarreal, assisted by Villarreal's nephew, O. Rene Flores. They were appointed by former District Judge Abel Limas in September 2007 to represent Mr. Velez, after his previous attorney, Gary Ortega, was removed as unqualified to defend a capital murder charge.

FINDINGS OF FACT

The State Relied on a 14-day Timeline of Injuries to Convict Mr. Velez.

1. It is undisputed that both the child's mother and Mr. Velez were home at the time Angel suffered respiratory trauma and was rushed to the emergency room on October 31, 2005. However, it is unclear exactly what occurred to trigger that trauma on October 31, 2005. Ms. Moreno, the only other adult home at the time, testified for the State, but did not testify that Mr. Velez had struck Angel on October 31, 2005 and in fact, she stated in her videotaped interview with police on November 1, 2005, that Mr. Velez had never struck Angel.

2. The State's case against Mr. Velez relied on the premise that Angel was a healthy, uninjured child on October 18, 2005, and that all of Angel's death-causing injuries were inflicted in the last 14 days of his life, after Mr. Velez returned from five weeks in Tennessee and moved into a house in Brownsville with Moreno and her three children, including Angel.

3. Mr. Velez left Brownsville for a job in Memphis, Tennessee, on September 10 and returned October 14, 2005, and therefore had no opportunity to harm Angel during this time. The State's timeline was thus essential to its case against Mr. Velez.

4. During the trial, the State emphasized this 14-day timeline and relied upon it heavily to convict Mr. Velez of capital murder:

> 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.

5. The State emphasized its timeline in defending the conviction on direct appeal with the Court of Criminal Appeals noting, for example, that "Angel died as the result of significant head trauma" two weeks after Velez and Moreno moved to a house "away from the neighborhood in which her family lived."

6. The State's support for its timeline theory began with the testimony of a pediatrician (Dr. Asim Zamir), who testified that Angel was healthy and uninjured on October 18, 2005, based primarily on his review of medical records prepared by his employees. The State has represented to the jury, the Court of Criminal Appeals, and this Court that Dr. Zamir personally examined Angel on that date, and did not "see" any signs of injury or abuse. Dr. Zamir testified at the habeas hearing, however, that he did not personally evaluate Angel on October 18, but was testifying from a handwritten chart created by a nurse practitioner who did not testify at trial or the habeas hearing.

7. Trial counsel, Hector Villarreal and O. Rene Flores, did not ask Dr. Zamir, Angel's pediatrician any questions. At trial, Dr. Zamir testified that Angel was a healthy baby on October 18, 2005. Dr. Zamir was testifying from the medical notes and record, and not from personal knowledge. Trial counsel's failure to clarify this fact, and the State's references to Dr. Zamir's having "seen" the child on October 18, left the jury with a false impression that Dr. Zamir had actually examined Angel that day.

8. The State also relied at trial on the testimony of two pathologists (Dr. Norma J. Farley, who performed the autopsy, and Dr. Vincent DiMaio, who reviewed Dr. Farley's report and other postmortem medical records), each of whom supported the State's timeline theory with testimony that Angel's injuries occurred in two episodes. The pathologists testified that the first episode of injuries, inflicting two skull fractures

and an "organizing" subdural hematoma, occurred not more than two weeks prior to Angel's death.

9. Drs. Farley and DiMaio based the 7-14 day estimate of the first episode on their analyses of tissue slides of the fractures. Dr. Farley did not separately analyze the subdural hematoma, but sent the child's brain to Dr. Daniel Brown, a neuropathologist in Pennsylvania for his analysis. Dr. Brown's report, which was incorporated into Dr. Farley's autopsy report, was not discussed at trial. Although Dr. DiMaio had also not analyzed the brain tissue, he opined at trial that healing of the older subdural hematoma was "advanced," which was "consistent with the one to two weeks of the skull fractures."

10. The State's experts said the second episode (causing "acute" subdural and subarachnoid hemorrhaging and various contusions) occurred on October 31, 2005, and was caused by another blunt force trauma.

11. Dr. DiMaio opined that Angel's death was caused by a "combination" of the two injury episodes. Dr. Farley's testimony at trial was similar; she stated: "We already had the fractures before and the subdural hemorrhages from the first time. Now we are getting more . . . blood between the brain and skull from the second episode and . . . it's too much for the child." The State relied on this testimony in its case on appeal and adopted the theory that death was caused by the combination of injuries.

12. The State leaned heavily on its experts to prove its timeline theory, telling the jury: "[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."

The Theory of Defense Was That the Victim's Mother Caused the Fatal Injuries.

13. The defense theories articulated by Mr. Velez's counsel at trial were that (1) Mr. Velez did not have the opportunity to cause Angel's fatal injuries, and (2) Moreno was a drug abuser who was responsible for Angel's death.

14. For example, in his opening statement, trial counsel, Hector Villarreal said:

> [W]hat it all boils down to is who done it, who had the opportunity, who had the means, who had the drug problem.
> . . . .
> The question [is] who had access to the child during that . . . time line. If you weren't around, . . ., it couldn't have been you. . . . [T]he evidence is going to show that Ms. Moreno was available, that Ms. Moreno . . . had a little drug problem
> . . . .

15. As described below, trial counsel, Hector Villarreal and O. Rene Flores, presented virtually no evidence to support these assertions, and did nothing to show that any of Angel's injuries occurred when Moreno, but not Mr. Velez, had "access to the child."

Trial Counsel Did Not Effectively Challenge the State's Medical Evidence at Trial.

16. As described below, trial counsel, Hector Villarreal and O. Rene Flores, did not attempt to challenge the State's theory of the date of injuries, and did not present any medical evidence at trial.

Trial Counsel's Pre-Trial Investigation of the Medical Evidence

17. In developing the defense of Mr. Velez and preparing for trial, trial counsel, Hector Villarreal and O. Rene Flores, did not investigate the age of the injuries.

18. Trial counsel, Hector Villarreal and O. Rene Flores, did not contact Drs. Farley, DiMaio, or Zamir before trial. Nor did they contact Dr. Daniel Brown, the neuropathologist whose analysis of the child's brain tissue was incorporated into Dr. Farley's autopsy report as testified to by O. Rene Flores, at the habeas hearing.

19. Trial counsel, Hector Villarreal and O. Rene Flores, did contact two doctors—Dr. Keith Rose, a surgeon, and Dr. James Lukefahr, a pediatrician. Neither of these doctors was a pathologist. Each of them told trial counsel, Hector Villarreal and O. Rene Flores, that it appeared from the records that some of Angel's injuries could have been sustained more than two weeks before his death, at a time when Mr. Velez was not in Brownsville.

20. Trial counsel, Hector Villarreal and O. Rene Flores, did not provide Dr. Lukefahr with Angel's pediatric records and did not ask Dr. Lukefahr to testify at trial. Had he been asked by trial counsel, Hector Villarreal and O. Rene Flores, Dr. Lukefahr would have been willing to review Angel's pediatric records and to testify at Mr. Velez's trial regarding the age of the child's injuries and the abnormal and dramatic increase in the child's head circumference during the summer of 2005.

21. Dr. Rose specifically recommended to O. Rene Flores, trial counsel for Mr. Velez that he retain a forensic pathologist or other expert qualified to determine the manner and means of death and to opine on the age of Angel's injuries. Trial counsel, O. Rene Flores, ignored the suggestions and instructions of Dr. Rose and did not retain or even contact a pathologist ***or any other*** doctor qualified to opine on these issues.

Trial Counsel's Handling of Medical Evidence and Examination of the State's Medical Experts

22. Trial counsel, Hector Villarreal and O. Rene Flores, presented no medical evidence and no medical testimony on the age of the injuries to the child or the cause of death.

23. Trial counsel, Hector Villarreal and O. Rene Flores, minimally cross-examined the State's medical experts. The total cross-examination of the State's medical experts is less than ten pages of transcript. Trial counsel did not question Dr. Zamir. Trial counsel, Hector Villarreal and O. Rene Flores, did not question either Dr. Farley or Dr. DiMaio regarding the date of Angel's older head injuries. During the habeas hearing, Mr. O. Rene Flores, the assistant trial counsel, honestly admitted that there was no meaningful preparation for the cross-examination of these key expert witnesses who were critical to the State's theory of the case. These experts were also critical to the defense theory of the case—that Mr. Velez did not cause the injuries that killed Angel.

24. When asked by the Court what he, O. Rene Flores, would have done differently he (Mr. Flores) testified I would have given Mr. Velez a defense. I would do what the habeas counsel has done and hired the experts and give Mr. Velez a defense.

25. Trial counsel, Hector Villarreal and O. Rene Flores, did not ask questions of Dr. Farley that (as shown by her testimony at the habeas hearing) would have raised reasonable doubt in the minds of the jurors. Instead, in cross-examining Dr. Farley, trial counsel asked questions focusing on an irrelevant, four-day timeline for the date of Angel's injuries, which did not further any theory offered by the defense.

26. With respect to the age of Angel's skull fractures, Dr. Farley testified at trial that she estimated them at 7 to 14 days. Although this timing was a critical issue in the case, and despite having been previously advised by Drs. Rose and Lukefahr that the injuries could be older than 14 days, Mr. Velez's trial counsel did not ask Dr. Farley if the fractures could have been older than 14 days.

27. When Dr. Farley was asked this question at the habeas hearing, she said she didn't mean 14 days was "exactly right," and conceded that the older fractures could be as old as 20 days and that they are a sign of prior abuse to the child. As noted above, 20 days earlier, Mr. Velez was in Tennessee, far away from Angel and his mother.

28. Defense counsel, Hector Villarreal and O. Rene Flores, also did not ask Dr. DiMaio whether the older injuries could have been inflicted more than 14 days prior to death. Further, although Dr. DiMaio's report referred to a radiology report of the CT scan of Angel's head on October 31, 2005, showing a "chronic" subdural hematoma, trial counsel did not confront him with (or even obtain a copy of) Dr. DiMaio's textbook, which defines a chronic subdural hematoma as manifesting itself "more than 3 weeks after injury." VINCENT DIMAIO, FORENSIC PATHOLOGY at 167 (2d ed. 2001).

29. Trial counsel, Hector Villarreal and O. Rene Flores, did not ask Dr. Zamir, the pediatrician who testified that Angel was a healthy baby on October 18, 2005, any questions at trial. Although a careful reading of the trial transcript reveals that he was testifying from the record, not personal knowledge, trial counsel's failure to clarify this fact, and the State's references to Dr. Zamir's having "seen" the child on October 18, left the false impression that Dr. Zamir had actually examined the child that day.

30. Trial counsel, Hector Villarreal and O. Rene Flores, did not present any medical evidence on the age of injuries or the cause of death and in his cross-examination of the State's medical experts, he did not ask about the age of the injuries. Thus, the State's central theory of the case—that the injuries were inflicted within 14 days of death—went unchallenged.

31. The habeas medical testimony focused on the postmortem evidence on the nature and "dating" of the injuries to the child. In addition, evidence from the child's pediatric records that supported the pathology evidence was presented. Habeas counsel also presented evidence concerning the connection between the older and newer injuries and the actual cause of Angel's death.

32. In addition to the two episodes of head injuries—one older and one more recent, Angel had a number of bruises visible on the skin, including some identified as bite marks and as burns by the State's experts. These marks are signs of abuse; however, these did not cause Angel's death. The evidence of the age of these injuries was inconclusive. At trial, Dr. Farley described a burn on the bottom of Angel's foot as "scar tissue, so . . . we can't date it." At the habeas hearing, Dr. Farley said that burn was older than 14 days, and was "probably more than a month" old. Dr. Spitz estimated Angel's superficial bruising as "days to weeks old."

33. Who was responsible for these contusions was also unclear. In his statement to police, Mr. Velez said he caused bruising on the child's rib area while playing with him. Moreno, in her videotaped interrogation, stated that she may have burned the baby with a cigarette while she, Acela, was holding Angel in her arms. And in her written statement to police, Moreno stated "I may have burned Angel's foot when I carried him, but only one time." Moreno's sister Magnolia stated in her written statement to police that she saw a bite mark on the child's face when Manuel was in Memphis and that Moreno admitted that she had bit the child. Magnolia repeated this testimony at trial. Accordingly, because these injuries alone did not cause Angel's death and the testimony on the cause and age of these injuries was conflicting and

inconclusive, the Court did not give much weight to such evidence and it was not consequential in the Court's determination in this matter.

34. As described below, the medical evidence presented by habeas counsel through testimony of several medical experts at the hearing, as well as affidavits and documents, establishes that Angel was not a healthy, uninjured baby on October 18, 2005. That evidence, from several credible sources, establishes that Angel's more serious injuries occurred more than 14 days and perhaps several weeks or months, before his death. None of this evidence was presented to the jury at Mr. Velez's trial in 2008. The State did not present rebuttal evidence at the habeas hearing; however, three doctors who worked on the State's behalf at or prior to trial, Dr. Brown, Dr. Farley, and Dr. Zamir, were called as witnesses by habeas counsel and cross-examined by the State.

