Case No. D-1-DC-04-904165-D

Ex parte ROSA ESTELA OLVERA JIMENEZ, *Applicant*,	§ § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 299TH JUDICIAL DISTRICT

Agreed Findings of Fact, Conclusions of Law, and Recommendation on Application for Writ of Habeas Corpus

Based on a review conducted by the Trial Division, Special Victim's Unit, and Conviction Integrity Unit of the Travis County District Attorney's Office, the State agrees that Rosa Estela Olvera Jimenez ("Applicant") is entitled to relief on Ground One and Ground Three of her Application for Writ of Habeas Corpus (and accompanying memorandum in support), filed on January 4, 2021. Specifically, the State agrees that Applicant is entitled to habeas corpus relief because (1) her conviction rests on material false evidence, introduced in violation of due process, and (2) clear and convincing evidence demonstrates that she is innocent of her crimes of conviction.

Having considered the application and supporting memorandum, the State's Original Answer to 11.07 Writ Application, filed January 8, 2021, all evidence presented by the parties, the entire record in this case, and the applicable legal authorities, the Court concurs.

For the reasons set forth below, the Court determines that Applicant's trial was infected with constitutional error and that Applicant is likely innocent of the crimes for which she was convicted and has been imprisoned for the past 17 years. The Court recommends that the judgment be vacated and Applicant be remanded to the custody of the Travis County Sheriff to answer the charges against her and for consideration of a bond pursuant to Texas Code of Criminal Procedure 11.65. The Court's findings of fact and conclusions of law in support of this recommendation, which are jointly stipulated to by Applicant and the State, are set forth below.

Factual Background and Procedural History

On January 30, 2003, Applicant was babysitting a 21-month-old toddler named B.G. when a wad of paper towels lodged in B.G.'s throat and obstructed his airway. Applicant appeared at her neighbor's door with the boy in her arms and, because Applicant did not have a phone, asked her neighbor to call 911. Law enforcement officers and emergency medical technicians arrived on the scene within minutes. After unsuccessfully attempting CPR and trying manually to clear B.G.'s airway, the paramedics succeeded in removing the wad of paper towels using forceps. B.G. was rushed to the hospital. He suffered a severe brain injury due to oxygen deprivation and never regained consciousness. B.G. passed away three months later in hospice.

The paramedics who treated B.G. on the scene initially thought that B.G.'s condition was the result of an accidental choking. However, once they saw the object removed from B.G.'s throat, they became suspicious because it was unlike anything they had ever removed from a child's throat. Law enforcement officers immediately treated Applicant as a suspect. With Applicant present, police searched her apartment. Afterward, officers questioned Applicant at the police station, where she was without a lawyer and separated from her young daughter. After several hours of questioning, law enforcement returned Applicant to her home, only to double back and arrest her that very same evening. Applicant has remained incarcerated since that date, January 31, 2003.

Applicant faced trial in 2005 for felony murder and injury to a child. The State elicited testimony from medical professionals, including the physicians that treated B.G. prior to his death, that it would have been physically impossible for B.G. to choke accidentally on the wad of paper towels and so the paper towels must have been intentionally forced into his throat. The State's entire case for Applicant's conviction rested on the testimony of these medical professionals: the paramedics and two medical doctors who treated B.G.; a forensic pathologist; and a child-abuse specialist. The State presented no evidence of motive, prior mistreatment, substance abuse, or any other evidence to support its theory that Applicant perpetrated an unprecedented attack on a young boy in her care. Based on the medical testimony presented at trial,

Applicant was convicted of felony murder and injury to a child. After further proceedings, the jury sentenced Applicant to 75 years in prison for the offense of murder and 99 years in prison and a fine of $10,000 for the offense of injury to a child.

Applicant's convictions were affirmed by the Third Court of Appeals in *Jimenez v. State*, 240 S.W.3d 384 (Tex. App. 2007), *pet. for discretionary review refused*. After discretionary appeals were rejected, Applicant's conviction became final when the U.S. Supreme Court denied certiorari. *See Jimenez v. Texas*, 555 U.S. 892 (2008).

