IN THE 138TH JUDICIAL DISTRICT COURT
OF CAMERON COUNTY, TEXAS

EX PARTE MELISSA ELIZABETH LUCIO, APPLICANT.	§ § § § § § § § § §	CAUSE NO. 07-CR-00000885 DEATH PENALTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICANT'S FIRST SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS

Pursuant to Article 11.071, Section 9, of the Texas Code of Criminal Procedure, and the orders issued in this matter by the Court of Criminal Appeals, this Court makes the following findings of fact, conclusions of law, and recommended dispositions of Claims 1, 2, 3, and 5 of Applicant Melissa Elizabeth Lucio's subsequent application for a writ of habeas corpus. Having independently evaluated the evidence and applicable law, the Court agrees with the parties that Applicant's conviction and sentence of death should be vacated.

PROCEDURAL HISTORY

In July 2008, a jury convicted Applicant of the capital murder of her two-year-old daughter, Mariah Alvarez. 2 CR 260. Based on the jury's answers to the special issues submitted pursuant to Article 37.071, the trial court sentenced Applicant to

death. *Id.* The Court of Criminal Appeals affirmed Applicant's conviction and sentence on direct appeal. *Lucio v. State*, 351 S.W.3d 878 (Tex. Crim. App. 2011). The United States Supreme Court denied certiorari on June 4, 2012. *Lucio v. Texas*, 566 U.S. 1036 (2012).

Applicant filed an initial application for a writ of habeas corpus on January 13, 2011. The Court of Criminal Appeals denied relief on January 8, 2013. *Ex parte Lucio*, No. WR-72,702-02 (Tex. Crim. App. Jan. 9, 2013) (not designated for publication).

Applicant sought federal habeas corpus relief in January 2014. The district court denied her petition. *Lucio v. Davis*, No. 13-cv-125, 2016 U.S. Dist. LEXIS 195659 (S.D. Tex. Sept. 28, 2016). The Fifth Circuit Court of Appeals granted a certificate of appealability on whether the exclusion of Applicant's proffered experts regarding the reliability of her custodial statements violated her constitutional right to present a complete defense. *Lucio v. Davis*, 751 F. App'x 484 (5th Cir. 2018). The court reversed the district court's judgment denying federal habeas corpus relief and remanded with instructions to grant relief on the complete defense issue. 783 F. App'x 313 (5th Cir. 2019). The State petitioned for rehearing, which was granted. *Lucio v. Davis*, 947 F.3d 331 (5th Cir. 2020). On February 9, 2021, the *en banc* Fifth Circuit court vacated the panel's decision and denied relief. *Lucio v. Lumpkin*, 987 F.3d 451, 493 (5th Cir. 2021) (*en banc*). The Supreme Court denied certiorari on

October 18, 2021. *Lucio v. Lumpkin*, 142 S. Ct. 404 (2021).

In January of 2022, the convicting court set April 27, 2022 for Applicant's execution. On April 18, 2022, Applicant filed the instant first subsequent application for writ of habeas corpus under Article 11.071, § 5, which asserted nine claims for relief.

On April 25, 2022, the Court of Criminal Appeals stayed her execution and determined that four of Applicant's claims met the requirements of Article 11.071 § 5(a):

- Claim 1: but for the State's use of false testimony, no juror would have convicted Applicant;
- Claim 2: previously unavailable scientific evidence would preclude Applicant's conviction;
- Claim 3: Applicant is actually innocent; and
- Claim 5: the State suppressed favorable, material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Having found the requirements of Article 11.071 § 5 for subsequent writs met, pursuant to § 6(b) of Article 11.071, "a writ of habeas corpus, returnable to the court of criminal appeals, [] issue[d] by operation of law." Accordingly, the Court of Criminal Appeals remanded these claims to the convicting court "for a merits' review."[1] *Ex parte Lucio*, WR-72,702-05, 2022 WL 1211313 (Tex. Crim. App. Apr. 25, 2022)

[1] *See* Article 11.071 §§ 5 - 8, setting forth the procedures for a subsequent application in a capital case.

(per curiam) (unpublished).

On August 12, 2022, the State filed its response which was a general denial and acknowledgement that under Article 11.071 § 8(a), the court "must evaluate [the remanded] four claims to determine whether 'controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist.'" *See* State's Resp. 1st Subs. Appl. Writ Habeas Corpus.

On December 20, 2022, the parties filed with the Court a "Joint Advisory & Notice of Filing Exhibit" indicating that the State had sought independent expert review of Applicant's claims, and that expert report was submitted to the Court. The parties also advised the Court that uncontroverted facts regarding Claim 5 made a hearing on that claim unnecessary because the parties agreed the claim was supported by the law and the evidence.

Also on December 20, 2022, and on January 11, 2024, the parties filed proposed agreed findings of fact and conclusions of law on Claim 5. The parties agreed that evidence material to Applicant's defense had been suppressed at trial. Among other things, suppressed reports and statements of Applicant's children corroborated her account of the victim falling on stairs and the victim's subsequent declining condition which undermined the prosecution's theory that abuse was the only medically possible explanation for the victim's injuries. The parties agreed this Court should recommend that habeas relief be granted on Claim 5 and Applicant's conviction

should be vacated.