35. The evidence presented in the habeas proceeding is addressed in detail below as follows:

- Postmortem evidence on the organizing subdural hematoma;
- Postmortem evidence on the two linear skull fractures;
- Evidence from the child's pediatric records showing an increase in head circumference and vomiting in June – July 2005;
- The child's medical condition on October 18, 2005; and
- The nature and severity of the injuries on October 31, 2005.

The Organizing Subdural Hematoma

The Testimony of Dr. Daniel Brown on the Age of the Older Subdural Hematoma

36. The first witness at the habeas hearing, Dr. Daniel Brown, was the State's neuropathologist in 2006 who examined the brain at the request of Dr. Farley. Dr. Brown received his medical degree from Upstate Medical University in Syracuse, New York. He did his residency in anatomic pathology and neuropathology at the University

of Texas Southwestern Medical School in Dallas. He is also board-certified in anatomic pathology and neuropathology. His affidavit was included in the Habeas Appendix and admitted at the hearing.

37. Dr. Brown issued a report in 2006 based on his initial findings, which Dr. Farley incorporated into her autopsy report. In his report, Dr. Brown indicated that Angel's older subdural hematoma was "well-developed . . . with dense fibro vascular connective tissue and a few scattered hemosiderin-laden microphages." As Dr. Brown explained at the habeas hearing, by use of such language, he communicated his estimate that the hematoma was between two weeks and six months old at the time of death. This clear meaning of the language ascribed by Dr. Brown was supported by the testimony of other medical experts and evidence presented by habeas counsel.

38. For example, Dr. Daniel Spitz, a forensic pathologist and experienced medical examiner, testified that he understood Dr. Brown's words quoted in the previous paragraph to "indicate . . . a chronic subdural hematoma" that "would put the age at probably a month, possibly longer."

39. Dr. Brown was not asked by Dr. Farley, defense counsel, Hector Villarreal and O. Rene Flores, or anyone else prior to trial in 2008 to explain his report or otherwise determine more precisely the age of the injury. Dr. Brown did not testify at trial, and no other witness interpreted his report for the jury.

40. After further analysis of the tissue slides in 2011 performed at the request of habeas counsel, Dr. Brown concluded that Angel's older subdural hematoma was inflicted between 18 and 36 days prior to his death. On cross-examination, Dr. Brown made clear that the older hematoma could not be less than 18 days old, because the changes that would reflect that possibility "were simply not present."

41. Dr. Brown further testified that he read the trial testimony of Drs. Farley and DiMaio regarding the age of injuries, and that the testimony was "not consistent" with his report.

42. Trial counsel, Hector Villarreal and O. Rene Flores, never contacted Dr. Brown and never asked him about the date of the injuries. Nothing prevented trial counsel from doing so. Dr. Brown would have been willing to express his opinions regarding the date of Angel's injuries had he been called to testify.

The Testimony of Other Medical Experts on the Age of the Older Subdural Hematoma

43. At the habeas hearing, Dr. Farley testified that she would defer to Dr. Brown's assessment that the organizing subdural hematoma was 18-36 days old at the time of Angel's death. Neither Dr. Farley nor Dr. DiMaio had personally analyzed the brain tissue, and neither testified specifically on that issue except to connect the subdural hematoma to the skull fractures.

44. Other doctors who reviewed and analyzed the postmortem evidence of the chronic subdural hematoma agree with Dr. Brown that Angel's subdural hematoma was more than two weeks old at the time of his death. These other doctors include Dr. Daniel Spitz (forensic pathologist), Dr. Janice Ophoven (pediatric forensic pathologist), and Dr. Ronald Uscinski (neurological surgeon).

- **Dr. Daniel Spitz**

45. Dr. Daniel Spitz is a forensic pathologist, who has served as chief medical examiner for Macomb and St. Clair Counties, Michigan for approximately nine years. His affidavit was included in the Habeas Appendix and admitted at the hearing, and he testified at the hearing. Dr. Spitz is board certified in anatomic pathology, clinical pathology, and forensic pathology. He is one of the co-editors of the textbook, *Spitz & Fisher's Medicolegal Investigation of Death*, in which he authored sections on the investigation of deaths in childhood.

46. Dr. Spitz, after he was contacted by habeas counsel in 2011, reviewed medical records pertinent to this case, including Dr. Farley's autopsy report (with Dr. Brown's neuropathology report incorporated), re-cuts of tissue slides prepared by Dr. Farley, medical records following the October 31 event, Angel's prior pediatric records,

CT scans, the autopsy video, Dr. Brown's affidavit, recuts of brain tissue slides prepared by Dr. Brown, and the trial testimony of Drs. Farley and DiMaio.

47. Dr. Spitz discussed the radiology report by Dr. Maria Camacho interpreting the first CT scan of Angel's head, taken on October 31, 2005. He noted the description of a "chronic subdural hematoma," and confirmed that Dr. DiMaio's textbook uses the term "chronic" in this context to mean a hematoma manifesting more than three weeks after an injury. Dr. Spitz also noted that the first CT scan is very important in assessing the condition of the brain before it has incurred pathologic changes as a result of prolonged lack of oxygen and time on a ventilator.

48. Dr. Spitz agreed with Dr. Brown's opinion that Angel's older subdural hematoma was the result of an injury inflicted more than two weeks before he died. Dr. Spitz demonstrated to the Court, using microscopic slides of the child's brain tissue prepared by Dr. Brown, the histologic findings from which he determined that the subdural hematoma was "certainly greater than two weeks old, [and] maybe substantially more than that" at the time of Angel's death. The Court finds the jury should have had the opportunity to hear and consider Dr. Spitz's testimony ***or any other doctor*** concerning the age of the chronic subdural hematoma. The court finds Dr. Spitz's testimony credible, informative, and persuasive. The court finds the jury may have found Dr. Spitz's testimony credible, informative, persuasive, and after hearing Dr. Spitz's testimony ***or any other doctor*** on the age of injuries may have reached a different result.

49. Trial counsel, Hector Villarreal and O. Rene Flores, never consulted Dr. Spitz ***or any other*** pathologist to ask about the date of the injuries. Dr. Spitz would have been willing to express his opinions regarding the date of Angel's injuries had he been called to testify.

- **Dr. Janice Ophoven**

50. Dr. Janice Ophoven, a pediatric forensic pathologist, also provided an affidavit and testified by deposition concerning the subdural hematoma and other

medical issues. Dr. Ophoven is a former pediatrician and medical examiner who is board certified in forensic pathology and anatomic pathology.

51. Dr. Ophoven's analysis was similar to that of Dr. Spitz. Dr. Ophoven took a number of photographs of the autopsy tissue slides and reviewed the photographs during her testimony. When explaining the age of the older subdural hematoma, she reviewed the photographs contained in habeas evidentiary hearing Exhibits 137 and 138 and explained to the Court what she saw that convinced her that the older hematoma was more than two weeks in age when the victim died and possibly several weeks to months old at that time. She identified collagen and scar tissue and specifically discussed the characteristics of the tissue that she observed in the slides that indicate an older injury, including sclerosis, the spacing of the nuclei, and the presence of a large blood vessel.

52. Because of her extensive experience with pediatric injuries and the detailed evidence provided by Dr. Ophoven showing the bases for her findings and opinions, the Court finds Dr. Ophoven qualified as an expert and qualified to offer an opinion.

53. Trial counsel, Hector Villarreal and O. Rene Flores, never consulted Dr. Ophoven ***or any other*** pathologist to ask about the date of the injuries. Dr. Ophoven would have been willing to express her opinions regarding the date of Angel's injuries had she been called to testify.

- **Dr. Ronald Uscinski**

54. Dr. Ronald Uscinski, a renowned neurosurgeon, also gave an affidavit and testified at the hearing. Dr. Uscinski is board certified in neurosurgery by the American Board of Neurosurgery and a professor of neurosurgery at the Potomac Institute for Policy Studies.

55. Dr. Uscinski demonstrated the scientific foundation for his opinion that Angel's chronic subdural hematoma was several weeks or months old when he died. His opinion was based in part on a CT scan of the child's head taken on November 1,

2005, at Valley Baptist Hospital. At the habeas hearing, Dr. Uscinski reviewed images of the CT scan displayed in the courtroom, and explained his findings. The Court found Dr. Uscinski's demonstration informative, and finds the jury should have heard his testimony ***or that of any other*** doctor and the court finds the jury may have found Dr. Uscinskil's testimony credible and persuasive and may have reached a different result.

56. Dr. Uscinski would have been willing to express his opinions regarding the date of Angel's injuries had he been contacted by trial counsel and called to testify.

57. Based on the foregoing evidence, which was not rebutted by the State, the Court finds that the organizing subdural hematoma may have been the result of an injury inflicted not less than 18-36 days before Angel's death, and possibly weeks or months earlier. The Court further finds that the medical evidence on the age of the organizing subdural hematoma is persuasive as it offers another possibility to the State's theory of the case at trial that all the injuries were inflicted within 14 days of death. The court finds that the age of the injuries this is a fact issue for the jury and a jury should be allowed to consider this evidence when rendering a verdict against Mr. Velez. The jury was deprived of any credible medical evidence and a medical opinion on the age of the injuries due to the ineffective assistance of counsel of Mr. Hector Villarreal and Mr. O. Rene Flores.

The Two Linear Skull Fractures

58. The other head injuries associated with the "first episode," according to Drs. Farley and DiMaio, were two linear skull fractures—one on the left side of approximately 6 inches, and one on the right side of approximately 1½ inches. Drs. Farley and DiMaio both testified at trial that the fractures were inflicted 7-14 days before Angel's death, based on their analysis of microscopic slides of the tissue. Relying on this testimony, the State argued at trial that Mr. Velez fractured Angel's skull on October 19, 2005 (the day after Angel's visit to Dr. Zamir's office). The State repeated this same argument on appeal.

59. As discussed above, Dr. Farley testified at the habeas hearing that the fractures could have been 20 days old, and thus could have occurred while Mr. Velez was working in Memphis.

60. Other doctors who analyzed the tissue slides of the skull fractures opined that the fractures were definitely inflicted more than 14 days before Angel's death.

61. Dr. Daniel Spitz microscopically analyzed recuts of the tissue slides prepared by Dr. Farley, and concluded that the fractures were "certainly greater than two weeks old . . . probably a month or two" at the time of death. He demonstrated to the Court several indicia supporting his opinion. Dr. Spitz explained that the slides revealed "a fracture that is well along the process of healing almost to the point of being . . . healed." The site showed no inflammation or residual hemorrhage, "just scarring and new bone growth," indicating it had been healing for more than two weeks. The Court finds Dr. Spitz's to be a qualified to serve as an expert witness qualified to offer opinion testimony.

62. Dr. Janice Ophoven also analyzed recuts of Dr. Farley's tissue slides, and agreed with Dr. Spitz that the skull fractures were more than two weeks old, and likely much older, when Angel died. Specifically, Dr. Ophoven reviewed a series of photographs she took of the skull fracture tissue slides. In doing so, she explained how she came to her conclusion as to the age of the fractures:

> And then after weeks, one will see this is new bone that's been being deposited in the healing process. And then after that, the new bone will actually start to get this discoloration, this bluish discoloration, which means that mineral is being deposited into the bone, meaning that it's ossifying. The process for removing, clearing, filling, and bone deposits is orderly and progresses over time. The—this picture is a higher power magnification of this new bone, which is obviously substantial, meaning that this—this fracture has undergone significant remodeling, filling, rebuilding, bone deposits, and mineralizing of those bone deposits. This is not a two-week process at all. This is much more than two weeks.

Dr. Ophoven further explained: "In this particular case, it's filled not just with connective tissue, which is the first state of a scar that fills in, but it's also filled in with bone. It

takes weeks for bone to actually fill in into the space. So now we're already talking about weeks of time before a skull fracture has this appearance. Also important is the fact that there's no fresh blood in the bone tissue or in the under layer of the scalp."

63. In reviewing the Autopsy Report (12 HRR Ex. 58), Dr. Ophoven noted that Dr. Farley had made similar observations, and like Dr. Spitz, noted new bone growth and no inflammation:

> Q. Dr. Farley says: There is central marrow fibrosis with increased vascularity and a few non-viable bone fragments. Osteoclasts are noted reabsorbing this nonviable bone. There is new bone formation as well with osteoblastic activity around the periphery. Scattered histocytes are seen, but there is no acute inflammation. What does this mean?
>
> A. It means that the bone healing is so far advanced that there is no new reactivity that one would typically see if it's a recent fracture. And importantly, she also confirms the presence of new bone activity and the skull fracture being filled in with connective tissue.
>
> Q. And that's exactly what you were showing us in Exhibit 139; is that correct?
>
> A. Yes.

64. The Court finds Dr. Ophoven's testimony concerning the skull fractures credible and persuasive. Dr. Ophoven was able to explain and show the Court what medical evidence she relied on in forming her medical opinion and specifically, she showed the Court exactly what she saw in the skull fracture tissue that ruled out a determination that the fractures occurred within two weeks of the child's death.