Applicant's first application for writ of habeas corpus was denied in an opinion by the Court of Criminal Appeals rejecting this Court's recommendation that Applicant be granted relief. *See Ex parte Jimenez*, 364 S.W.3d 866, 882 (Tex. Crim. App. 2012). Applicant's second and third applications were summarily dismissed on April 16, 2014 and February 24, 2016, respectively. Applicant filed the instant Application for Writ of Habeas Corpus and supporting memorandum of law on January 4, 2021. The State filed an Answer on January 8, 2021. The present Agreed Findings of Fact and Conclusions of Law address all evidence submitted by the parties and reflects the agreement of the parties.

Designated Issues

The following issues were designated for resolution at the habeas hearing:

1. Whether Applicant's due process rights were violated by the State's introduction of false or misleading testimony at her trial.
2. Whether Applicant received ineffective assistance of counsel at her trial.[1]
3. Whether Applicant is actually innocent.

General Findings

1. The Court takes judicial notice of the entire contents of the Court's file in Cause Number D-1-DC-04-904165.
2. The Court takes judicial notice of the entire contents of the Court's file in Cause Number D-1-DC-04-904165-D.
3. The Court finds that Applicant remains confined in the Texas Department of Criminal Justice for purposes of Article 11.07, §3(C).
4. A successive petition is not permitted unless the applicant establishes that "(1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

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[1] At this time, the Court withholds review of Ground Two in Applicant's application: her claim that her Sixth Amendment rights were violated because she received ineffective assistance of counsel during her trial.

or (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." Tex. Code Crim. Proc. Ann. art. 11.07, §4(a).

5. The Court finds that Applicant's claims are based on newly available evidence and could not have been a presented previously in an original application "because the factual … basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. Ann. art. 11.07, §4(a)(1).

6. Specifically, Applicant identifies (1) a newly available Consensus Statement of four leading pediatric otolaryngologists concluding that B.G.'s death likely was the result of a tragic accident, and (2) a newly available affidavit submitted by Dr. Elizabeth Peacock, one of the medical professionals who testified against Applicant at her trial, revising the testimony she presented on behalf of the State at Applicant's trial. Applicant previously filed applications without the benefit of the Consensus Statement or Dr. Peacock's Affidavit.

7. Previously unavailable scientific reports, including revisions to trial testimony made by trial witnesses, can constitute "newly available" evidence that excuses procedural default. *See, e.g.*, *Ex parte De La Cruz*, 466 S.W.3d 855, 865 (Tex. Crim. App. 2015) (amended autopsy report constitutes "newly available" evidence in context of false-testimony claim); *see also Estrada v. State*, 313

S.W.3d 274, 288 (Tex. Crim. App. 2010) (holding that false-evidence claim was not procedurally defaulted and observing that defendant "had no duty to object because he could not reasonably be expected to have known that the testimony was false at the time that it was made").

8. The Court finds that Applicant exercised reasonable diligence to obtain the newly available evidence and submit it for this Court's review. The Consensus Statement was authored only recently, during the course of a conviction-integrity review carried out by the Travis County District Attorney's Office after Applicant obtained relief in federal district court. And Dr. Peacock submitted her affidavit shortly before this Court commenced a hearing on Applicant's application.

9. In the alternative, the Court concludes that Applicant has satisfied her burden of demonstrating "by a preponderance of the evidence, that, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt." Tex. Code Crim. Proc. Ann. art. 11.07, §4(a)(2).

10. In sum, the Court finds that Applicant has met her burden for the reasons stated. Consequently, this subsequent writ is properly before the Court under Article 11.07, Section 4(a)(1) and (2). *See also Schlup v. Delo*, 513 U.S. 298 (1995).

Findings of Fact and Conclusions of Law

11. On February 3, 2020, after a federal district court ordered that Applicant be released or re-tried, the Travis County District Attorney's Office initiated a thorough review by both the Conviction Integrity Unit and an experienced team of other prosecutors to review the evidence and determine whether Applicant's case should be re-tried.

12. As part of their review, the District Attorney and her team considered a newly available Consensus Statement authored in March 2020 by four pediatric otolaryngologists who specialize in the management of children's airways that contains those experts' unanimous conclusion that B.G.'s death was likely the result of an accident, not an intentional murder.

13. After considering the newly available scientific consensus reflected in the Consensus Statement, the District Attorney and members of her Office, including attorneys from the Trial Division, Special Victims Unit, and Conviction Integrity Unit, stated publicly their conclusion that Applicant should be re-tried.