The parties requested that the other three remanded claims be held in abeyance pending resolution of Claim 5 in the Court of Criminal Appeals.

This Court considered the evidence and the parties' submissions and, on April 12, 2024, this Court entered findings and conclusions, adopting the parties' recommendation pertaining to relief on Claim 5 and their request that Applicant's other remanded claims be held in abeyance.

On June 19, 2024, the Court of Criminal Appeals issued an Order remanding the case and directing this Court, within ninety (90) days, to make findings of fact, conclusions of law, and recommendations regarding the disposition of Applicant's abated Claims 1, 2, and 3, and for those to be transmitted along with the record developed on remand to the Court of Criminal Appeals along with Claim 5. *Ex parte Lucio*, WR-72,702-05, (Tex. Crim. App. June 19, 2024) (per curiam).

The Court set a September 9, 2024 appearance to determine whether controverted issues of material fact exist, and if so, the manner in which the Court would receive evidence to resolve any such issues. *See* Tex. Code Crim. P. art. 11.071 § 9(a).

The Court, having now reviewed the record, the parties' submissions, affidavits and other evidence, and the applicable law, makes the following findings of fact and conclusions of law regarding Claims 1, 2, 3 & 5 and recommends that Applicant

be granted relief.

MATERIALS CONSIDERED

This Court considered the following materials in making its findings, conclusions, and recommendations:

- The record of Applicant's trial, including pretrial proceedings;
- The undersigned's memory of the trial and initial habeas proceedings;
- The record of the initial habeas proceedings in this case;
- Claims 1, 2, 3, and 5 of the instant application and all evidence submitted in support of those claims included exhibits appended to the application;
- The State's initial and supplemental response to the subsequent application;
- The parties' joint submissions, including exhibits;
- Affidavits and exhibits admitted into evidence;
- The arguments of counsel;
- The parties' proposed findings of fact and conclusions of law.

SUMMARY OF FACTS

On the evening of February 17, 2007, paramedics were dispatched to Applicant's residence at 117 W. Lee #8, Brownsville, Texas, where Applicant's two-year-

old daughter, Mariah Alvarez, was turning purple and unresponsive. 33 RR 84-86.[2] Applicant had just moved to this new apartment along with Mariah, Applicant's common-law husband, Robert Alvarez, and eight other children besides Mariah, who was the youngest. Applicant informed paramedics and responding officers that Mariah had recently fallen down steps[3] at their previous apartment on Madison Street. 33 RR 77. After paramedics unsuccessfully tried to resuscitate Mariah, they transported her to a hospital emergency room, 33 RR 91, where additional resuscitation efforts were also unsuccessful and Mariah was pronounced dead. 32 RR 71. Mariah's body showed numerous signs of trauma, including bruising on her torso, arms, legs, vaginal area, face, forehead, and around her eyes. *See* 32 RR 71; 34 RR 13, 32, 38.

Applicant was brought to the Harlingen Police Department that night where she underwent questioning by several investigators for approximately five hours, beginning at 10:00 p.m. *See* 32 RR 33. Applicant told the interrogating officers that two days prior to her death, on February 15, 2007, Mariah accidentally fell down the

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[2] The Reporter's Record from the trial is cited as: (vol.) RR (page); the Clerk's Record is cited as: (vol.) CR (page); the Clerk's Record from the writ proceedings are cited as (vol.) WCR (page) and (vol.) Supp. WCR (page) for the Supplemental Writ Record.

[3] A paramedic testified that Applicant informed him at the scene that Mariah had fallen down two steps on the stairs outside Applicant's former residence. 33 RR 87. A responding officer testified that Applicant did not specify how many steps Mariah fell down. 33 RR 77.

stairs at the family's previous apartment, 33 RR 70, which had a steep wooden outdoor staircase that led to the second-floor apartment. 33 RR 20. Applicant described to the officers Mariah's deteriorating condition in the two days between the fall and her death—specifically, that Mariah became heavily congested and lethargic, that she vomited, and experienced lockjaw. App. Ex. 45 (Transcript of Interrogation-Melissa Lucio) at 4, 7, 17-18. Applicant acknowledged that neither she nor her partner, Robert Alvarez, sought medical care for Mariah after the fall, *id.* at 85, but repeatedly denied having intentionally hurt her or knowing what caused her daughter's extensive bruising and death. *Id.* at 47, 48, 55, 57, 65. Applicant admitted that her husband urged her to seek medical attention for Mariah on the morning of her death, but Applicant did not take Mariah to the doctor. *Id.* at 34. During questioning police showed Applicant photographs of her deceased daughter and told her that she must have caused her daughter's injuries or that she knew who did. *Id.* at 64, 95, 106, 168.

After several hours of interrogation, Applicant ultimately told officers that she had slapped, pinched, and bitten Mariah and agreed that she was responsible for what happened, *id.* at 152-155, 168-171, but never made an admission to causing her daughter's death.

Applicant was prosecuted for capital murder which required the State to prove beyond a reasonable doubt that she, Melissa Lucio, "intend[ed] to cause serious bodily injury" to Mariah and that resulted in her death. Tex. Penal Code § 19.02(b)(2).