65. Dr. Uscinski also showed the Court, through his review of the skull fracture slides, that Angel's skull fractures were "several days to weeks old, maybe older." Dr. Uscinski supported this opinion by showing the Court that there was scar tissue around the fracture area, and explaining that scars take time to develop. Further, there was no soft tissue swelling or hemorrhage near the two fractures to indicate a fresh injury.

66. Based on the foregoing credible evidence, the Court finds the jury may have found the skull fractures were inflicted more than two weeks before Angel's death, and possibly weeks or months earlier based on the opinion testimony of Dr. Uscinski. The Court further finds that the medical evidence on the age of the skull fractures was critical information for the jury to have heard and it was ineffective assistance of counsel for defense counsel to fail to bring it forth. This is another reason and further evidence for the granting of a new trial.

Angel's Increase in Head Circumference and Vomiting in June-July 2005

67. Angel's pediatric records indicate that his head circumference expanded significantly between mid-June and late July 2005 and that he suffered various vomiting episodes during that same period. According to the medical testimony and evidence, because other potential causes such as hydrocephalus and a brain tumor were ruled out in the autopsy report, the only remaining likely cause of such an increase is significant head trauma inflicted shortly before or during June to July 2005.

Records Document Head Circumference Increase

68. The pediatric records admitted into evidence reflect the following head circumference measurements for Angel, taken at four different medical facilities:

Clinic Where Measured	Date	Age	Head Circumference	Percentile
Valley Baptist Medical Center	November 1, 2004	Birth	34.5 cm	25 %
Dr. Zamir's Clinic	June 11, 2005	7.3 months	45 cm	50-75 %
Valley Regional Medical Center	June 14, 2005	7.5 months	44 cm	25-50 %
Boys & Girls Clinic	June 28, 2005	8 months	45 cm	50 %
Dr. Zamir's Clinic	July 25, 2005	9 months	48 cm	97 %
Boys & Girls Clinic	August 16, 2005	9.5 months	47.5 cm	95 %
Dr. Zamir's Clinic	October 18, 2005	11.5 months	48.5 cm	95 %

69. Although there was some controversy at the hearing regarding two of the head circumference measurements, the remaining measurements were largely undisputed and reveal an abnormally dramatic increase. First, the table reveals a discrepancy in the measurements for mid-June. Dr. Zamir's records indicate 45 cm for June 11, while the hospital records reflect a measurement of 44 cm on June 14. One of the two numbers must be a mistake, as the child's head did not shrink a centimeter in three days. The experts reviewing these records generally relied on the 45 cm measurement to compare against the later measurements. If the hospital's 44 cm is used instead, the July, August, and October measurements would reveal an even more dramatic increase.

70. Second, the State challenged the July 25, 2005 head circumference measurement of 48 cm taken from Dr. Zamir's records, based on Dr. Zamir's assertion that it was an erroneous measurement and that the correct measurement was actually 46.5 cm. Dr. Zamir's testimony that he re-measured Angel's head circumference on July 25, 2005 to eliminate the possibility of an error in performing the measurement and then circled the point for 46.5 cm on the chart is not supported by the records produced by his office in response to three separate subpoenas. The Court notes that the records produced by Dr. Zamir's office show that Angel's head circumference was written on the records in three different locations for that day as "48 cm." Dr. Zamir's testimony as to his re-measurement on July 25, 2005 is not credited by the Court. A revised chart showing that date whereon this new 46.5 cm measurement was plotted, which had not been produced in response to at least three subpoenas, was not admitted into evidence.

71. Although the State suggested at the hearing that the head circumference records were completely unreliable because these two measurements might have been mistaken, Dr. Zamir testified that measurements of a child's head circumference, like height and weight, are important, and he and other doctors rely on these measurements in assessing a child's health and development. Read over time, Angel's measurements reflect a definite, steep increase. While the State's argument might affect the weight of the evidence if presented to a jury, the fact remains that the

jury at Mr. Velez's trial did not see any of this evidence. The Court will not disregard the inferences drawn by the experts from the medical records on this issue, especially given the State's reliance on other entries in the same records to support its prosecution of Mr. Velez.

72. It is undisputed that the increase in head circumference was not investigated by any doctor through such procedures as a CT scan or MRI, which would have been a standard response to such an abnormal increase in such a short period of time and could have identified the cause and extent of Angel's trauma at the time.

Significance of the Head Circumference Increase

73. Several doctors, including two experienced pediatricians and a pediatric forensic pathologist, testified that the rapid growth of Angel's head reflected in these records signified some type of trauma occurring in the summer of 2005.

- **Dr. Andrew Sirotnak**

74. Dr. Andrew Sirotnak, 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, provided an affidavit and testified by deposition at the hearing. Dr. Sirotnak is board certified in pediatrics and a Professor of Pediatrics at the University of Colorado School of Medicine. As Dr. Sirotnak testified, children should sustain a consistent growth pattern over time, according to what percentile they have declared themselves as they are growing, in height, weight, and head circumference. Angel started at the 50th percentile or below and then jumped two percentile lines in a short period of time. According to Dr. Sirotnak, an increase in head circumference from the 50th percentile to the 95th percentile between late June and late July 2005 is "remarkable, a 'red flag,' and suggests . . . that a violent head trauma may have occurred sometime prior to the change."

75. Trial counsel, Hector Villarreal and O. Rene Flores, never provided Angel's pediatric records to a pediatrician or other doctor. Dr. Sirotnak would have

been willing to express his opinions regarding the pediatric records had he been contacted and called to testify.

- **Dr. James Lukfahr**

76. Dr. James Lukefahr, Medical Director of the Center for Miracles at Santa Rosa Children's Hospital provided an affidavit and testified at the hearing. Dr. Lukefahr is board certified in general pediatrics and child abuse pediatrics and a professor in the Department of Pediatrics at the University of Texas Health Science Center. Dr. Lukefahr testified that an increase in head circumference of 3 centimeters in 4-6 weeks is "definitely not" typical and that an increase from the 50th percentile to the 95th percentile in that period would be a red flag for a pediatrician.

77. Dr. Lukefahr further testified that even if the revised July 25, 2005 measurement proffered by Dr. Zamir were accurate, there still would have been cause for concern because Angel's head circumference growth crossed two percentile lines—from the 50th percentile to over the 90th percentile—in a very short period of time. That level of growth over a period of less than two months would have been alarming and should have been investigated. As Dr. Uscinski notes, "he still had a substantial increase."

78. Trial counsel, Hector Villarreal and O. Rene Flores, contacted Dr. Lukefahr prior to trial but did not provide him with Angel's pediatric records and did not ask him to testify at trial.

- **Dr. Janice Ophoven**

79. Likewise, when considering the new record produced by Dr. Zamir showing a head circumference in the graph of 46.5 cm, Dr. Ophoven (the pediatric forensic pathologist) stated: "[I]t's still straight up. I mean, it's still an excessive growth pattern that in the—in the presence of symptomatology is just as worrisome." As Dr. Ophoven explained, "what is evident here is that there was a remarkable change in the rate and nature of his head growth sometime in the summer of 2005, indicating that he jumped substantially" around that time.

80. When asked what could be the cause of such an increase in head size, Dr. Ophoven, who specializes in injuries to children, stated:

> [I]n a case such as this where there's evidence of a chronic subdural, then the cause of the increased head size is the accumulation of fluid where it doesn't belong that causes pressure. As the brain's growing, the head has to split apart and grow and actually isn't necessarily growing appropriately. When you look at the postmortem, the sutures, the plates of the skull that are normally closed are spread apart. And that means that the brain and the skull and the internal dynamics of this head were reflecting pressure that exceeded what was normal. So the head had to grow to accommodate the pressure.

81. In reviewing the CT scans of Angel's head, Dr. Uscinski also noted the expanded sutures as evidence of an abnormal increase in head growth.

- **Other Doctors and Lay Witness Testimony**

82. Dr. Spitz also reviewed the records indicating a dramatic increase in Angel's head circumference measurements in the summer of 2005 and confirmed that such an increase likely indicated some sort of serious head trauma during that period. Dr. Uscinski testified that an increase in head circumference is a side effect of a subdural hematoma in an infant.

83. Although Dr. Zamir denied that Angel's head growth was cause for alarm, he acknowledged that the most likely reason a head would grow disproportionately would be trauma. He further testified that excess fluid or blood in the brain could cause an increase in head circumference. Dr. Zamir also said that he would be concerned if he saw head circumference jump from the 50th percentile to the 95th percentile within a month and a half (as shown in the records of the Boys' and Girls' Clinic). Such an increase would be something Dr. Zamir would want to look at because it could be a result of trauma or abuse. Nevertheless, after reviewing the records, Dr. Zamir opined that "Angel's head "was growing normally" between June and October 2005. This opinion was contradicted by other doctors, for the reasons summarized above.

84. On viewing pictures shown to him by the State (State's Exs. 7, 8, 9), Dr. Zamir agreed at the habeas hearing that Angel had a large head for a child around six to eight months of age.

85. Credible lay witness testimony at the habeas hearing also indicated that Angel's head was getting bigger during the summer of 2005. Four lay witnesses testified at the habeas hearing: Cesar Velez (Mr. Velez's nephew), Leticia Velez (Mr. Velez's sister), Ivonne Salazar Torres (neighbor), and Yaritza Salazar (neighbor). Sworn affidavits of each of these witnesses were also admitted into evidence without objection, along with other affidavits and declarations by people familiar with Mr. Velez, Ms. Moreno and their families. Through their testimony and written statements, these witnesses provided evidence of Angel's condition. Specifically, the lay witnesses observed that Angel had an unusually large head for his age. Each of the witnesses also described Angel as inactive and lethargic in comparison to other children. Several of the lay witnesses further observed that Angel stared blankly and blinked slowly in a manner that seemed abnormal.

86. At trial, Dr. DiMaio testified that a symptom of head trauma is that the child "would be kind of sleepy all the time, dopey, you know." Dr. Zamir's employees may have thought Angel sleepy when they examined him on October 18, 2005, when he was otherwise injured and not well.

87. Based on the medical evidence presented to the Court, violent head trauma prior to late July of 2005 is the only explanation for Angel's rapid increase in head circumference, because a brain tumor and hydrocephalus were ruled out by the autopsy. The Court finds the affidavits and testimony of Drs. Lukefahr, Sirotnak, and Ophoven credible and persuasive. The Court finds a jury may have found the affidavits and testimony of Drs. Lukefahr, Sirotnak, and Ophoven ***or any other doctor*** credible and persuasive on this point and the jury may have rendered a different result.

Angel's Vomiting Episodes

88. Dr. Zamir testified that Angel had repeated vomiting in June 2005. Angel vomited four times on June 13, 2005. At that time, Angel had been vomiting on and off

for five days. And Angel had already been seen once by Dr. Zamir on June 11, 2005, for the same symptoms. Angel was then back in Dr. Zamir's clinic on June 14, 2005 having vomited three times in the previous 24 hours. Again on June 27, 2005, Angel was at Dr. Zamir's office having vomited four times that day. And, although Dr. Zamir was unaware of this at the time, Angel also went to another clinic in Brownsville on June 28, 2005 because he had vomited three times that day. These episodes of vomiting are significant because Dr. Zamir testified that a symptom of a subdural hematoma would be vomiting.

89. Other doctors commented on Angel's series of significant vomiting incidents in June 2005, preceding the abnormally rapid increase in head circumference. As Dr. Lukefahr testified, it is striking that the vomiting episodes correspond with the dramatic increase in head size, strongly suggesting a connection between the two. Although these vomiting episodes do not, by themselves, prove that Angel suffered serious head trauma, one of the causes of persistent vomiting is increased intracranial pressure resulting from such trauma. Indeed, Dr. Sirotnak testified that the most common presentation of a missed abusive head injury is vomiting.

90. Although the pediatric records evidencing the increase in head circumference and vomiting were not presented at trial, Dr. DiMaio testified at trial that vomiting is a symptom of head trauma.

91. Dr. Ophoven recognized that vomiting is not in and of itself a direct indicator of head trauma. However, she explained the significance of the vomiting, when accompanied by the rapid increase in head circumference:

> Q. And so having reviewed these pediatric and hospital records of the child from June 11th to June 28th, 2005, tell us what was happening to this child at that time.
>
> A. The child was—the child was showing signs of—of persistent and ongoing vomiting. Vomiting is a—as you might imagine not an uncommon problem. But to continue vomiting for as long as this child is very unusual. The explanation is not embedded in the vomiting itself but in understanding what additional evidence is now available that

> the child's head size increases substantially and the obvious presence of significant head trauma.
>
> When asked the question, based on my training and experience, when is it likely that the child suffered a serious and devastating head injury, it would be coincident with the time that his head growth started growing excessively and he had symptoms of alterations in his intracranial physiology, aka, vomiting being a sign of increased intracranial pressure and injury?

92. Dr. Zamir agreed that vomiting is a symptom of a subdural hematoma and increased intracranial pressure, but he insisted that Angel's repeated vomiting was properly diagnosed at the time and did not reflect any neurological problems. He noted Angel's frequent visits to the doctors and a hospital admission which required standard neurologic tests as well as x-rays. He acknowledged, however, that no CT scan was taken, which could have determined whether Angel had incurred internal head injuries.