14. On January 26, 2021, shortly before this Court commenced an evidentiary hearing on Applicant's writ application, Dr. Elizabeth Peacock executed an affidavit revising her trial testimony on behalf of the State where she stated that B.G.'s death could not have been accidental. Dr. Peacock affirmed in her affidavit that, contrary to

her trial testimony, she now "believe[s] it is possible that [B.G.'s] death was accidental." Dr. Peacock also affirmed that she "recognize[s] [the] specialization and expertise" of the authors of the Consensus Statement "in blocked airways of children and the biological mechanisms at play in pediatric airway blockage situations."

15. The Court finds that pediatric otolaryngologists specializing in pediatric airways are most knowledgeable as to the mechanics of children's airways, including the introduction and removal of foreign bodies into a child's airway. The Court also notes that the scientific field of pediatric aerodigestive medicine has evolved significantly since Applicant's trial in 2005. Further, while the medical field of pediatric otolaryngology is itself highly specialized, with approximately 400 pediatric otolaryngologists in the country, the field further narrows to fewer than 50 medical professionals who specialize in pediatric airways.

The Authors of the Consensus Statement

16. Dr. Michael J. Rutter is Professor of Otolaryngology and Director of Clinical Research at the Department of Otolaryngology, University of Cincinnati College of Medicine. He is also the Director of the Aerodigestive Center at Cincinnati Children's Hospital Medical Center. Dr. Rutter has written more than 100 peer-reviewed articles and dozens of book chapters. He has been an invited

speaker at 245 international and 249 national conferences. He has taught more than 40 instruction courses, among many other national and international courses where he was an invited speaker. He has four patents, including a balloon dilator, having helped design or patent both of the airway balloons currently on the market. He has received many awards and honors throughout his career, most notably his faculty teaching award and distinguished service award from the American Academy of Otolaryngology; he has also been named one of the 'Best Doctors in America' six times. Dr. Rutter has received numerous research grants, including significant grants from the National Institute of Health. He provides informal airway advice resource for the pediatric otolaryngology community and is asked for advice by dozens of ear, nose, and throat surgeons (pediatric surgeons, pulmonologists, intensivists, and cardiothoracic surgeons) annually from around the world to consult on particularly challenging cases.

17. Dr. Douglas Sidell is Assistant Professor of Otolaryngology-Head and Neck Surgery at the Stanford University Medical Center, where he is a member of the Division of Pediatric Otolaryngology. Dr. Sidell's surgical practice focuses on the treatment of children with complex airway and pulmonary disorders, with a special interest in complex and revision airway reconstruction. He is the Director of the Pediatric Aerodigestive Center and the Pediatric

Voice and Swallowing Clinics at Lucile Packard Children's Hospital Stanford. Dr. Sidell has authored or co-authored more than 65 scholarly peer-reviewed publications and authored or co-authored 19 book chapters that appear in top-tier medical publications. He has presented at more than 30 international conference and over 75 national conferences. He has held numerous editorial positions with leading pediatric and otolaryngologic peer-reviewed journals.

18. Dr. Ron Mitchell is Professor and Vice Chairman of the Department of Otolaryngology at UT Southwestern Medical Center and serves as Chief of Pediatric Otolaryngology. He holds the William Beckner Distinguished Chair in Otolaryngology. Dr. Mitchell specializes in pediatric otolaryngology and airway conditions. Dr. Mitchell edits four otolaryngology journals and serves as a peer reviewer for 11 more. He has also published more than 130 peer-reviewed papers, as well as two dozen book chapters and four books on pediatric otolaryngology. A highly respected educator, he has delivered more than 110 lectures on pediatric otolaryngology and pediatric sleep medicine across the United States, as well as in Israel, Panama, Argentina, Brazil, and Mexico. Dr. Mitchell is actively involved in his profession's national leadership, chairing multiple committees, including a recent task force of the American Academy of Otolaryngology-Head and Neck Surgery that published Clinical Practice Guideline: Tonsillectomy in Children (Update). He

previously chaired a committee that published a consensus document about the optimal care of patients with a tracheostomy. Dr. Mitchell has earned numerous honors throughout his career, including the prestigious Honor Award in 2008 and a Distinguished Service Award in 2018 from the American Academy of Otolaryngology-Head and Neck Surgery in recognition of his many volunteer contributions and service on scientific programs and instructional courses.