At trial, the State relied primarily on Applicant's custodial statements, and on the testimony from its Medical Examiner, Dr. Norma Jean Farley, to make its case that Mariah died as a result of head trauma caused by Applicant's physical abuse. Dr. Farley testified that Mariah's injuries could only have been caused by intentional physical abuse exerted within twenty-four hours of her death. 34 RR 35-36, 59. Relying in large part on the extensive bruising on Mariah's body, Dr. Farley's testimony ruled out the possibility that an accidental fall was the cause of the child's fatal injuries. 34 RR 54, 56, 58.

The night of Mariah's death, eight of Applicant's children were taken into the custody of Child Protective Services ("CPS"). That evening, several of the children were interviewed by Harlingen police officers and a CPS investigator. 32 RR 34. *See also* App. Exs. 20 (Arreola Report); 22 (Alexandra Lucio Statement); 24 (Daniella Lucio Statement). CPS conducted proceedings related to the removal and placement of the children, and also worked with law enforcement officers regarding the criminal investigation. *See id.*

Prior to Applicant's trial, the defense sought access to the CPS records and any other *Brady* material. Over the State's objection, the trial court ordered disclosure of all CPS records; however, the issue continued to be litigated throughout trial. For example, during the course of Applicant's trial, the defense objected to the

State's failure to disclose[4] video-recorded interviews of several of Applicant's children conducted three days after Mariah's death by CPS personnel at "Maggie's House," the Children's Advocacy Center for Cameron and Willacy Counties. *See* 33 RR 104-106, 36 RR 27-28.

In her initial habeas application, Applicant sought to establish that the "Maggie's House" videos included statements of witnesses, made contemporaneously to Mariah's death, that corroborated Applicant's defense. In their interviews with social workers, Applicant's younger children denied she was physically abusive, and, significantly, at least one of the children (Rene) saw Mariah fall down some stairs prior to her death.

The State's case-in-chief against Applicant consisted of three days of testimony, with Dr. Farley as the exclusive witness on the third day. During the second day of trial, when the defense objected to the State's failure to turn over the "Maggie's House" tapes, the State represented that it was "99 percent sure" that the tapes were accessible to the defense through the District Attorney's open file. 33 RR 105. No evidence was offered to confirm or refute the representation, and the prosecution

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[4] The defense also received late disclosure of the video-recorded statements of Robert Alvarez—Applicant's partner and one of Mariah's primary caretakers—in which he denied any knowledge of Applicant abusing Mariah. On the third day of trial, prior to the State's final witness, after *in camera* review, the court made the video of Robert Alvarez's interview available to the defense. 34 RR 3.

had previously represented to the court and defense counsel that all evidence from the CPS files had been hand-delivered to Applicant's counsel before the trial started. 1 CR 72-73; 10 RR 10-11; 31 RR 4; 2 Supp. WCR 98-99. Applicant's defense counsel stated at the time that he had relied upon the prosecution's representations that the hand-delivered materials constituted all the evidence the prosecution obtained from CPS. *Id.*

In its 2013 decision on Applicant's initial habeas, the Court of Criminal Appeals found that Applicant's *Brady* claim related to late disclosure of the "Maggie's House" videos was defaulted. Although the court held the claim was defaulted, the parties stipulate that the "Maggie's House" videotapes contained favorable, material evidence that was not timely disclosed.

Applicant's defense at trial was that she was not guilty of capital murder because Mariah's death resulted from an accidental fall rather than abuse. Having been precluded by the court from presenting expert testimony to rebut her custodial statements,[5] the defense argued to the jury that Applicant never actually confessed to any specific conduct that would have caused the head injury. The defense presented no

[5] Applicant moved to present expert testimony in an effort to establish that her demeanor and her incriminating statements during the interrogation reflected her acquiescence to aggressive, male authority figures, and did not indicate guilt. The Court denied the motion.

evidence that corroborated Applicant's account that a fall occurred and its sole expert, a neurosurgeon, could not account for the bodily injuries that were central to Dr. Farley's conclusion of abuse and central to the State's theory of Mariah's death.

The jury convicted Applicant of capital murder and sentenced her to death. 2 CR 260.

In 2019, after communication between Applicant's post-conviction counsel and the State, the State provided Applicant access to case files created and maintained under the administration of the former District Attorney, who prosecuted the case against Applicant.

Applicant's 2019 case file review revealed to Applicant's post-conviction counsel the existence of witness statements that had not been disclosed prior to and during trial. These witness statements corroborate Applicant's defense theory that Mariah's cause of death was head trauma sustained during an accidental fall rather than intentional abuse.

These documents also support Applicant's non-abuse explanations for some of Mariah's extensive bruising; specifically, Applicant's theory that Mariah's extensive bruising—which Dr. Farley attributed to intentional abuse—could have been caused by a blood coagulation disorder, disseminated intravascular coagulation ("DIC"). A post-mortem diagnosis of DIC depends on the very kind of evidence that the parties stipulate was suppressed: meaning, evidence of Mariah's fall, the injuries

she had immediately afterwards, and the steady decline in her health between the fall and her death. That suppressed evidence informs a medical diagnosis consistent with Applicant's defense: that Mariah died as the result of accidental trauma.