93. The State contested the significance of this evidence and argued that the vomiting episodes could have been caused by the diagnosed ailments reflected in the medical records and that they do not prove that Angel suffered trauma in June – July 2005. Mr. Velez's medical experts, however, did not contend that the vomiting incidents independently prove that Angel suffered trauma in June – July 2005. As discussed above, the various medical experts who opined on the repeated vomiting were clear in their opinions that the pediatric records showing Angel's head expanding and contemporaneous vomiting were suggestive of and consistent with the undisputed postmortem findings that the organizing subdural hematoma and the two skull fractures were more than two weeks old.

94. Based on the foregoing evidence, the Court finds the cause(s) of Angel's vomiting is an important issue that should have been explored. The jury should have heard this testimony and received evidence regarding Angel's vomiting episodes in June 2005. The doctor(s) testified the vomiting episodes are consistent with significant head trauma which was the proximate cause of the rapid increase in Angel's head circumference measurements in July and August.

95. In questioning some of the witnesses, the State suggested that there could not have been a traumatic head injury in June or July if Dr. Brown's estimate of 18-36 days as the age of the older subdural hematoma is correct. But Dr. Brown testified in response to questions by the Court that an older hematoma could have healed, so that he was unable to detect it at the time he examined Angel's brain. Dr. Lukefahr agreed that it is possible to have an acute subdural hematoma that resolves itself and thus not be detectible at the time of the autopsy.

96. Dr. Ophoven also noted that Dr. Brown only reviewed the autopsy report and examined the brain regarding the organizing subdural hematoma, whereas she had the opportunity to review the full medical record, including the tissue of the organizing subdural hematoma, tissue of the skull fractures, CT scans, pediatric records, and other materials that Dr. Brown did not. Thus, she explained on cross examination, her estimate that the older injuries were weeks to months old are not inconsistent with Dr. Brown's estimate aging the chronic subdural hematoma at 18-36 days.

97. In other words, according to these doctors, there could have been an episode of injury in June or July 2005 and another episode 18-36 days prior to death. The Court finds the jury should have heard this testimony, received this information, and may have found this evidence not only plausible, but persuasive based on the evidence presented in the habeas proceeding. This would mean that both of these episodes of injury were inflicted when Velez had no opportunity to harm the child. Based on this evidence the result at trial may have been different.

Trial Counsel's Failure to Present this Evidence

98. Trial counsel, Hector Villarreal and O. Rene Flores, did not provide Angel's pediatric medical records to a pediatrician or other doctor for review. This failure eliminated any opportunity for discovering the head increase in circumference and vomiting incidents so that such evidence could be presented to the jury. Trial counsel also did not present any evidence of Angel's inactive, slow, and non-

responsive behavior during the summer of 2005, even though witnesses would have been willing and able to testify.

99. The documentary evidence presented by habeas counsel indicates that Moreno and Velez did not live together until approximately August 1, 2005—which is after the increase in head circumference and vomiting occurred. This evidence consists of Moreno's sworn statements to police (in this matter and in the case against Angel's father, Juan Chavez, for assaulting Ms. Moreno in early July 2005), stating that she lived at Chavez's address on July 22 and that as of October 31, she had lived with Velez for three months.

100. At trial, Moreno testified inconsistently with her two written statements, and estimated that she "got together" with Velez sometime "[a]round June or July," but noted she didn't "remember exactly." The State told the jury that Moreno and Velez never had their own place to live until they moved in together on October 18, 2005, and thus Velez had no opportunity to harm Angel until October 18, 2005. On direct appeal, the State acknowledged that Velez and Moreno lived in their own apartment across the street from Moreno's sister, Magnolia Medrano, before Mr. Velez left for Memphis, but insisted that Mr. Velez had no opportunity to harm Angel before he left for Memphis because they were living under the "watchful eye" of Medrano's sister. A jury should have heard this information and the jury may have reached a different result.

101. The evidence showing that Moreno and Velez did not move in together until approximately August 1, 2005 as well as the evidence showing the increase in the child's head circumference and his vomiting in June – July 2005 was not presented to the jury, but would have been consistent with the defense theory that Angel's injuries occurred at a time when Mr. Velez did not have access to him.

Angel's Medical Condition on October 18, 2005

102. As discussed above, the State's timeline began with Dr. Zamir's testimony at trial that Angel showed no signs of traumatic injury at a well-baby examination on October 18, 2005.

103. Testimony at the habeas hearing revealed that Dr. Zamir's clinic sees, on average, 150-200 patients each day. For a well-baby exam, Dr. Zamir testified that a doctor will not generally see the child unless the nurse practitioner believes something is wrong. The medical assistants at Dr. Zamir's office are generally the ones that take a patient's height, weight, and head circumference measurements. Dr. Zamir testified that a child could have a chronic subdural hematoma with no external symptoms, which would prevent his office from discovering the injury. Dr. Zamir testified that, according to records prepared by his assistant, Angel did not present any external signs of a subdural hematoma on October 18, 2005, so Dr. Zamir's office would not have known the hematoma existed. Dr. Zamir further answered the Court's questions by stating that linear fractures could have made Angel asymptomatic, which happens "a lot," and the fractures often "go unnoticed." Dr. Zamir admitted that he could not disprove that Angel had suffered the skull fractures before October 18.

104. Dr. Spitz testified that the older subdural hematoma and skull fractures might not have been "noted externallyin a clinic setting and that"clinically the child may or may not show various symptoms." Dr. Spitz noted, however, that while the child may have appeared healthy on October 18 that does not mean he actually was healthy, given the pathology evidence. Dr. Ophoven agreed and stated that the nurse or doctor "may or may not appreciate that the child isn't himself or normal under those circumstances." Dr. Lukefahr confirmed that subdural hematomas can be "subtle" and "hard to detect." Dr. Sirotnak also stated that such internal injuries might not be detected during a clinic exam.

105. Based on this evidence, Angel could have been asymptomatic on October 18, 2005. But it is also possible that signs of Angel's abuse existed on that date and were missed because the examination was not as thorough as it could have been. Dr. Zamir testified that on a well-baby exam, the diaper is routinely removed and the genitals are examined, such that any bite mark would have been noticed in the diaper area. Such an exam was supposedly conducted on Angel on October 18, 2005, and recorded on the standard Texas Department of Health form. On redirect, however, Dr. Zamir testified that "NE" on his charts stands for "not examined." And Angel's

medical records for October 18, 2005, reveal that "NE" was marked for the genitals, showing that area was "not examined." There is also no check on the spine/hips to show that any examination was done on that part of Angel. And while the sensory screens are checked as "normal," there is no check to indicate that Angel's eyes were physically examined either.

106. Several doctors, including Dr. Farley, testified that the "circular burn" on Angel's left foot was certainly present, and likely visible, on October 18, 2005.

107. For example, Dr. Farley conceded at the habeas hearing the burn on the bottom of Angel's foot was older than 14 days, and was "probably more than a month" old. Dr. Farley disputed that the medical testimony she presented at trial had suggested to the jury that all of the injuries on Angel Moreno had occurred within 14 days since she agreed that the cigarette burn was more than 14 days old. Yet, she testified at trial about the cigarette burn that "it was just scar tissue, so, no, we can't date it." In attempting to explain this, Dr. Farley said she was never asked at trial about the age of the cigarette burn. Dr. Farley conceded that had Mr. Velez's trial counsel asked that question, she would have testified that it was more than two weeks old. Dr. Farley also conceded that no one could accurately describe a baby who had suffered an intentionally inflicted cigarette burn on the bottom of their foot as a healthy baby.

108. Based on evidence as to the nature and age of Angel's older injuries, the Court finds that Angel had suffered significant prior injuries and thus was not a healthy, uninjured baby on October 18, 2005. While some signs of the child's injuries may have been undetectable on an external examination, others were apparently missed by the medical personnel in Dr. Zamir's office who examined Angel. The Court reviewed the record of the October 18 visit to Dr. Zamir's clinic, but the Court finds Dr. Zamir's testimony as to Angel's health on October 18, 2005, cannot be credited because he did not personally see or examine Angel on that day. The fact that Dr. Zamir did not personally and physically see and examine Angel is important information for the jury and a jury may have rendered a different result had the jury not been mislead by the failure of defense counsel, Hector Villarreal and O. Rene Flores, to discover and bring

out this information. The court finds that, but for, this misleading information the jury may have arrived at a different result.

Nature and Severity of Injuries on October 31, 2005

109. In response to evidence that the older injuries were inflicted more than 14 days prior to death presented by Mr. Velez's habeas application filed in January 2012, the State began for the first time to argue that the age of the older injuries does not matter because Mr. Velez was charged with inflicting injury on October 31, 2005, and the injuries on that day were what killed Angel. As mentioned in the first paragraph of these Findings, it is unclear exactly what happened to Angel on October 31. There is no eyewitness testimony to any harm to Angel on that day and the nature and severity of the injuries incurred by Angel on October 31, 2005, was the subject of conflicting testimony at the hearing. Although Acela Moreno testified for the State, Acela Moreno did not say she saw Manuel Velez hit Angel.

Conditions Created By Older Injuries

110. Before considering what specific injuries were actually inflicted on October 31, the Court will first review the testimony concerning the conditions created by the older injuries:

111. Dr. Spitz testified:

> [T]he injuries that this child has dating back . . . greater than two weeks, probably three to four weeks or even longer, are significant injuries. And these are injuries which . . . could cause a variety of. . . symptoms which could change over time as the injury . . . begins to organize and heal. But certainly at the time of this child's death, those older injuries are still present and would put the child in a compromised state and at risk for further trauma with a lesser degree of . . . injury than would typically be associated with causing significant trauma and significant injuries in a child.

112. Similarly, Dr. Ophoven testified that because of the earlier injuries to the child, "the delicate balance between being able to continue those brain functions and that circulation is in jeopardy, and the . . . increased pressure residual, means that the

child is really on . . . the cusp of deterioration all the time. So anything can literally tip the balance off of all right to not all right. . . . This child is a time bomb."

113. Discussing the risk posed by the chronic subdural hematoma, Dr. Uscinski testified that even a small amount of new blood could have made "the scales tip" so that Angel could no longer sustain the injuries:

> [If the new blood] gets outpaced by reabsorption, the subdural goes away and everything is fine. But if it outpaces reabsorption, then the subdural may expand slowly by reaccumulation or accumulation of fresh blood and eventually comes to clinical attention weeks or months later when the patient has a seizure, convulsion, aspirates, develops a hemiparesis or develops other signs.

114. Based on the testimony of these doctors, which the Court finds these doctors to be qualified to serve as expert witnesses and qualified to offer opinion testimony. Based on this testimony which is credible and persuasive, the Court finds the jury may have found it plausible that as a result of the first episode of head injury, Angel's brain was in a compromised state on October 31, 2005.

Severity of Injuries on October 31

115. Dr. Spitz made several observations about Angel's acute head injuries from his analysis of tissue slides and the medical records:

- there were no acute fractures or new inflammation or blood at the existing fracture sites;
- there was not a significant area of acute contusion or swelling of the scalp that he would expect to see if the child had been slammed against a wall or other object on October 31;
- there was no diffuse axonal injury, which indicates the child's trauma was not caused by shaking or tossing the baby in the air on October 31;
- the acute subdural hematoma was relatively small, could have been the result of rebleeding of the older hematoma, and was not necessarily caused by a violent act on October 31;

- the acute subarachnoid hematoma was thin, localized, "quite minor," and could have been caused or exacerbated by coagulation problems, which are reflected in hospital records; and

- there was no indication of a contusion on the brain itself that was visible, and Dr. Brown's findings of conditions "consistent with contusional injury," in the context of a "very ischemic brain," do not indicate an injury that was the "result of a violent external act."

116. Based on these facts, Dr. Spitz determined that the medical evidence does not support a conclusion "that there was any type of significant violent act on October 31st."

- **Subdural Hematoma Rebleeding**

117. Consistent with Dr. Spitz's assessment, Dr. Ophoven explained how the newer subdural hematoma could have been caused:

> Actually, . . . my knowledge and experience with the literature and with cases is that . . . once the normal balance has been altered and there is the presence of substantial fluid in the head, then if the balance is delicate, . . . even a small amount of blood added to the volume that's already excessive inside the head can be sufficient to alter the perfusion or circulation to the brain and sudden lights-out kind of effect can occur.
>
> What could precipitate that, what's known as activities of daily living, an otherwise not-fatal impact and, of course, a potentially fatal impact? I mean, it's not known. But what we do know is it takes a lot less to cause a deterioration in a child that is, like I said, a time bomb.
>
> Q. So is it your opinion that the second set of injury to the child was less severe than the older set of injuries?
>
> A. Absolutely.

118. Dr. Uscinski showed the Court, through a review of Angel's CT scan, that Angel's chronic subdural hematoma had both fresh blood and older blood. Dr. Uscinski testified that the acute subdural hematoma was a "fresher component" of the chronic subdural hematoma where the chronic subdural was rebleeding.