19. Dr. Karen B. Zur is Interim Chief of Otolaryngology, Associate Director of the Center for Pediatric Airway Disorders, Director of the Pediatric Voice Program and Attending Surgeon at Children's Hospital of Philadelphia. She is also Associate Professor of Otorhinolaryngology, Head and Neck Surgery, Perelman School of Medicine at the University of Pennsylvania. Dr. Zur is an expert in the field of pediatric otolaryngology, pediatric airway disorders and pediatric voice disorders. Her research interests include pediatric laryngotracheal pathology, surgical reconstruction, and voicing issues. She has been invited to deliver more than 120 lectures at both national and international conferences. Dr. Zur has written more than 45 peer-reviewed research publications and reviews, more than 55 abstracts, and 5 books. She has earned a number of awards and honors throughout her career, and held numerous

editorial positions with top-tier pediatric and otolaryngology journals.

The Consensus Statement

20. The Consensus Statement contains four relevant conclusions:

- First, the Consensus Statement "reject[s] as erroneous" the testimony at Applicant's trial that "accidental ingestion of the paper towels [by B.G.] was 'impossible.'" APP007. The Consensus Statement concludes that "B.G. could have readily inserted the paper towels in his mouth, either as a string or as a wad," and could have begun "to have trouble swallowing them completely or getting them out of his mouth" within "a matter of seconds." APP005.

- Second, the Consensus Statement rejects the assertion that a single person could have intentionally forced the paper towels in B.G.'s mouth without great effort and without leaving behind physical evidence of a struggle. APP004-005. The Consensus Statement states: "Inserting a string or wad of paper towels would be exceedingly difficult even with additional adults restraining the child. A single individual attempting this on a 21-month-old boy would find this task nearly impossible." APP005. The Consensus Statement provides an analogy by explaining that even doctors find it "almost impossible" to use a tongue depressor to view an uncooperative child's tonsils "without the assistance of a second adult (usually a parent) who has been shown how to hold the child still"—and viewing an uncooperative child's tonsils is considerably easier than forcing a foreign object into a child's throat. *Id.*

- Third, the Consensus Statement rejects the conclusion that B.G.'s "gag reflex" would have prevented the wad of paper towels from becoming stuck in his throat. Specifically, the Consensus Statement explains how the mechanics of a child's

airway and the expected physical reaction to a foreign object can result in paper towels being pulled into a child's throat rather than expelled. *Id.*

- Fourth, all four authors of the Consensus Statement independently and affirmatively conclude that "the medical evidence makes it far more likely than not [that the choking] was an accident." APP007.

21. The Court finds that the Consensus Statement reflects the considered and unanimous view of the most relevant medical experts, and therefore constitutes newly available evidence that is qualitatively different from any evidence presented in Applicant's prior writ applications.

The January 26, 2021 Hearing

22. The Court held an evidentiary hearing on January 26, 2021. Dr. Rutter, Dr. Sidell, and Dr. Mitchell testified via Zoom, while Dr. Zur and Dr. Peacock testified by affidavit.

23. The Court finds that each expert testified knowledgeably and credibly. The authors of the Consensus Statement reaffirmed their conclusions contained therein and provided additional details to support those conclusions.

24. The Court specifically notes the following summaries of the live testimony presented at the hearing:

- Any reasonable pediatric otolaryngologist with specialized training and experience in pediatric airway management would agree with the conclusion in the Consensus Statement

that it was possible for the paper towel wad accidentally to become lodged in B.G.'s throat.

- The conclusion that B.G.'s death was likely the result of a tragic accident, rather than an intentional act by someone other than B.G., is not a "close call." It would be near to impossible for a single individual to force a wad of paper towels into an uncooperative child's throat. Dr. Sidell specifically testified that he would not be physically capable of doing so, and that he did not believe that Applicant would be able to do so either.

- The gag reflex would not prevent the wad of paper towels from becoming lodged in B.G.'s throat. Rather, the reflexive mechanics of a child's airway would result in the paper towels being drawn further into the throat and tightly compressed as the child attempted to swallow the foreign body.

- The amount of blood contained on the wad of paper towels removed from B.G.'s throat was entirely consistent with an accidental choking, particularly in light of the efforts to resuscitate B.G. and remove the wad of paper towels. Dr. Mitchell testified that the amount of blood was "minimal," while Dr. Sidell produced a photograph of a patient's airway containing blood and testified that the blood was a result of intubation.

- Blood-gas readings are not reliable indicators of how long a child has been without oxygen.