FINDINGS OF FACT & CONCLUSIONS OF LAW REGARDING INDIVIDUAL CLAIMS
CLAIM 5: *Brady*

1. The parties stipulate and the Court finds that at trial the State withheld favorable, material evidence, in violation of Applicant's constitutional due process rights and *Brady v. Maryland* and its progeny.

2. The Court finds that this suppressed, favorable, and material evidence, which includes firsthand statements from witnesses regarding Mariah's fall, and her deteriorating condition in the days following the fall, App. Exs. 20 (Arreola Report); 22 (Alexandra Lucio Statement); 24 (Daniella Lucio Statement),[6] would have corroborated Applicant's defense that Mariah died from a head injury sustained in an accidental fall two days prior to her death. *See* 36 RR 17, 21, 30, 36, 46, 54.

3. The Court finds that the suppressed evidence would have led defense counsel to further investigate additional evidence confirming that accidental cause of death and the non-abuse explanations for the extensiveness of the child's bruising. *See Kyles v. Whitley*, 514 U.S. 419, 441 (1995) (noting that the question under *Brady*

[6] "App. Ex." refers to Applicant's exhibits filed with her First Subsequent Application for Writ of Habeas Corpus on April 18, 2022.

is whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable"); Ex. A to Joint Advisory & Notice of Filing Exhibit (Rpt. of DeWitt and Sanchez).

Legal Standards

4. The Fourteenth Amendment to the United States Constitution imposes on prosecutors an affirmative duty to disclose to the defense prior to trial any and all exculpatory and/or impeachment evidence if said evidence could be material to either guilt or punishment of the defendant. *Banks v. Dretke*, 540 U.S. 668, 696 (2004); *Kyles*, 514 U.S. at 437-38, 441; *Ex parte Reed*, 271 S.W.3d 698, 726 (Tex. Crim. App. 2008). Thus, Applicant's right to due process prohibits the State from withholding material, favorable evidence from her. *Brady*, 373 U.S. at 87. Under *Brady* it is irrelevant whether suppression of the favorable evidence was done willfully or inadvertently; inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. *Strickler v. Greene*, 527 U.S. 263, 288 (1999); *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006).

5. Because Applicant raises this claim on collateral review, she bears the burden of proving by a preponderance of the evidence the constitutional violation and her entitlement to habeas relief. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002) (citing *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App.

1997)). To prevail on her due process claim, Applicant must establish by a preponderance of the evidence that: (1) the State failed to disclose evidence; (2) the evidence was favorable to her; and (3) the evidence was material. *Banks*, 540 U.S. at 691; *Reed*, 271 S.W.3d at 726; *Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997) (holding that the burden of showing materiality rests on the defendant); *see also Spence v. Johnson*, 80 F.3d 989, 994 (5th Cir. 1996).

6. "[P]rosecutors have a duty to learn of *Brady* evidence known to the others acting on the State's behalf in a particular case." *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006) (citing *Kyles* 514 U.S. 419 at 437–38); *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012) (" '[T]he State' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement connected to the investigation and prosecution of the case"); *O'Rarden v. State*, 777 S.W.2d 455, 458 (Tex. App. 1989 – Dallas) (holding that a worker with the Department of Human Resources, who investigated the sexual abuse allegations at issue, was part of the prosecution team and that the contents of the worker's file were thus *Brady* material, reasoning that "[t]he 'prosecution' includes all members of the 'prosecution team'—both investigative and prosecutorial—and no distinction is drawn between different agencies under the same government").

7. If evidence has been suppressed, Applicant must then demonstrate that

the suppressed evidence was "favorable" in that it is exculpatory, mitigating or impeaching toward any aspect of the State's case. *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

8. Lastly, Applicant must demonstrate materiality. *Lagrone*, 942 S.W.2d at 615. "The materiality of exculpatory evidence [is evaluated] in light of the entire record." *Ibid.*; *cf. Pena v. State*, 353 S.W.3d 797, 812 (Tex. Crim. App. 2011) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Evidence is material if there is a reasonable probability that, in light of all the evidence, the outcome would have been different had the withheld evidence been timely disclosed to the defendant. *Hampton v. State* 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) (quoting *United States v. Agurs*, 427 U.S. 97 109 (1976)); *Diamond v. State,* 613 S.W.3d 536, 546 (Tex. Crim. App. 2020). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome" of the trial. *Reed*, 271 S.W.3d at 727 (citing *United States v Bagley*, 473 U.S. 667, 682 (1985); *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000). When evaluating the materiality standard, the strength of the favorable evidence is balanced against the evidence supporting the conviction, and the suppressed evidence is to be considered collectively, rather than item-by-item. *Miles*, 359 S.W.3d at 666 (Tex. Crim. App. 2012), *accord Lagrone*, 942 S.W.2d at 615.

9. Both the questions of whether the evidence is favorable to the accused and whether it is material are determined based on what defense counsel could have done with the evidence. *See Kyles*, 514 U.S. at 441 (holding suppressed evidence was material because "disclosure ... to competent counsel would have made a different result reasonably probable"); *Bagley*, 473 U.S. at 676 (*Brady* "evidence is 'evidence favorable to an accused,' ... so that, if disclosed and used effectively, it may make the difference between conviction and acquittal" (quoting *Brady*, 373 U.S. at 87)).