119. Dr. Uscinski stated that this fresh blood did not mean there was a fresh injury, but merely that the "normal healing mechanism isn't working." He noted that the acute subdural hematoma "require[d] little or no precipitating trauma." Dr. Uscinski testified that the presence of fresh blood can act as an irritant and "trigger neurologic catastrophe."

120. Drs. Uscinski and Ophoven both agreed with Dr. DiMaio's statement in his Handbook on Forensic Pathology that a "chronic subdural hematoma can rebleed either spontaneously or as a result of relatively minor trauma." Drs. Spitz and Brown concurred that the acute subdural hematoma could have been a "rebleed" of the older subdural hematoma.

- **Brain Contusions**

121. Dr. Farley did not agree that no severe head injuries were inflicted on October 31. In particular, she insisted that Angel had incurred contusions on the brain itself, and that they were more significant than the older fractures and hematoma. She also opined that the brain contusions were caused by "slamming of the head against a wall, that kind of force."

122. Dr. Farley similarly testified at trial that "on the brain there was one contusion seen microscopically, but the CT scans picked up two contusions to the brain." She concluded that Angel had "contusions on both sides of the brain," which she attributed to the second episode. The Court of Criminal Appeals credited Dr. Farley's testimony that she "found two additional 'new' contusions" on the child's brain in assessing the sufficiency of the evidence on direct appeal.

123. At the habeas hearing, however, considerable doubt was cast on whether the evidence showed acute contusions on the brain itself. First, Dr. Farley did not claim to have personally seen contusions on the brain. Her reference to "CT scans" is based on a radiology report prepared by another doctor. In contrast, Dr. Uscinski reviewed the actual CT scan images, and saw no evidence of brain contusions. Dr. Uscinski reviewed the CT scans of Angel's head with the Court and disagreed with the findings in the radiology report from Valley Baptist Medical Center of "bilateral frontal

and parietal brain contusions." He stated that it is generally easy to identify such contusions "because fresh blood images are pure white, and there's no evidence of any of that within the substance of the brain itself."

124. As discussed above, Dr. Spitz noted that neither Dr. Farley nor Dr. Brown reported actually *seeing* contusions on the brain, and that such an injury would be visible on gross evaluation. Dr. Spitz explained that when making a diagnosis of contusion to the brain, the pathologist should be able to see the contusion upon "gross" examination—i.e. without the use of a microscope. He noted that in Dr. Farley's autopsy report there was no indication of a contusion on the brain that was visible and that the "cut surface of the brain during the neuropathology exam was negative for any type of hemorrhage within the brain tissue and negative for any kind of contusion."

125. Dr. Farley sent the brain to Dr. Brown for examination. In Dr. Brown's neuropathology report, he made findings of conditions "consistent with contusional injury." As discussed by Dr. Uscinski, Dr. Brown did not conclude there was a brain contusion. He merely stated there were conditions that were "consistent" with a contusion:

> The operant word is "consistent." What he's not saying is what else it's consistent there. And acute subarachnoid hemorrhage in a patient who has died clinically and been resuscitated so that you're trying to reperfuse the brain is something that is seen, because you're reperfusing dead tissue and blood is going to leak out. The -- so that's – that's a very nonspecific finding. And that's exactly I think why he used the word consistent.

126. Dr. Spitz similarly testified that, in the context of a "very ischemic brain," Dr. Brown's findings do not indicate an injury that was the result of a violent external act and he determined that it is more likely a consequence of the brain dying:

> Q. Okay. Dr. Brown's report, in the supplemental report, indicated that he found conditions that were suggestive or consistent with a contusion. Do you recall reading that?
>
> A. Yes. He calls -- he makes a diagnosis, I believe superficial parenchymal hemorrhage or brain tissue

> hemorrhage consistent with contusional injury. And I think any time you see parenchymal hemorrhage or contusional hemorrhage -- contusional hemorrhage, it is consistent with a contusion, but it's also consistent with reperfusion hemorrhage, and that's because you're having a very ischemic brain where the tissues are breaking down, blood vessels are breaking down, and so you can get some small areas of hemorrhage in the cortex that is unrelated to actual trauma. So, again, there's different things that -- that that could be consistent with. And the fact that it was not seen grossly would lend my opinion to the fact that this was probably a consequence of brain death and the process associated with that rather than from any type of trauma.
>
> Q. So in your view, this is not necessarily associated with a violent external act?
>
> A. No. I wouldn't characterize it as being the result of a violent external act.

127. He concluded that "the totality of the medical evidence" does not support that a violent act occurred on October 31.

128. Like Dr. Spitz, Dr. Uscinski noted the difference between a gross diagnosis of a contusion on the brain and a microscopic contusion. He stated that the conditions consistent with a microscopic contusion, as seen by Dr. Brown, "may not be a contusion."

129. Dr. Spitz also noted that there were no acute external injuries to the child's head of the type that could cause brain contusions as described by Dr. Farley:

> There were no acute defects in the skin [of the scalp], except for some areas of bruising, none of which indicate a violent action. They're fairly small. Exactly their mechanism, I don't know, but none of them indicate a violent act . . . where the child is struck against some type of solid surface. That generally results in a much bigger area of injury.

130. Dr. Uscinski also noted the absence of any external evidence of head trauma sufficient to cause contusions to the brain itself. Where, as here, there is no evidence of acute external injury and no finding of brain contusion upon gross

examination of the brain, both Drs. Spitz and Uscinski disagree with Dr. Farley's view that a violent impact on October 31 caused brain contusions.

131. Mr. Velez's experts did not testify in lock step on this point. Dr. Lukefahr, for example, opined that Angel "clearly had sustained blunt force trauma on that day." Dr. Sirotnak concurred. Neither of the pediatricians, however, commented on whether there were brain contusions, which would be outside their expertise.

132. The evidence is clear that the contusions were not seen upon gross examination of the brain, although they were reported by the radiologist, Dr. Camacho, based on the CT scan, and Dr. Brown saw conditions consistent with contusional injury via microscope. Dr. Uscinski disagreed that any brain contusions were visible on the CT scan and in his detailed review of the slides of the CT scans with the Court; Dr. Uscinski did not identify any contusions to the brain.

133. The evidence as to what occurred on October 31 is unclear and the medical evidence as to the nature and extent of injuries inflicted on October 31 or the preceding few days is conflicting. In any event, the medical evidence as to the injuries inflicted on or about October 31st no more implicates Mr. Velez than it does Ms. Moreno. Thus, the timing of the older injuries and the question of who had the opportunity to inflict those injuries is of critical importance.

Cause of Death

134. Dr. DiMaio did not testify at the habeas hearing. At trial, he testified that Angel's death was caused by a combination of the first and second "episodes" of injury. Dr. Farley's autopsy report and trial testimony were consistent with DiMaio's opinion; she told the jury that with the older subdural hematoma, additional "blood between the brain and skull from the second episode . . . [was] too much for the child."

135. At the habeas hearing, however, Dr. Farley testified that the acute injuries, particularly brain contusions that she believed were inflicted on October 31, caused Angel's death rather than a combination of the old injuries with the new injuries. She therefore disagreed with Dr. DiMaio's trial testimony.

136. Dr. Spitz agreed with Dr. DiMaio's conclusion that Angel's death was caused by a combination of the old and the new injuries. He further noted that it would not be scientifically sound to assess the cause of death without considering the older injuries and that excluding those injuries from the analysis could "lead to erroneous conclusions."

137. Dr. Ophoven agreed and stated on cross examination:

> A. . . . [T]he baby died as a consequence of complications of blunt force trauma that began with a severe impact some weeks or months prior and ended with his sudden decompensation on October 31st.
>
> Q. But what I'm asking you, if alone – if you're just looking at the acute injuries that occurred on October 31st, were those sufficient or could they have been sufficient enough to cause the death of baby Angel?
>
> A. There's no evidence that the child suffered a life-ending impact on that day from the -- from the postmortem examination. But it is -- it would be scientifically improper for me to separate the two.

138. She agreed with Dr. DiMaio's conclusion that death was caused by both a combination of the old injury to the brain and the new injury. Dr. Uscinski agreed that the older injuries were required to cause Angel's death.

139. Again, Mr. Velez's experts were not unanimous in this opinion. Dr. Sirotnak said, "I don't see how those two [the old and new injury] are connected." He further opined that it was "quite possible" that Angel could have been killed by the acute injuries alone. Dr. Lukefahr deferred to the forensic pathologists on this issue.

140. In any event, Drs. Sirotnak and Lukefahr are pediatricians, not pathologists, and the Court gives their opinions on the cause of death less weight than those expressed by Drs. Spitz and Ophoven.

141. Additionally, the apparent conflict between Dr. Farley and Dr. DiMaio on this issue, as well as the difference between Dr. Farley's testimony at trial and at the

hearing, cause the Court to give less weight to the opinions expressed by Dr. Farley at the habeas hearing on the contribution of the older injuries to the child's death.

142. Dr. Brown testified that he was unable to "definitely state" what would have happened to Angel Moreno if there had not been older injuries present. In other words, Dr. Brown is unable to say whether the acute injuries alone caused the death of Angel with a reasonable degree of medical certainty.

143. All of the experts agree that Angel's death was not caused by shaking. Dr. Brown, the neuropathologist, testified that he was requested to perform a diffuse axonal injury review to determine if Angel was the victim of so-called shaken baby syndrome. The results of this test were negative. Dr. Farley confirmed at the habeas hearing that Angel did not die from shaking or tossing, and agreed that additional testing performed by Dr. Brown ruled out any such cause of death. References in Mr. Velez's 3-page Statement to shaking or tossing Angel do not, therefore, relate to the cause of the child's death.

144. Further, as Dr. Spitz explained, "there's nothing in these statements [by Velez and Moreno] that talk about significant head trauma. In fact, "none of the information in those statements account for the previous significant head trauma with these fractures and subdural or anything that would be associated with what happened on October 31st." The Court concurs with this assessment.

145. As discussed above, several doctors testified that the older head injuries put Angel at risk of severe trauma or death triggered by relatively minor impacts or even internal trauma. Evidence was also presented that such minor injuries may have occurred. For example, Acela Moreno admitted that Angel fell from his bed the night before he became unconscious, in her statements to police and at least one other person.

146. Mr. Velez's statement to the police also states that Angel had "fallen off the bed several times as the result of him being unattended on the bed." This statement was corroborated by the testimony and affidavits that Angel was often

neglected by Moreno in a manner that put Angel at risk of injury from falls or other accidents. Cesar Velez described how Acela would just leave Angel on the couch, assuming that Angel would stay put. Yaritza Salazar witnessed Angel fall "on several occasions," including a fall causing him to topple head first over the arm rest of a couch and strike his head on a tile floor, multiple falls from the bed, and falls from being dropped by his young sister Emily. Ivonne Salazar witnessed at least one fall of Angel from a couch, heard reports confirming that Angel had fallen at other times, and stated that Angel was often left unattended on furniture in a way that made falls likely. Another time, Ms. Salazar witnessed Acela slip down the outside stairs of Acela's apartment while drinking alcohol, holding Angel, and holding a cigarette. Ms. Salazar also witnessed that Angel's younger sister Emily was allowed to carry Angel, even though Emily did not have the strength to carry him safely and sometimes dropped Angel. Leticia Velez, stopping by on her noon lunch break from work, witnessed Angel on the stairs leading down from Acela's second-story apartment—Angel had been left unattended while Acela was next door drinking beer with her sister.

147. At trial, the focus of the theory put forth by the State was that the injuries to Angel were inflicted within 14 days of death, after Mr. Velez returned from Tennessee. While the injuries that were inflicted on October 31 and the brain contusions were mentioned, they were not the focus of the State's case and often it was difficult to discern in the trial testimony of Drs. Farley and DiMaio whether they were referring to the new injuries or the old injuries. The State did not clarify this for the jury and in fact seemed to take advantage of and perpetuate the lack of precision.

148. In response to the medical evidence presented by Mr. Velez in his habeas application, the State shifted its focus to the acute injuries, and Dr. Farley now asserts that acute brain contusions killed Angel. The Court finds the testimony of Drs. Spitz, Ophoven, and Uscinski should have been heard and considered by the jury. The jury may have found it credible and persuasive concerning the nature and severity of the injuries on October 31, along with the opinions on cause of death offered at trial by both Dr. Farley and Dr. DiMaio.

149. While the medical evidence presented at the evidentiary hearing and with the habeas application does not establish precise dates for Angel's older injuries or a definitive determination of the cause of death, the evidence conclusively negates the State's theory that Angel was a healthy, uninjured baby on October 18, 2005, and the State's theory that all of his head injuries were inflicted in the last two weeks of his life, after Mr. Velez returned from Memphis.

Trial Counsel Did Not Effectively Present Evidence of the Culpability of Acela Moreno

150. Defense counsel, Hector Villarreal and O. Rene Flores, told the jury he would demonstrate the culpability of Acela Moreno, but did not provide any evidence to support this theory. And although trial counsel promised to show the jury that Acela abused her children, the jury heard almost no evidence of such abuse.