- There is nothing unique about paper towels that would cause a child not to put paper towels in her mouth. Dr. Sidell specifically testified that he had previously treated a patient who had ingested a paper towel, as well as a patient who ingested a piece of notebook paper. The doctors testified that they had personally treated patients who had ingested all manner of truly bizarre objects. For example, Dr. Mitchell

testified that he had treated a child who had ingested a cockroach.

25. The Court finds that no testimony, including the testimony introduced by the State during Applicant's trial, credibly rebuts the Consensus Statement and supporting testimony elicited at the January 26, 2021 hearing.

Grounds For Relief

Ground One: Whether Applicant's due process rights were violated by the State's introduction of false or misleading testimony at her trial.

Legal Standard

26. The use of false or misleading testimony to convict an individual violates due process. *See Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). A due process false-evidence claim is "designed to ensure that the defendant is convicted and sentenced on truthful testimony." *Ex parte Weinstein*, 421 S.W.3d 656, 666 (Tex. Crim. App. 2014) (internal quotation marks and citation omitted). Accordingly, a due process violation occurs regardless of whether the false evidence is the result of intentional perjury or good-faith misstatements. *Ex parte Chaney*, 563 S.W.3d 239, 263 (Tex. Crim. App. 2018) (citing *Weinstein*, 421 S.W.3d at 665).

27. The use of false testimony must be material to constitute a due process violation. If there is "a reasonable likelihood that the false

testimony could have affected the judgment of the jury," then the false evidence was material and the introduction of that testimony violated the defendant's due process rights. *Id.* at 265; *see also Weinstein*, 421 S.W.3d at 665 ("[I]n any habeas claim alleging the use of material false testimony, this Court must determine (1) whether the testimony was, in fact, false, and, if so, (2) whether the testimony was material.").

28. The "reasonable likelihood" standard in the context of a false-evidence claim "is more stringent (i.e., more likely to result in a finding of error) than the standard applied to *Brady* claims of suppressed evidence, which requires the defendant to show a 'reasonable probability' that the suppression of evidence affected the outcome." *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011); *see Brady v. Maryland*, 373 U.S. 83 (1963). The "reasonable likelihood" standard "is equivalent to the standard for constitutional error, which 'requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Ghahremani*, 332 S.W.3d at 478 (citation omitted).

Application of Law to Facts

29. After reviewing the Consensus Statement, the testimony elicited at the January 26, 2021 hearing, and the January 26, 2021 Affidavit of Dr. Peacock, the Court finds that the State elicited false and

misleading testimony at Applicant's trial in violation of Applicant's due process rights.

30. First, the Court concludes that the State's experts at trial testified categorically, but falsely, that it would have been impossible for B.G. to accidentally choke on the wad of paper towels. The Consensus Statement and testimony elicited at the January 26, 2021 hearing credibly explains how it would have been possible for B.G. to accidentally choke on the wad of paper towels. Further, one of the State's trial witnesses filed an affidavit stating, contrary to her trial testimony, that it was possible that B.G.'s death could have been accidental. After considering the newly available evidence, the Court concludes at minimum that the following trial testimony stating or implying categorically that B.G. could not have accidentally choked on the wad of paper towels, including because of its size, was misleading and false:

- Dr. Patricia Aldridge testified: "There is no way that [B.G.] put [the paper towels] in his mouth … all by himself." Trial Tr. Vol. 5 at 73:1-2. Dr. Aldridge also testified that B.G.'s airway was the size of a quarter, and that the wad of paper towels could not have entered into the airway accidentally because it was "ten times that big." *Id*. at 80:10-15. She further stated: "[B.G.] would[not] have had … the dexterity to make a wad like that [removed from his throat]. He would[not] have had the strength to make it that small. It … had to have been soaked in water or something before that. He does[not] even have enough saliva in his mouth to wet five paper towels and make them that little. They would have had to

have been wadded before they put it in his mouth[,] before they were put in his mouth.… [H]e would[not] have had the strength or the dexterity to push backwards and push that in." *Id.* at 86:11-24.

- Dr. Elizabeth Peacock testified in absolute terms when asked whether B.G. would be able to place the paper towels in his own throat: "No. He would not be able to." Trial Tr. Vol. 6 at 43:14. She referred to "forensic texts" which she explained confirm that only "something that [is] round or small" like "grapes [or] marbles" could be choked on accidentally because otherwise "the physics of it are impossible." *Id.* at 43:21-44:6. And when asked whether it was "possible" for a child to "get an object, a large wad of paper towels in his mouth [and] accidentally swallow an object that large," she answered categorically: "No." *Id.* at 44:7-12.[2]

- Dr. John Boulet testified that the paper towels could not have entered B.G.'s airway accidentally, but "would have to be put down there." Trial Tr. Vol. 3 at 273:10-13.