Merits of the Claim

10. The parties stipulate and the Court finds that at trial the State suppressed three documents that contained evidence favorable to Applicant's defense. *See* App. Exs. 20 (Arreola Report); 22 (Alexandra Lucio Statement); 24 (Daniella Lucio Statement). Collectively, the suppressed evidence was material in that it undermines confidence in the outcome of Applicant's capital conviction because it provides evidentiary support for the defense theory that Mariah's death resulted from an accidental head wound consistent with a fall down the stairs.

The Suppressed CPS Investigation Report Contained Favorable Evidence

11. The Court finds that, on February 17, 2007, the night Mariah died, Child Protective Services ("CPS") dispatched Investigator Florence "Lucy" Arreola to the Harlingen police station where Applicant and her husband, Robert Alvarez,

were being questioned. *See* App. Ex. 19 (Arreola Decl.) at ¶¶ 11, 13. The parties stipulate and the Court finds that Investigator Arreola drafted a detailed investigative report (the "Investigative Report"), revealing that she interviewed relevant witnesses at the Harlingen police station who provided information in support of Applicant's defense. *See* App. Ex. 20 (Arreola Report).

12. The Court finds that the Investigative Report establishes that during Applicant's interrogation, Detective Rebecca Cruz, one of the interrogating officers, spoke with Investigator Arreola about the interrogation and Investigator Arreola's work. App. Ex. 20 (Arreola Report) at 89-90. The Court finds that law enforcement thus possessed information about the interviews conducted by CPS regarding the circumstances surrounding Mariah's death. 32 RR 34 (Det. Cruz testifying that she spoke with a CPS worker at the police station who was interviewing the children concerning what the children told the CPS worker). The State therefore had a duty to learn about those interviews and, if they possessed information favorable to Applicant's defense, to disclose that information to her. *See Harm*, 183 S.W.3d at 406 (citing *Kyles* 514 U.S. 419 at 437–38); *Ex Parte Miles*, 359 S.W.3d at 665.

13. The Court finds that, rather than disclose Arreola's Investigative Report, the State produced to defense counsel a document that purported to represent Investigator Arreola's work on the case, App. Ex. 21 (Intake Information), but omit-

ted critical aspects of the full report, including the descriptions of Arreola's interviews with five of Applicant's children, which she conducted on the night of Mariah's death, at the Harlingen Police Department, while Applicant and her husband were being questioned. *See* App. Ex. 20 (Arreola Report) at 90-93, 95; App. Ex. 39 (Weber Decl.) at ¶¶ 3-7.

14. The parties agree and the Court finds that the suppressed Investigative Report containing previously undisclosed interviews with Mariah's siblings on the night Mariah died includes information favorable to Applicant's defense. First, the suppressed Investigative Report indicates that another of Applicant's children, Robert "Bobby" Alvarez, who was seven years old at the time, was present when Mariah "fell down some stairs" and reported that "when Mariah fell she cried for a little." App. Ex 20 (Arreola Report) at 92. Applicant's teenaged daughter Alexandra stated that she saw bruises on Mariah's eye "from when she fell at the previous apartment." App. Ex. 20 (Arreola Report) at 91.

15. Second, the suppressed Investigative Report revealed that all of Applicant's children told Arreola that their mother was not abusive to them or Mariah. App. Ex. 20 (Arreola Report) at 90-92. Specifically, Bobby told Investigator Arreola that "he has never seen anyone hit Mariah." App. Ex. 20 (Arreola Report) at 92. The suppressed Investigative Report also reveals that Alexandra told Investigator Arreola that she "didn't believe that her [mother] would hit Mariah" and that whenever

she disciplined the other children, she only "spanked" them "on the butt with her hand." App. Ex. 20 (Arreola Report) at 91. Two other children, Rene (age 9) and Selina (age 15), likewise told Investigator Arreola that they had never seen their mother hit Mariah or her other children. App. Ex. 20 (Arreola Report) at 90, 92.

16. Third, the parties agree and the Court finds that the suppressed Investigative Report also includes information regarding Mariah's condition in the days before her death, App. Ex. 20 (Arreola Report) at 90-91, which informs the defense theory that Mariah's health declined after her fall down the stairs. *See* Ex. A to Joint Advisory & Notice of Filing Exhibit (Rpt. of DeWitt and Sanchez). Specifically, Alexandra told Investigator Arreola that "Mariah had been throwing up," which Applicant "thought ... was because she ate a bad tamale," and that Mariah then stopped eating. App. Ex. 20 (Arreola Report) at 90-91. Alexandra described how the family "noticed Mariah having difficulty breathing" the night before she died. *Id* at 91. Additionally, while the prosecution at trial attributed Mariah's dehydration at the time of death to abuse, the suppressed report contains Alexandra's account that Applicant repeatedly tried to get Mariah to drink something in the two days between her fall and her death, and that Applicant was visibly distressed by Mariah's deteriorating condition. *Id.*

Suppressed Sworn Statements to Police from Two of Applicant's Children Contained Favorable Evidence

17. The parties agree and the Court finds that at trial the State also suppressed two sworn statements that Applicant's children, Alexandra and Daniella, each made to Harlingen police on the night Mariah died, February 17, 2007. *See* App. Ex. 22 (Alexandra Lucio Statement) & App. Ex. 24 (Daniella Lucio Statement).