151. Evidence was presented showing that during the time Mr. Velez was in Memphis, Acela Moreno had custody and control of Angel and thus had the opportunity to harm the child. And some evidence reflected prior abuse by Moreno. For example, Moreno admitted to harming her children in her statement to the police. Moreno also admitted to burning Angel with a cigarette. Mr. Velez's statement to police included a description of Moreno's abuse of Emily. Magnolia Medrano, Moreno's sister, observed a bite mark on Angel's cheek during the time that Mr. Velez was working in Memphis. Moreno told Magnolia she bit Angel on the cheek. But trial counsel did not ask Magnolia about the bite mark. Nor did trial counsel highlight this evidence as pointing to Moreno as the likely perpetrator of Angel's injuries. And, as the habeas proceeding has shown, trial counsel, Hector Villarreal and O. Rene Flores, failed to investigate and present more substantial evidence of Moreno's culpability.

152. In credible testimony at the habeas hearing and in affidavits, several lay witnesses described Acela as a sad and desperate woman. They testified that Acela neglected and lacked patience with her young children (including Angel), whom she sometimes left unattended during the day while she slept or went elsewhere to drink alcohol. They described Acela as constantly screaming at her children. Cesar Velez

once witnessed Acela angrily tossing Angel over five feet into a sofa. Ivonne Salazar stated that Acela would often throw things at her children, especially Angel's sister Emily, whom she also saw Acela strike with a shoe.

153. Compelling evidence corroborates Mr. Velez's statement that Moreno had abused Emily, hitting her so hard that she fell, cut her head, and started to bleed. Yaritza Salazar witnessed Moreno slap Emily, causing the young girl to fall, hit her head on a ceramic statue, and cut her head open. Leticia Velez was present during this incident, and she described Moreno throwing Emily into the statue, causing the girl to suffer a bleeding wound from her head. Ivonne Salazar was also in the house during this incident, and she testified that she overheard screaming and saw that Emily was injured. At Leticia's insistence, emergency services were called for Emily, but Moreno lied about the cause of the injury (claiming that Emily fell on her own) and refused to let Emily be transported to the hospital, despite the recommendation of the emergency service providers. EMS records confirm this incident, including Moreno's refusing three times to allow them to treat Emily. Trial counsel had the EMS report in his file. Additional records from the Texas Department of Family Protective Services also indicate that Moreno's other children had been physically abused by Moreno before they were removed from her custody.

154. As noted above, these witnesses also observed that Moreno often neglected Angel in a manner that put Angel at risk of injury from falls or other accidents, and that her neglect resulted in Angel falling on several occasions.

155. Trial counsel, Hector Villarreal and O. Rene Flores, did not ask questions or investigate Moreno's history of abusing her children, including her admission that she bit Angel on the cheek and may have burned him with a cigarette.

156. Although trial counsel, Hector Villarreal and O. Rene Flores, mentioned Moreno's plea agreement, they did not present evidence showing that she pled guilty to intentionally or knowingly causing Angel bodily injury by striking him on or about October 31, 2005.

157. Moreno testified that she pled guilty to failure to report that Mr. Velez was harming her child. Trial counsel, Hector Villarreal and O. Rene Flores, did not object to this misleading testimony and never corrected this testimony through cross examination or otherwise. Acela Moreno's judgment should have been an exhibit at trial.

158. Trial counsel, Hector Villarreal and O. Rene Flores, also failed to present evidence that Moreno's other son, Alexis Moreno, had a habit of biting other children and thus was potentially responsible for the alleged bite marks. Child protective service records from just after Angel's death establish that Alexis was biting children at school and in the foster home.

159. Moreno and her children, including Angel, had lived in an abusive household before she met Mr. Velez. Juan Chavez raped and assaulted Moreno, and Moreno was afraid of him. Chavez's abuse of Moreno made it more likely that she would abuse her own children. Trial counsel, Hector Villarreal and O. Rene Flores, failed to ask Chavez, who testified at trial, whether he had ever struck Angel.

160. Moreno told Dr. Kimberly Arredondo, a psychologist retained by Mr. Velez's former attorneys Larry Warner and Gary Ortega, that Mr. Velez did not abuse her children. Moreno also stated that she never left Mr. Velez alone with the children. Trial counsel had this information, but never cross examined Moreno on these issues.

161. Each of the testifying lay witnesses knew Mr. Velez very well, and they confirmed that Mr. Velez was never violent with anyone, including children.

162. In spite of the defense theory of the case, trial counsel, Hector Villarreal and O. Rene Flores, did not investigate Moreno's history of abusing her children and presented no evidence on Moreno's abuse of her children. He failed to ask witnesses, including Moreno and her sister, about Moreno's abuse and he failed to ask Moreno about her admissions of burning Angel on the foot with a cigarette and bruising her daughter Emily. He also did not present evidence of the incident when EMS was called when Moreno hit Emily and caused her to head to bleed.

163. Trial counsel, Hector Villarreal and O. Rene Flores's, failure to provide evidence to support his own defense theory undermines confidence in the jury's verdict.

Trial Counsel Did Not Effectively Deal with the Two Statements and the State's False Accusation of Fraud

164. At Mr. Velez's suppression hearing and trial, there appeared two versions of a "voluntary statement of the accused"—a two-page version and a three-page version.

165. The three-page statement is consistent with the State's predetermined theory of the case—that this was a shaken-baby case. The State later determined, however, that the evidence did not support a shaken-baby case.

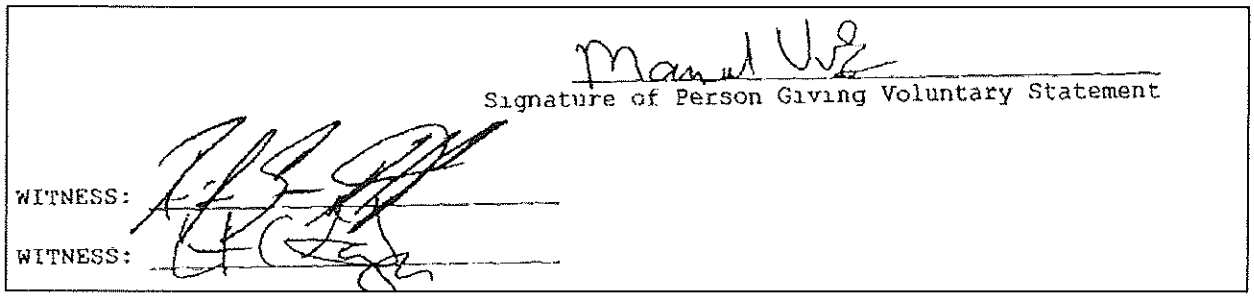
166. Judge Limas did not make a record of how he resolved the controversy concerning the statements other than to admit both, and Mr. Velez was not present for the in-chambers proceedings that followed the suppression hearing. Judge Limas did not issue findings of fact and conclusions of law after the suppression hearing.

167. Trial counsel, Hector Villarreal and O. Rene Flores, performed unreasonably when they failed to ensure that Mr. Velez was present for all critical stages of the proceedings, namely the in-chambers hearings that occurred as part of the suppression hearing.

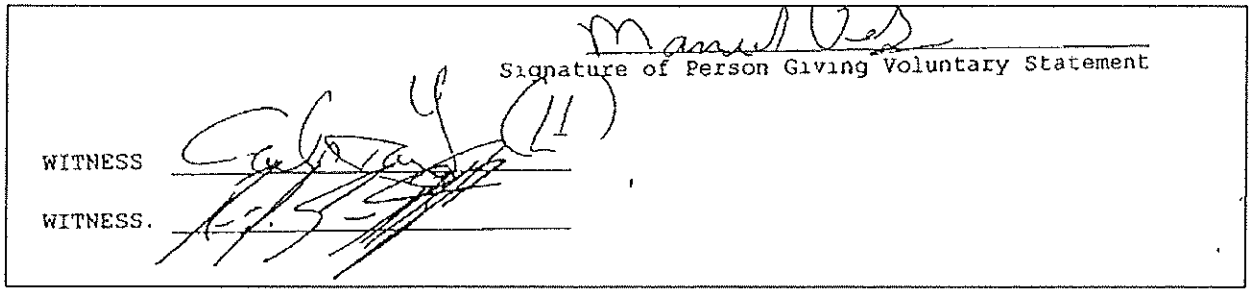
168. The State falsely and improperly told the jury that the judge had found that the two-page statement was a forged document. Trial counsel, Hector Villarreal and O. Rene Flores, did not object to this characterization and did not refute the accusation. In fact, trial counsel, Hector Villarreal and O. Rene Flores, completely failed to refute the State's accusation of fabrication or forgery.

169. The State's accusation could have been refuted by reasonable effort, as habeas counsel demonstrated. The differences between the two-page statement and the three-page statement show that they cannot be photocopies of one another. If Mr. Velez and/or or his trial counsel created the two-page statement with a "copy machine," as the State argued at trial the signatures on the copy would be identical. The same

portions of the two statements are not replicas, as they would be if created from one another, and as shown by the similar but different signatures of Mr. Velez and the inverted order of the witness signatures, which also display other differences. The three-page statement, State's Trial 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:



170. Because the unique characteristics of the two statements are not replicas, the Court finds this is a fact issue for the jury and the weight to be given the two-page statements. It is up to the jury to decide who and if anyone created, fabricated, or manufactured the two-page statement. Defense counsel, Hector Villarreal and O. Rene Flores, should have asked for a jury instruction or asked that the jury if in doubt favor the defense. The court finds the jury should have considered this information and it should have been a fact issue for the jury to decide.

Trial Counsel Unreasonably Did Not Object to or Correct Critical Errors in the Jury Charge

171. It is undisputed that Moreno's testimony at trial was accomplice testimony as a matter of law. Moreno's testimony was presented by the State as evidence of Mr. Velez's guilt, and the State relied heavily on Moreno's testimony in its case.

172. The trial court did not charge the jury on the need for corroborating evidence to support Moreno's testimony. Trial counsel, Hector Villarreal and O. Rene Flores, did not object to the omission of the "accomplice witness" instruction or request the inclusion of such instruction. Trial counsel, O. Rene Flores, testified at the habeas hearing that he was familiar with the instruction, it would have been appropriate, and there was no reason that he, Hector Villarreal and O. Rene Flores, trial counsel, did not ask for it. Furthermore, trial counsel, O. Rene Flores, could provide no reason for failing to object to the exclusion of the accomplice-instruction.

173. The evidence offered to corroborate Moreno's testimony implicating Mr. Velez is weak, circumstantial, and could easily have been refuted by competent counsel had the jury been given the accomplice-witness instruction. The references in Mr. Velez's 3-page Statement to shaking or tossing Angel do not corroborate any testimony by Moreno that links Mr. Velez to events contributing to the child's death.

174. The trial court also failed to include an instruction that doubt should be resolved in favor of the lesser-included offenses in its charge to the jury. Trial counsel, Hector Villarreal and O. Rene Flores's, failure to object to this error was unreasonable performance. In doing so, trial counsel, Hector Villarreal and O. Rene Flores, failed to provide the jury with information and options for resolving doubt they may have had about the State's case.

Applicant's Habeas point: State Withheld Material Impeachment Evidence

175. Regarding this allegation the court finds that Manuel Velez's defense counsel, Hector Villarreal and O. Rene Flores's, ineffective assistance failed to cure and failed to find this evidence. If trial counsel had done its job they would have discovered this evidence.

176. Two convicts, Bradshaw and Martin, testified at the suppression hearing and at trial against Mr. Velez. Both were given plea deals in exchange for their testimony. Defense counsel, Hector Villarreal and O. Rene Flores, could have questioned Bradshaw and Martin about their plea bargain agreements with the State. Attorneys on the capital murder list should be able to think on their feet due to their trial

experience and be able to handle extracting information during cross-examination as simple as criminal history and plea bargain agreements. Defense counsel, Hector Villarreal and O. Rene Flores, were ineffective and it's not the State's fault they did not perform their obligations. Luis Saenz performed his duties and did not have a duty to do less because defense counsel was not performing. This ineffectiveness assistance of counsel merits a new trial for Manuel Velez.

177. Prior to the suppression hearing at which the two witnesses testified for the first time, the State had not told Mr. Velez's lawyers about them. Defense counsel, Hector Villarreal and O. Rene Flores, should have been checking on subpoenas and the state's witness list and not expect to be spoon fed. This is another example of ineffective assistance of counsel. Even if there was surprise to defense counsel at the suppression hearing, there certainly wasn't any surprise at the trial. Hector Villarreal and O. Rene Flores simply failed to perform their duty and obtain this information for themselves. Manuel Velez did not have effective counsel.

178. Even after identifying them, the State withheld evidence that the witnesses exchanged disproportionately favorable plea agreements in exchange for their testimony against Mr. Velez. Withholding this evidence negatively impacted trial counsel's cross-examination of the two convicts. The cross examination should have still taken place whether defense counsel, Hector Villarreal and O. Rene Flores, had this information on not, to show bias.