31. Second, the Court concludes that the State's experts at trial testified misleadingly and falsely that B.G.'s gag reflect would have prevented him from choking accidentally on the wad of paper towels. The Consensus Statement and credible testimony elicited at the January 26, 2021 hearing explain how the mechanics of the gag reflex could in fact pull the paper towels into B.G.'s throat, and that the gag reflex would not function to expel the paper towels, contrary to trial testimony. After considering the newly available

[2] Dr. Peacock has now revised her trial testimony, stating in her affidavit that she "believe[s] it is possible that [B.G.'s] death was accidental."

evidence, the Court concludes at minimum that the following trial testimony describing the mechanics of the gag reflect was misleading and false:

- Dr. Aldridge testified that the gag reflex would prevent the wad of paper towels from becoming lodged in B.G.'s throat, and that "there's no such thing as bypassing a reflex." Trial Tr. Vol. 5 at 74:9-25.

- Dr. Boulet testified that "the gag reflex would prevent" B.G. from accidentally choking on the wad of paper towels. Trial Tr. Vol. 3 at 271:17-272:20.

- Dr. Randall Alexander testified that B.G.'s gag reflex would have prevented him from choking if the ingestion of paper towels were truly an accident: "As soon as you get to the back of the throat, you get a gag response unless you[are] neurologically damaged or something." Trial Tr. Vol. 7 at 210:2-6.

32. Third, the Court concludes that the State's experts at trial testified falsely and misleadingly that the presence of blood on the paper towel wad indicated that its introduction into B.G.'s throat must have been traumatic and the result of intentional action by another person. Each of the experts that testified at the January 26, 2021 hearing reviewed photographs of the paper towels removed from B.G.'s throat and concluded that the blood stains on the paper towels are consistent with what they would expect as a result of the removal of a foreign body, not the forced placement of it in the throat by another. Their conclusion is based on their own experience and

the recorded efforts of various individuals to first identify and then remove the obstruction in B.G.'s airway. Specifically, in the experience of the experts, it was "not a large amount of blood given the way the paper towels were removed," and the blood present was attributable to recovery efforts and the removal of the paper towel. APP006. Dr. Mitchell testified that it was a "minimal" amount of blood, and on the "low end" of the amount of blood he would expect to see. In addition, an image recorded by Dr. Sidell and introduced at the hearing as Exhibit 9 reflects bleeding associated with the use of a laryngoscope during an emergency intubation. Dr. Sidell testified that the efforts to resuscitate B.G. and remove the obstruction would likely lead to bleeding at least consistent with the bleeding shown in Exhibit 9. Moreover, he also testified that blood mixes with saliva in such circumstances, which leads non-experts to overestimate the amount of blood actually present and form a false impression. After considering the newly available evidence, the Court concludes at minimum that the following trial testimony regarding the presence of blood on the paper towel wad was misleading and false:

- Dr. Aldridge testified that "[t]he fact that there was blood there [on the paper towel wad] indicates … that there was some sort of tissue injury." Trial Tr. Vol. 5 at 70:5-8. Viewed in context, that testimony clearly implies that Dr. Aldridge

believed that the blood indicated intentional action on the part of Applicant, not an accidental choking.

- Ms. Jordan Rojo testified that B.G.'s death "had to be traumatic," not accidental, because the paper towels were "soaked in blood." Trial Tr. Vol. 3 at 199:12-18.

33. Fourth, the Court concludes that the State's experts at trial testified falsely that B.G.'s blood-gas levels indicated that he was without oxygen for much longer than accounted for in the defense timeline. The pediatric otolaryngologists credibly conclude that there is no way to state with any certainty "whether B.G. was hypoxic for 5 minutes or 20 minutes." This is because "[p]atients may achieve hypoxia on a blood gas over a matter of minutes, and other may achieve the same level of hypoxia slowly—over a matter of hours," and, consequently, blood-gas levels are not a reliable method to determine the length of time an individual was hypoxic. APP006. For example, Dr. Sidell credibly testified that no reliable, relevant conclusions can be drawn from the blood-gas readings. After considering the newly available evidence, the Court concludes at minimum that the following trial testimony related to blood-gas levels was misleading and false:

- Dr. Aldridge testified that, based on B.G.'s blood-gas levels, B.G. had been deprived of oxygen for "probably 30 or 40 minutes." Trial Tr. Vol. 5 at 61:24-25. She further testified that "his heart had been stopped" and, in her experience, it is possible for a child's heart to continue for up to 45 minutes "with no breathing." *Id.* at 60:17 –61:5.