18. Instead of providing the defense with Alexandra and Daniella's full sworn statements from the night Mariah died, prosecutors gave the defense only summaries of their statements that omitted the exculpatory information discussed directly below. *See* App. Ex. 23 (Alexandra Lucio Statement Summary); App. Ex. 25 (Daniella Lucio Statement Summary).

19. The parties stipulate and this Court finds that Applicant's counsel first discovered the sworn statements from Alexandra and Daniella in 2019 when the District Attorney's office under the administration of Mr. Luis V. Saenz permitted Applicant's counsel to conduct an in-office review of case files in the District Attorney's office. The parties stipulate and this Court finds that the District Attorney's office under the administration of Mr. Luis V. Saenz, who came into office in 2013, did not add to, remove from, nor alter the original case file or its contents. The parties further stipulate that the sworn statements disclosed by the State in 2019 represent favorable, material evidence entitling Applicant to relief.

20. The parties stipulate and the Court finds that Alexandra's sworn statement to police, made on the night Mariah died, contained evidence favorable to Applicant's defense. The statement corroborated Applicant's account of Mariah's injuries and declining health in the days between Mariah's fall and her death. App. Ex. 22 (Alexandra Lucio Statement). Further, Alexandra's observation of Applicant's concern for Mariah over a 48-hour period prior to her death contradicted other evidence that Applicant inflicted a fatal head wound on Mariah within 24 hours of her death and then showed little concern as to her condition. *See id.*

21. Specifically, Alexandra avers in her sworn statement that Applicant and Mariah's father "had been awake all night with the baby" the night before she died because she "had been breathing heavily." App. Ex. 22 (Alexandra Lucio Statement) at 1. In her statement, Alexandra attributed Mariah's condition to illness—that Mariah "might have got sick yesterday when she went outside with" Applicant—rather than abuse. *Id.*

22. The parties agree and the Court finds that the sworn statement from Applicant's twenty-year-old daughter, Daniella, also contains favorable evidence. Daniella observed in her statement that Mariah "looked really healthy and active" two weeks before she died, and that she "didn't notice anything to be wrong with her," App. Ex. 24 (Daniella Lucio Statement) at 1. Daniella likewise averred that on the day of her death Applicant was "worried" about Mariah because she had been

"sleeping all day" and "wouldn't eat," because "Mariah would close her mouth very tight and wouldn't open it." *Id.* Daniella also observed Mariah "breathing heavily." *Id.* Further, Daniella informed police that, before she died, Alexandra had called her to tell her about Mariah's fall down steps. *Id.*

The Cumulative Impact of the Suppressed Evidence Was Material

23. The parties agree and the Court finds that the cumulative impact of the suppressed evidence detailed above is material because intentional infliction of serious bodily injury resulting in death is an element of murder, and the suppressed evidence, viewed cumulatively and in light of the record as a whole, provides evidentiary support for the defense that Mariah's head injury was accidental, and counters the State's evidence that the injuries could have only been the result of intentional abuse.

24. Specifically, the Court finds that, collectively, the suppressed evidence revealed the following material facts in support of Applicant's defense:

- All of Mariah's siblings who were interviewed by CPS Investigator Arreola the night Mariah died denied that Applicant ever hit Mariah or her other children, *see* App. Ex. 20 (Arreola Report);

- Several of Mariah's siblings corroborated Applicant's assertion that Mariah fell down some stairs at the family's previous home, and Bobby, Mariah's older sibling, witnessed her fall, *see* App. Ex. 20 (Arreola Report);

- Applicant's teenaged and adult children, Daniella and Alexandra, corroborated Mariah's decline in health after the fall in the two days prior to her death; specifically, that she was sleeping excessively, was having trouble breathing, vomited, and had lockjaw—all symptoms consistent with a diagnosis of DIC, *see* App. Exs. 20 (Arreola Report), 22 (Alexandra Lucio Statement), 24 (Daniella Lucio Statement);

- Applicant's teenaged daughter, Alexandra, observed bruises on Mariah's eye "from when she fell at the previous apartment," App. Ex. 20 (Arreola Report); and

- Applicant's teenaged and adult children, Daniella and Alexandra, provided contemporaneous accounts of Applicant's concern for Mariah in the days leading up to her death. *See* App. Exs. 20 (Arreola Report), 22 (Alexandra Lucio Statement), 24 (Daniella Lucio Statement).

25. Further, the parties agree and this Court finds that disclosure of the suppressed evidence would have allowed defense counsel to present evidence to establish a fall occurred and to meaningfully challenge testimony suggesting that Applicant was lying about Mariah's accidental fall. Specifically, at trial, Detective Rebecca Cruz testified that she physically inspected the steps at Applicant's prior apartment and that, upon visual inspection, she did not find any evidence of blood, hair, or any other evidence that someone sustained a head injury on the steps. 32 RR 43. In effect, Detective Cruz testified that Applicant—and only Applicant—alleged that Mariah fell down the stairs at their prior apartment, and that there was no physical evidence to corroborate Applicant's assertion. Had defense counsel been aware of the contemporaneous witness statements provided to police and CPS workers that

corroborated Applicant's account of Mariah's fall, the defense could have meaningfully challenged Det. Cruz's testimony that implied Applicant made up the fall.