179. The State also withheld evidence showing that Moreno abused her children in the past, including reports by social service agencies. The defense counsel, Hector Villarreal and O. Rene Flores, and its mitigation expert failed to obtain these records and failed to create a bill of exception. This is another example of the ineffective assistance of counsel by Hector Villarreal and O. Rene Flores. Mr. Velez did not have effective counsel representing him at the trial in 2008.

Applicant's Habeas allegation: A Corrupt Judge Presided Over Mr. Velez's Trial

180. The Court takes judicial notice of the fact that the judge who presided at Mr. Velez's trial, Abel Limas, has admitted to corruption during the time in which Mr. Velez's case was before him. This Court has not found a nexus between this case and the corruption conviction of Abel Limas. The habeas counsel argues that Abel Limas had to sentence non-paying clients to harsher sentences so that defendants would have an incentive to pay for light sentences. This argument makes sense except that at the time of the trial of this case, Abel Limas had less than two months before his last day on the bench. Abel Lima'ss last day on the bench was December 19, 2008. Limas's term ended on December 31, 2008, but his last day on the bench was the 19th. At this time there was no real incentive to continue to recruit paying defendants.

181. This Court will likewise "take note of the readily available public information [concerning] the prior judge. The Texas Supreme Court has also taken judicial notice of former Judge Limas's guilty plea, holding that his admitted corruption rendered void an order entered in a civil matter. *Freedom Communications, Inc. v. Coronado,* 372 S.W.3d 621 (Tex. 2012).

Conclusions of Law

Based on the foregoing findings of fact and the evidence referenced above, the Court makes and enters the following conclusions of law.

1. This Court has jurisdiction over this habeas proceeding because Mr. Velez had been convicted of capital murder and sentenced to death at the time the habeas Application was filed. *Ex parte Jackson*, 187 S.W.3d 416 (Tex. Crim. App. 2005) (retaining jurisdiction of article 11.071 writ after death sentence commuted to life); *Kniatt v. State*, 206 S.W.3d 657, 663 (Tex. Crim. App. 2006) ("[T]he jurisdiction of a court to consider an application for writ of habeas corpus is determined at the time the application is filed.").

Ineffective Assistance of Counsel

2. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. To establish an ineffective assistance claim, a defendant must show that trial counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficient performance prong is met by showing that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Prejudice is established if there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability "need not be proof by preponderance that the result would have been different," rather it should be a "showing sufficient to undermine confidence in the outcome." *Soffar v. Dretke*, 368 F.3d 441, 478 (5th Cir. 2004) (quoting *Williams v. Cain*, 125 F.3d 269, 279 (5th Cir. 1997)). An applicant's burden on an ineffective assistance of counsel claim is by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

3. Effective assistance of counsel requires meaningfully challenging the State's theory of the case, *see United States v. Cronic*, 466 U.S. 648, 656 (1984), and ensuring that the trial was a "reliable adversarial testing process," *Strickland*, 466 U.S. at 688. "It is well settled that an attorney has a professional duty to present all available evidence and arguments to support the defense of his client." *Ex parte Duffy*, 607 S.W.2d 507, 518 (Tex. Crim. App. 1980).

4. A thorough investigation of the underlying facts is part of providing effective assistance of counsel: "It may not be argued that a given course of conduct was within the realm of trial strategy unless and until the trial attorney has conducted the necessary legal and factual investigation which would enable him to make an informed, rational decision. Abdication of basic threshold responsibility is the antithesis of a considered strategy to assert or withhold possible defenses." *Ex parte Duffy*, 607 S.W.2d at 526 (internal citations omitted). Furthermore, "[i]f an investigation of medical records to determine a child's cause of death is essential to the presentation of an

effective defense, counsel cannot decline to conduct such an investigation . . . because 'effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively.'" *Ex parte Briggs*, 187 S.W.3d 458, 467 n.22 (Tex. Crim. App. 2005) (quoting ABA Standards for Criminal Justice: The Defense Function, Standard 4-4.1 cmt. at 4-55 (2d ed. 1986)).

5. If the defense is to focus on the victim's medical history and cause of death, "any reasonable attorney appointed to represent an indigent defendant would be expected to investigate and request expert assistance [e.g., a pathologist] to determine a deceased infant's cause of death. . . ." *Id.* at 469.

6. Although the Court will defer to strategic decisions actually made by counsel, the Court cannot defer to counsel's choices that are not "made after thorough investigation of law and facts relevant to plausible options" unless it was reasonable not to conduct such an investigation under the circumstances. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 691); *Ex parte Briggs*, 187 S.W.3d at 466 (quoting *Strickland*, 466 U.S. at 691). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996) (quoting *Strickland*, 466 U.S. at 691). "In assessing the reasonableness of an attorney's investigation . . . a 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." *Wiggins*, 539 U.S. at 527. "[A]n actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results." *Soffar*, 368 F.3d at 474. And a cursory investigation does not "automatically justif[y] a tactical decision. . . . Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins*, 539 U.S. at 527. Failure to investigate a main defense theory "underscores the unreasonableness of counsel's conduct by suggesting that [their] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *See id.* at 526.

7. In addition, "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 [he] did." *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005).

Failure to Investigate and Present Medical Evidence

8. In light of the defense theory of the case – that the injuries were inflicted by Ms. Moreno and that they occurred while Mr. Velez was "not around" – trial counsel's minimal investigation of the case was insufficient. Trial counsel, O. Rene Flores, had been informed by two medical experts that the injuries appeared to be older than two weeks and that the age of the injuries should be investigated. The rejection of this advice given by two doctors to determine the age of the older injuries; the rejection of Dr. Rose's advice to retain a forensic pathologist or other expert to opine on the age of injuries; and the failure to contact any of the State's medical experts prior to trial could not have been sound trial strategy. Based on the information known to him at the time and the advice he had received from two medical experts, it is inexplicable that trial counsel, O. Rene Flores did not take the reasonable next steps in the investigation of the injuries and the death of Angel. A reasonable attorney would have investigated further. This is pure inattention on the part of Mr. Velez's trial counsel, O. Rene Flores, and cannot be considered reasoned strategic judgment. *See Wiggins*, 539 U.S. at 526.

This lack of investigation impeded trial counsel, Hector Villarreal and O. Rene Flores's, ability to effectively present its defense and to cross-examine the State's medical experts. Even apart from the failure to present any medical evidence at trial, additional and more effective cross examination of Drs. Zamir, Farley, and DiMaio on the timing and cause of Angel's injuries would have created a substantial reason for doubt in the minds of the jurors. For example:

(a) Trial counsel, Hector Villarreal and O. Rene Flores, did not ask Drs. Farley or DiMaio whether the skull fractures or organizing subdural hematoma could have been inflicted more than 14 days prior to death;

(b) Trial counsel, Hector Villarreal and O. Rene Flores, did not ask Drs. Farley or DiMaio any questions about the "chronic" subdural hematoma described in the radiology report or the terms used by Dr. Brown to describe that injury; and

(c) Trial counsel, Hector Villarreal and O. Rene Flores, did not ask Dr. Zamir if he, in fact, personally examined the child on October 18, 2005 (trial counsel did not ask Dr. Zamir a single question).

9. In addition, trial counsel, Hector Villarreal and O. Rene Flores, never established for the jury the dates Mr. Velez was in Memphis and, in his opening and closing to the jury, he did not explain that his client was in Memphis for a five week period two weeks before Angel died.

10. These would have been sensible themes to pursue and important evidence to present in support of the defense theory of the case that the injuries occurred at the hands of the mother while Mr. Velez was in Memphis. Accordingly, the Court concludes that trial counsel, Hector Villarreal and O. Rene Flores's, decision not to challenge the State's central theory of the case and not to present any medical evidence on the age of the injuries was not a sound strategic decision, especially considering trial counsel's theory of the case, as set forth in his opening argument, to make opportunity the central defense. And, to the extent any strategic decision was made by trial counsel, the decision was not based on a thorough investigation of the facts.

11. The Court finds that Mr. Velez was deprived of his right to effective assistance of counsel because his trial counsel, Hector Villarreal and O. Rene Flores, did not adequately investigate and present medical evidence exculpating Mr. Velez. This failure to investigate and present evidence included:

(a) the failure to cross-examine the State's medical experts or present medical evidence regarding the age of Angel's injuries in support of the defense theory that the injuries were inflicted by Moreno at a time Mr. Velez was "not around.";

(b) the failure to investigate and present evidence refuting the State's theory that Angel was healthy on October 18, 2005, and that all of Angel's traumatic head injuries were inflicted during the last 14 days of his life;

(c) the failure to investigate and present evidence of a traumatic head injury that occurred before Mr. Velez was living with Moreno and Angel; and

(d) the failure to investigate and present medical evidence challenging the State's theory that a severe traumatic blow to the victim's head was required on October 31, 2005, to cause Angel's death.

12. As set forth in the Findings of Fact above, several experts were willing and able to provide valuable medical testimony had they been asked to do so.

13. These failures to investigate and to present medical evidence were not a result of sound trial strategy. To the contrary, the record shows that two doctors advised trial counsel, O. Rene Flores, to retain a forensic pathologist and other experts who could help date the child's injuries. No reasonably competent counsel would have disregarded such advice and proceeded to trial in a case like this without a comprehensive investigation of evidence pertaining to the timing of the child's injuries.

14. The State is correct that Mr. Velez is not entitled to pick and choose his experts and he does not have a right to a certain expert or to the best expert in the country, but in this situation, under these facts and in light of the defense theory of the case, Mr. Velez was entitled to at least one expert opining on the age of the injuries to the child. The Court rejects the State's arguments in its closing at the habeas hearing that in South Texas, the standards for the representation of capital defendants or the kind of expert testimony available to such defendants is lower than in other jurisdictions.

A life in Cameron County is worth just the same as a life in other parts of the United States of America. The fact of the matter is that Mr. Velez's trial counsel, Hector Villarreal and O. Rene Flores, did not make a single request of the Court for expert medical assistance pertaining to the age of the injuries. Given the nature of the case, the Court would have permitted state-funded appointment of a medical expert, including a pathologist, had trial counsel requested one. *See Briggs*, 187 S.W.3d at 468-69. Indeed, the Court approved other experts requested by trial counsel and previous defense counsel.

15. The Court also rejects the State's arguments that "[in] hindsight, which is not the standard, they're saying, well, [trial counsel] could have done all these other things." Yes—hindsight is not the standard and trial counsel could have done many things to support his theory of the case. However, the Court focuses here on one key failure—the failure to challenge the State's medical evidence. In doing so, the Court is careful to resist "the temptation to rely on hindsight" and instead reviews the evidence to determine whether trial counsel conducted "reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary." *Soffar*, 368 F.3d at 476 (citing *Strickland*, 466 U.S. at 689). The following is undisputed:

- Trial counsel, Hector Villarreal and O. Rene Flores's, theory of the case was that Moreno inflicted the injuries while Mr. Velez was in Tennessee. Accordingly, trial counsel's theory hinged on the age of the injuries.
- Trial counsel, O. Rene Flores, was told by two experts to investigate the age of the injuries to the child.
- Trial counsel, O. Rene Flores, was told by Dr. Rose to retain a pathologist or other expert to opine on the age of the injuries to the child.
- Trial counsel, O. Rene Flores, never contacted or retained a pathologist or other expert to opine on the age of injuries.

16. There simply is no explanation for trial counsel, O. Rene Flores, decision to not contact and retain a pathologist before the trial to opine on the age of Angel's injuries. This evidence was available to trial counsel. Every pathologist who testified at the habeas hearing, including Dr. Farley, stated that the older injuries to the child were more than 14 days old. The State presented no evidence contradicting this critical evidence. When the Court considers what trial counsel knew at the time concerning the age of the injuries, the Court cannot conclude that trial counsel reasonably investigated the age of injuries or that trial counsel reasonably decided that such investigation was unnecessary.

17. Many experts were willing to testify at Mr. Velez's trial and explain to the jury the medical evidence showing the injuries occurred while Mr. Velez had no

opportunity to harm the victim, as they showed the Court during the habeas hearing. The Court carefully followed the testimony of all the witnesses on direct and cross-examination, with an eye towards assessment of their reliability and credibility. On the highly critical, if not entirely decisive, question of whether the child victim suffered serious head injuries *when Mr. Velez had no access to him*, the Court found the affidavits and testimony of the doctors presented by habeas counsel to be credible, reliable, and consistent. Rather than identifying and retaining these or other qualified experts, trial counsel, O. Rene Flores, ignored the expert advice provided to him, did not investigate the age of the injuries, did not vigorously cross examine the State's experts, did not present any exculpatory evidence, and as a result was wholly ineffective in his defense of Mr. Velez.

18. The Court finds that Mr. Velez was prejudiced by trial counsel, Hector Villarreal's and O. Rene Flores's, failure to effectively investigate and present medical evidence exculpating Mr. Velez. Had counsel conducted a reasonable investigation, the evidence supporting the defense theory that Mr. Velez did not inflict the injuries (and contradicting the State's two-week timeframe—which was the crux of the State's circumstantial case), would have been discovered. There could not have been any reason for trial counsel, Hector Villarreal and O. Rene Flores, to not present evidence establishing that significant injuries to the victim occurred while Mr. Velez was not living with the victim's mother or was not in Texas.