34. Fifth, the Court concludes that the State's experts at trial testified falsely that a young child would not put paper towels into his mouth. The Consensus Statement observes—and Applicant's experts testified convincingly at the January 26, 2021 hearing—that there is no reason that a child would not put paper towels into his mouth. APP004. Dr. Sidell testified that he has personally treated one patient who inserted a paper towel into his mouth and another who inserted notebook paper into his mouth. After considering the newly available evidence, the Court concludes at minimum that the following trial testimony stating that children do not place items such as paper towels in their mouths was misleading and false:

- Dr. Aldridge testified at trial that "children don't suck on paper towels" and are only going to put "things that slip down" into their mouths—like "beads or small toys, or buttons or eyes off of Teddy bears, coins." Trial Tr. Vol. 5 at 73:13 – 74:05.

35. The Court finds that all of this misleading and false testimony was material. Specifically, the Court concludes that there is a reasonable likelihood that the misleading and false testimony affected the jury's decision to vote to convict Applicant of felony murder and injury to a child. Clearly, "[t]he resolution of this case depended primarily on expert testimony," specifically on expert testimony regarding whether it was "physically impossible" for

B.G.'s death to have been the result of an accidental choking. *Jimenez*, 364 S.W.3d at 871. Not only did the State's experts testify falsely that it would be impossible for B.G. to accidentally choke on the wad of paper towels, but they also bolstered this false conclusion with additional misleading and false testimony with respect to the mechanics of a child's gag reflex, the amount of blood on the wad of paper towels, the blood-gas levels, and the propensity of a child to put objects like paper towels into her mouth.

36. The Court concludes that the State's case rested primarily on this false and misleading testimony, as there was no evidence of motive, prior abuse, or substance abuse, or any other inculpatory evidence. Simply put, the false and misleading testimony cut to the core of the State's case and provided the entire foundation for Applicant's conviction. It certainly affected the jury's decision to convict Applicant.

Ground Three: Whether Applicant is actually innocent.

Legal Standard

37. The incarceration of an innocent person offends due process. *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). Actual innocence claims are cognizable in habeas proceedings. *Id*.

38. This Court may grant relief if clear and convincing evidence establishes that the State has incarcerated an innocent person. *Id*; *see also, e.g.*, *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App.

2005); *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012); *Ex parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002); *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002).

39. "Clear and convincing evidence is defined as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979).

40. When evaluating whether Applicant has satisfied her burden of putting forward clear and convincing evidence of her innocence under *Elizondo*, this Court must consider the totality of evidence: "The most important thing about *Elizondo* is that … it required *all* courts reviewing actual innocence claims to 'assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole' which necessarily involves weighing 'such exculpatory evidence against the evidence of guilt adduced at trial.'" *Thompson*, 153 S.W.3d at 432 (quoting *Elizondo*, 947 S.W.2d at 206).

Application of Law to Facts

41. After reviewing the Consensus Statement, the testimony elicited at the January 26, 2021 hearing, and the January 26, 2021 Affidavit of Dr. Peacock, the Court finds that Applicant has satisfied her burden and produced clear and convincing evidence that she is innocent of the offenses of felony murder and injury to a child.

42. The Court finds that the Consensus Statement credibly concludes that "the medical evidence makes it far more likely than not that this was an accidental ingestion by B.G.," and that B.G.'s death was "a tragic outcome, but an outcome stemming from an accident, not a malicious act on the part of [Applicant]." APP007.

43. The Consensus Statement credibly explains that "[i]nserting a string or wad of paper towels would be exceedingly difficult even with additional adults restraining the child," and a "single individual attempting this on a 21 month-old boy would find this task nearly impossible." APP005. Moreover, "the larger the object the less likely it is that another person could have intentionally forced the paper towels inside" the child's mouth. APP004.