26. Further, the Court finds that the State's failure to disclose evidence impeded defense counsel from fully investigating the cause of Mariah's death and from adequately challenging the prosecution's investigation in the case and the eventual theory of fatal abuse the prosecution presented at trial. Had defense counsel been aware of evidence corroborating Mariah's fall and observations of her declining condition that is consistent with the presentment of DIC, defense counsel could have provided the jury with evidence of a non-abuse cause of Mariah's bruising, to counter the State's evidence that the injuries could have only been the result of intentional abuse.

27. Expert reviews undertaken independently by the State and Applicant's counsel demonstrate that the suppressed eyewitness accounts of Mariah's injuries and declining health provided by Daniella, Alexandra, Selina, Richard, Rene, and Robert would have informed, and likely altered, forensic medical opinions at Applicant's trial. *See* Affidavit of Janice Ophoven Ex. 4 at ¶ 12 (Ophoven Dec.); Ex. A to Joint Advisory & Notice of Filing Exhibit (Rpt. of DeWitt and Sanchez).

28. The State provided this suppressed evidence to forensic pathologist Dr. Marguerite DeWitt and law enforcement expert Dr. Michael R. Sanchez. Considering this suppressed evidence in the context of the other medical evidence in the case,

Drs. DeWitt and Sanchez concluded that the likely cause of Mariah's death was an accidental fall resulting in head trauma. Ex. A to Joint Advisory & Notice of Filing Exhibit (Rpt. of DeWitt and Sanchez).

29. The Court finds that the cumulative effect of the suppressed evidence discussed above was material and that there is a reasonable probability that, in light of all the evidence in this case, the outcome of Applicant's case would have been different had the withheld evidence been timely disclosed.

Conclusions of Law

30. This Court concludes that material exculpatory evidence discussed above was not "ascertainable through the exercise of reasonable diligence on or before" January 13, 2011, when Applicant's initial habeas application was filed. *See* Tex. Code Crim. Proc. art. 11.071, § 5(e).

31. The Court concludes that the State had a duty to disclose at trial the exculpatory statements of Applicant's family members under *Brady* yet suppressed them in violation of Applicant's due process rights.

32. The Court concludes that all the suppressed evidence, detailed in Finding 18, *supra* and contained in the Investigative Report (including the contemporaneous accounts of several of applicant's children) and the sworn witness statements of Daniella and Alexandra Lucio was material because there is a reasonable likelihood that it affected the judgment of the jury.

33. The Court concludes that had the suppressed *Brady* material been disclosed to the jury, there is a reasonable probability that the outcome of the trial would have been different.

34. Specifically, the Court concludes first that Applicant's account of Mariah's fall and declining health would not have been discredited by the prosecution if the corroborating statements of her children were available to the defense. Second, Applicant's corroborated account of Mariah's fall and declining health would have led the defense to rebut Dr. Farley's testimony that only abuse could have caused Mariah's condition with evidence that Mariah was not abused, and her condition was caused by DIC after the fall.

35. The Court concludes that Applicant has met her burden of proof, by a preponderance of the evidence, that she would not have been convicted in light of the suppressed evidence.

The Court concludes that Applicant is entitled to habeas corpus relief from her conviction and sentence in this cause under the Due Process Clause of the Fourteenth Amendment and Article 11.071 as presented in Claim 5.

CLAIM 1: False Testimony

36. This Court finds based on the new evidence submitted that the Applicant's due process rights were violated by the State's use of false and misleading

evidence regarding two central factual issues contested at trial. First, the jury's verdict was affected by false testimony from the State's medical examiner that it was impossible that Mariah's injuries and death resulted from an accidental fall two days prior to her death. Second, the jury's verdict was affected by incorrect testimony from a Texas Ranger that he was able to tell Ms. Lucio was lying and guilty based on her demeanor and body language.

37. The Court incorporates by reference the Findings in Claims 5 *supra* and 2 *infra*.

Legal Standard

38. 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). To be entitled to habeas relief because of false or misleading evidence, an applicant must show that (1) false or misleading evidence was presented at trial; and (2) the false or misleading evidence was material to the jury's verdict. *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014).

39. *Ex parte Chabot* holds that that the State's presentation of false testimony can violate a defendant's due process rights—even if the falsity was unknown at the time. To be entitled to relief in such a claim requires showing that "the testimony, taken as a whole, [gave] the jury a false impression." *Id.* at 208. *Ex parte Chavez*, 371 S.W.3d 200 (Tex. Crim. App. 2012) *See also Townsend v. Burke*, 334

U.S. 736, 740-41 (1948).

40. A due process violation occurs regardless of whether the false evidence is the result of good-faith misstatements or intentional perjury. *Ex parte Chaney*, 563 S.W.3d 239, 263 (Tex. Crim. App. 2018) (citing *Weinstein*, 421 S.W.3d at 665). Thus, the *Chabot/Chavez* standard does not require that the State *knew* that the testimony at issue was false. *Chavez*, 371 S.W.3d at 208.