19. The defense theory presented during opening statements to the jury was that Mr. Velez did not have access to the victim when the injuries occurred. The medical evidence, which could have been found through a reasonable investigation, is consistent with the theory articulated during opening argument. Trial counsel did not present any evidence to support the theory during the trial. The Court finds that there is a reasonable probability that, but for counsel's failure to investigate and to present evidence, the result of the proceeding would have been different.

Failure to Investigate and Present Evidence of Moreno's Culpability

20. The Court finds that Mr. Velez was deprived of his right to effective assistance of counsel during the culpability phase because trial counsel, Hector Villarreal and O. Rene Flores, did not adequately investigate and present evidence showing that Moreno had a history of abusing her children, and that she admitted to striking Angel on the day in question, October 31, 2005. This failure to investigate and present evidence included:

(a) the failure to investigate and present evidence of Moreno's culpability and the failure to confront Moreno with this evidence;

(b) the failure to present the testimony of witnesses who had observed Moreno's abuse of her children;

(c) the failure to sufficiently cross examine other witnesses showing the history of abuse of her children by both Moreno and Juan Chavez; and

(d) the failure to present evidence of Moreno's admissions of her abuse of her children.

21. In light of trial counsel, Hector Villarreal's and O. Rene Flores's, stated theory of defense, the Court finds that their failure to investigate Moreno's abuse of her children and present such exculpatory evidence was not sound trial strategy. The court finds a jury may have reached a different result if this information and evidence been presented by defense counsel.

22. The evidence of Moreno's abusive conduct, which would have been found through a reasonable investigation – by simply talking to Moreno's friends and Mr. Velez's family, is consistent with the defense theory articulated during opening argument, but not supported by evidence presented by defense counsel during the trial. The lay witnesses who testified at the habeas hearing as to various incidents of Moreno's abuse of her children were compelling and credible. Often, lay witnesses are not called as there is fear as to what they might say on cross-examination about the defendant. In this case, the lay witnesses not only would have provided eye-witness testimony of Moreno abusing her children on various occasions, but they would have also each testified that they had never seen Mr. Velez hit anyone, let alone a child. This

information would have been helpful to the jury in considering the defense's claims that Moreno injured the child as the evidence would have directly supported trial counsel's arguments to the jury that Moreno was the guilty party.

23. The failure to investigate, discover, and present evidence to the jury of Moreno's abuse of her children significantly prejudiced Mr. Velez, and undermines confidence in the jury's verdict. The State's case against Mr. Velez was circumstantial. There were no eye-witnesses to his alleged striking of the victim. Had counsel conducted a reasonable investigation, evidence of Moreno's abusive past would have been discovered. There could have been no reason for trial counsel, Hector Villarreal and O. Rene Flores, not to have presented evidence indicating that Moreno was the person who fatally injured Angel – this was the defense theory of the case. In his opening statements, trial counsel, Hector Villarreal, told the jury "what it all boils down to is who done it, who had the opportunity, who had the means, who had the drug problem." Then, after summarizing the anticipated testimony regarding the older injuries, he 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." Trial counsel then failed to present any evidence to fulfill these promises or to cast doubt on the State's proffered answer to the question of who "had access to the child" when the critical injuries were inflicted.

24. The Court finds that there is a reasonable probability that, but for counsel's failure to investigate and present evidence inculpating Moreno, the result of the proceeding would have been different.

Failure to Correct Omission of Accomplice-Witness and Reasonable-Doubt Instructions

25. As a matter of law, Acela Moreno was an accomplice. She was a co-defendant charged with capital murder and injury to a child, and pled guilty to the lesser charge in exchange for testifying against Mr. Velez.

26. The State has acknowledged and the Court of Criminal Appeals has held that the trial court erred by omitting the accomplice-witness instruction.

27. The Court of Criminal Appeals found that the State presented "some" corroborating evidence to support Moreno's testimony and thus passed scrutiny under the "egregious harm" test applicable on direct appeal when trial counsel fails to preserve error.

28. In concluding that the circumstantial non-accomplice testimony was "not so unconvincing as to render the State's case clearly and significantly less persuasive," the Court of Criminal Appeals relied heavily on evidence that has been discredited in the habeas proceeding, including Dr. Zamir's "examination" on October 18 and Dr. Farley's opinion that the fatal injuries were inflicted "within two weeks of Angel's death."

29. Had trial counsel, Hector Villarreal and O. Rene Flores, requested or objected to the omission of the accomplice-witness instruction, the trial court presumably would have included it in the charge. Had the Court refused the instruction over counsel's objection, reversal would have been required on a showing of "some harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (cited in CCA Op. at *18). Given that the evidence admitted at the habeas hearing negates the State's 14-day timeline on which the Court of Appeals relied to affirm the conviction on direct appeal, Mr. Velez has certainly shown "some harm" caused by the erroneous omission of the accomplice-witness instruction. *See Ex parte Zepeda*, 819 S.W.2d 874, 876 (Tex. Crim. App. 1991) (non-accomplice evidence did not "connect applicant to the commission of the murder," although it showed "he was near the area . . . [and] possessed a rifle").

30. Trial counsel, Hector Villarreal and O. Rene Flores's, failure to object to the omission of an accomplice-witness instruction or to request it was unreasonable and deficient performance, particularly in light of the importance of Moreno's testimony to the State's theory. Moreover, it is inconsistent with the defense theory that Moreno was the guilty party. This failure was not the result of a strategic decision by trial counsel. It could not, in any event, have been sound strategy in the context of this case.

31. The Court finds that Mr. Velez was denied effective assistance of counsel by trial counsel, Hector Villarreal's and O. Rene Flores's, failure to request, or to object to the trial court's failure to include, instructions that the accomplice testimony of Acela Moreno be corroborated by other sufficient evidence.

32. The Court also finds that Mr. Velez was denied effective assistance of counsel by trial counsel, Hector Villarreal's and O. Rene Flores's, failure to request, or to object to the trial court's failure to include, instructions that any doubt should be resolved in favor of the lesser-included offenses. *See Barrios v. State*, 283 S.W.3d 348, 350, 352 (Tex. Crim. App. 2009). This failure was not the result of a strategic decision by trial counsel. It could not, in any event, have been sound strategy in the context of this case. *See Howard v. State*, 972 S.W.2d 121, 129 (Tex. App.—Austin 1998, no pet.).

33. Trial counsel, Hector Villarreal's and O. Rene Flores's, failure to object to these jury charge errors was unreasonable deficient performance and prejudiced Mr. Velez. Had trial counsel performed adequately, there is at least a reasonable probability that Mr. Velez's trial outcome would have been different. The State's case against Mr. Velez was circumstantial, and there were no eye-witnesses to his alleged striking of the victim. The State relied on the testimony of Acela Moreno. Moreno was an accomplice as a matter of law. There is a reasonable probability that, but for counsel's failure to ensure an instruction that the jury must disregard uncorroborated testimony of Moreno, the result of the proceeding would have been different. There is also a reasonable probability that, but for counsel's failure to ensure an instruction to the jury that doubt should be resolved in favor of the lesser-included offenses, the result of the proceeding would have been different. *See Zepeda*, 819 S.W.2d at 877; *Howard*, 972 S.W.2d at 129.

Failure to Rebut the State's Accusation of Evidence Fabrication

34. The Court finds Mr. Velez was denied his right to effective assistance of counsel because trial counsel, Hector Villarreal and O. Rene Flores, failed to rebut the State's allegation of fabrication of evidence, or effectively utilize favorable evidence.

Specifically, trial counsel did not effectively deal with the two different statements of the accused at trial, including the State's accusation of forgery by the defense. This was not sound trial strategy.

35. The failure to address the allegation of fabrication of evidence prejudiced Mr. Velez by portraying Mr. Velez as a fraud. The State's assertions of evidence fabrication should have been objected to by defense counsel and defense counsel should have moved to strike the allegations. *Orona v. State*, 791 S.W.2d 125, 128-30 (Tex. Crim App.—1990). There is a reasonable probability that the failure of trial counsel, Hector Villarreal and O. Rene Flores, to object to allegations of fraud and fabrication would cause the jurors to find Mr. Velez guilty and a different result may have been obtained had defense counsel not been ineffective. *Strickland*, at 694.

Cumulative Error

36. Each of the failures by trial counsel, Hector Villarreal and O. Rene Flores, discussed in the preceding paragraphs is by itself sufficient to satisfy the requisite level of prejudice under *Strickland*, 466 U.S. 668. In addition, trial counsels' cumulative errors rendered the jury's findings unreliable. *See Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999). This Court finds that there is a reasonable probability that, but for trial counsels' cumulative errors, the jury might have answered differently. *See id.* at 619-22.

Prosecutorial Misconduct

The Court makes no findings regarding Applicant's habeas point regarding prosecutorial misconduct. The allegations regarding prosecutorial misconduct would not exist had Mr. Velez's trial counsel, Hector Villarreal and O. Rene Flores done their job. The allegations herein of prosecutorial misconduct would not exist, but for the lack of representation by defense counsel, Hector Villarreal and O. Rene Flores.

(a) Two versions of Mr. Velez's voluntary statement of the accused with different signatures exist. Since there is no conclusive evidence as to which statement is true and correct, it becomes a fact issue for the jury, with both sides claiming the other statement is false. Mr. Velez's trial counsel, Hector Villarreal

and O. Rene Flores, did not file a motion in limine to prevent the state from accusing Mr. Velez of fraud in regard to the statements.

(b) The Court finds the State did not withhold material exculpatory or impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The *Brady* violation allegations made by Applicant are:

(i) the State improperly withheld exculpatory evidence concerning Acela Moreno's abuse of her own children; The Court finds defense counsel, Hector Villarreal and O. Rene Flores, should have obtained this evidence themselves, they had it in Gary Ortega's file, and did not properly object and get the trial judge to disclose and allow the admission of this evidence; and

(ii) The State improperly withheld evidence that David Bradshaw and Brian Martin received lenient plea agreements in exchange for their testimony against Mr. Velez. Here again, defense counsel, Hector Villarreal and O. Rene Flores, failed to obtain this information before hand and failed to cross-examine these witnesses in the Motion to Suppress hearing. The plea bargain agreements and the criminal history of these witnesses would be easy to obtain had defense counsel, Hector Villarreal and O. Rene Flores, not been ineffective. There is no finding of prosecutorial misconduct. The court finds the special prosecutor, Luis Saenz, marched forward and these errors, if any, were caused by and are the result of trial counsel, Hector Villarreal's and O. Rene Flores', failure to render effective assistance of counsel.

37. The State does not have a constitutional duty if the defendant was actually aware of the exculpatory evidence or could have accessed it from other sources. See *Harm v. State*, 183 S.W.3d 403, 407 (Tex. Crim. App. 2006); *Jackson v. State*, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976).

38. The Court finds that there is a reasonable probability that but for the ineffective assistance of counsel the outcome of the trial would have been different. *See United States v. Bagley*, 473 U.S. 667, 682 (1984).

Judicial Misconduct

39. Mr. Velez argues that he was denied his right to a fair trial because of the exposed corruption of the trial court judge who presided over the trial in 2008. As the Court of Criminal Appeals observed on direct appeal, "[p]eculiar circumstances surround this case." This Court will likewise "take note of the readily available public information [concerning] the prior judge. The Texas Supreme Court has also taken

judicial notice of former Judge Limas's guilty plea, holding that his admitted corruption rendered void an order entered in a civil matter. *Freedom Communications, Inc. v. Coronado,* 372 S.W.3d 621 (Tex. 2012).

40. Due process violations caused by judicial corruption do not require proof of direct bias. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009); *Bracy v. Gramely,* 520 U.S. 899, 909 (1997) (acknowledging potential due process violation of "compensatory, camouflaging bias"); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

41. This Court takes judicial notice of Abel Limas' guilty plea and confessions of corruption. This Court has not found a nexus between Judge Limas's confessions of corruption and the Velez trial. A new trial based on ineffective assistance of counsel is merited in this case for all of the reasons stated herein above.

CONCLUSION AND RECOMMENDATION

Based on the findings of fact and conclusions of law set forth above, It is the recommendation of this District Court Judge, the undersigned, Trier of fact, that Defendant, Manuel Velez, be GRANTED a New Trial on the charges against him.

ORDER

IT IS ORDERED THAT the clerk of the court transmit forthwith this Order, the findings of facts and conclusions of law, including the transcript, exhibits, the Application, Answer, Reply, and all other filings together with all relevant instruments on file that relate to Applicant's Application for Writ of Habeas Corpus, to the Clerk of the Texas Court of Criminal Appeals.

Signed for entry on this the 2nd day of April, 2013.

FILED 10:55 O'CLOCK a M
AURORA DE LA GARZA, CLERK

APR 02 2013

DISTRICT COURT OF CAMERON COUNTY, TEXAS
DEPUTY

Hon. Elia Cornejo Lopez
404th Judicial District Court