44. The Court finds particularly compelling evidence of innocence in the pediatric otolaryngologists' statements that based on their extensive experience placing objects (including tongue depressors) in children's mouths and airways, it would be nearly impossible for Applicant to have unilaterally forced the wad of paper towels into B.G.'s throat without assistance.

45. The Court finds that the experts also credibly testified that even if Applicant were capable of doing so, there would be evidence of a significant struggle that was wholly absent here.

46. Dr. Rutter credibly testified that "even a tongue depressor without a parent's help is nearly impossible."

47. Dr. Mitchell credibly stated affirmatively: "I do not believe that anyone [in this hearing]" could accomplish what Applicant was convicted of doing without assistance.

48. Dr. Sidell credibly testified that he had treated 28 patients the day before the hearing and did not believe that he himself would be capable of forcing a wad of paper towels into any of those patients' mouths without assistance, and affirmed that he did not believe Applicant would be able to do so either.

49. The doctors repeated variations of that conclusion throughout their testimony, and credibly explained their unanimous belief that Applicant would not have been able to force the wad of paper towels into B.G.'s throat.

50. This case turned entirely on the forensics. The State identified no meaningful corroborating evidence and did not even posit a motive for why Applicant would commit these crimes. The probable cause for Applicant's arrest warrant depended entirely on medical professionals' "suspicion" with respect to the size of the wad of paper towels; there was no other circumstantial evidence to create probable cause. APP480-82.

51. The experts who are most knowledgeable as to whether B.G. could have accidentally choked on the paper towels—physicians who study and perform surgeries on children's airways—conclude that it was not only possible for B.G. to have accidentally ingested the

paper towels himself, but also that it is significantly more likely that B.G. choked accidentally in light of the circumstances.

52. Each expert who appeared before the Court on January 26, 2021 testified that he felt compelled to act in Applicant's case because the medical evidence clearly indicates that it would be almost impossible for Applicant to do what she was convicted of doing, and therefore she is innocent and wrongfully imprisoned. The experts testified based on their experience that a miscarriage of justice has occurred, and they felt obliged to act because it was the right thing to do.

53. The Court finds that the Consensus Statement, the testimony elicited at the January 26, 2021 hearing, and Dr. Peacock's Affidavit are clear and convincing evidence that Applicant did not intentionally attack and harm B.G., and that B.G.'s death was almost certainly the result of a tragic accident, not murder.

Recommendation

54. The Court finds that Applicant's Application for Writ of Habeas Corpus has merit. The Court finds that Applicant diligently relies on newly available evidence and has established by a preponderance of the evidence that, but for a violation of the United States Constitution, no rational juror could have found her guilty

beyond a reasonable doubt, thus meeting the requirement of Article 11.07, Section 4(a)(2), of the Texas Code of Criminal Procedure.

55. The Court concludes that the record shows that Applicant's due process rights were violated because the State presented false and misleading testimony during her trial and there is a reasonable likelihood that the false and misleading testimony affected the jury's decision.

56. The Court concludes that Applicant has met her burden (i.e., preponderance of evidence) to establish that, but for the violation of her due process rights, no rational juror could have found her guilty beyond a reasonable doubt. *See* Tex. Code Crim. Proc. Ann. art. 11.07, §4(a)(2).

57. The Court concludes that Applicant has met her burden of proof (i.e., clear and convincing evidence) to establish that she meets the *Elizondo* standard for actual innocence.

58. Accordingly, the Court concludes that relief should be granted on grounds one and three presented by Applicant in her Application for Writ of Habeas Corpus.

Orders of the Court

In implementing the Court's Findings of Fact, Conclusions of Law, and Recommendation, the Clerk of this Court shall:

1. Prepare a transcript of all papers filed in this cause and transmit those papers, this Court's Findings of Fact,

Conclusions of Law, and Recommendation, and the Judgments, the Indictments, the docket sheets, and other exhibits and evidentiary matter filed in cause number D-1-DC-04-904165 to the Court of Criminal Appeals pursuant to Article 11.07 of the Texas Code of Criminal Procedure.

2. Send a copy of these Findings of Fact, Conclusions of Law, and Recommendation to the Applicant and her counsel and to counsel for the State of Texas, by depositing same in the United States Mail.

SIGNED this 27th day of January, 2021.

HONORABLE KAREN SAGE
Judge Presiding

Agreed as to Form and Substance:

DocuSigned by:
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