41. Applicant also bears the burden of demonstrating that the use of false testimony was material or prejudicial. Applicant satisfies this requirement if there is a reasonable likelihood that the false testimony affected the judgment of the jury, then the evidence was material and the introduction of that testimony violated the defendant's due process rights. *Id.* at 206-207.

42. At least in cases like this one, where a habeas applicant could not have raised her false-testimony claim on direct appeal, the Court of Criminal Appeals has said that the "applicant *may be* required to show that the due-process violation was not harmless." *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). The court also has "us[ed] the language of 'more likely than not' in lieu of 'reasonable likelihood,'" *Ex parte Robbins*, 360 S.W.3d 446, 459 n.16 (Tex. Crim. App. 2011) (citing *Chabot*, 300 S.W.3d at 772), and said the applicant has "'the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment,'" *Chabot*, 300 S.W.3d at 771 (quoting *Ex parte Fierro*, 934 S.W.2d

370, 374 (Tex. Crim. App. 1996)), because that, not the harmless-error standard, is "the normal standard on habeas review." *Ex parte Napper*, 322 S.W.3d 202, 242 (Tex. Crim. App. 2010) ("It remains unsettled whether a more favorable standard might be available to a defendant in the 'knowing use' context."). Accordingly, this Court considers whether Applicant demonstrated by a preponderance of the evidence that the false testimony impacted the verdict.

Findings of Fact

Testimony Regarding Injuries and Cause of Death

43. At trial, the State's medical examiner testified that Applicant's defense—that a fall on a steep staircase at their old apartment about two days before Mariah's death caused her fatal head injuries—was impossible, because the widespread bruising on Mariah's body could not have resulted from an accidental fall, and instead only could have been incurred through intentional abuse. The jury heard definitive testimony precluding Applicant's defense: "[T]his is a child that has been beaten. This is a battered child...Maybe if they fell off a house, fell off a significant height more than once. But these [bruises] are—all over the body. This isn't a simple fall." 34 RR 34.

44. The State's expert testified it was impossible that Mariah's injuries were the result of a fall on the stairs: "You can get bruising falling down the stairs, but as I said earlier, some of these are under the eye. That's not a commonplace [*sic.*]

to bump your head as you're tumbling down the steps. The lower cheeks—under the chin—the abdomen, and in the recessed areas. . . I think I made it clear. . . That child had more bruises than I've ever seen on any case that I had before. This is a beating." 34 RR 56. This testimony negating Applicant's defense was reiterated in closing argument: "Dr. Farley told you it's not a fall. It's impossible." 36 RR 17.

45. The State's medical examiner similarly testified that there was only one explanation for contusions to Mariah's lungs and right kidney: that these injuries to Mariah must have come from violent, intentional force—from "punches or stomps—or slams." 34 RR 28-29.

46. This court finds credible new evidence that Mariah's autopsy findings, along with previously suppressed eyewitness accounts of family members regarding the fall and Mariah's subsequent deterioration, support a diagnosis of disseminated intravascular coagulation ("DIC"), a blood coagulation disorder that can mimic traumatic bruising, but is a non-abuse explanation for Mariah's injuries and bruising and consistent with a cause of death attributable to head trauma incurred in an accidental fall on stairs.

47. The new evidence is based in part on the findings of Dr. Michael Laposata, Chairman of the Pathology Department for the University of Texas, Galveston, whose clinical focus is on blood coagulation and the diagnosis of bleeding disorders, *See* Affidavit of Dr. Michael Laposata (Laposata Dec.) Ex. 5. Dr. Laposata

has extensively written scientific articles on topics related to diagnosis of coagulation disorders and optimization of clinical laboratory operations for over three decades. This led to the publication of several books, including a major textbook entitled *Laboratory Medicine: The Diagnosis of Disease in the Clinical Laboratory,* the third edition has been named *Laposata's Laboratory Medicine.* Dr. Laposata is highly credentialed and has the necessary training and experience to opine on whether a blood coagulation disorder (DIC) could have caused Mariah's bruises. The Court finds Dr. Laposata's conclusions credible with regard to the possible causes of Mariah's bruises.

48. Dr. Marguerite DeWitt, a forensic pathology expert retained by the State to evaluate Applicant's claims reached similar conclusions regarding the findings supporting this claim. *See* Joint Advisory and Notice of Filing Exhibit, Exhibit A (Dr. Dewitt Rep.).

49. The new expert evidence presented in these proceedings shows that accidental trauma, including head trauma, and infection are catalysts for DIC. Mariah's fall on the stairs before she died is the type of trauma that can lead to DIC. *See* Affidavit of Dr. Michael Laposata (Laposata Dec.) Ex. 5 at 2. Emergency room reports also show that Mariah appears to have been battling an infection at the time of her death. *Id.*

50. Dr. Laposata explained that Mariah's autopsy documented certain factors indicative of DIC such as fibrin thrombi (clots) in the blood vessels. *See* Affidavit of Dr. Michael Laposata (Laposata Dec.) Ex. 5 at 2; *see also See* Joint Advisory and Notice of Filing Exhibit, Exhibit A (Dr. DeWitt Rep.) at 16.

51. The Court accepts the evidence presented regarding DIC. DIC can result in both widespread hemorrhages (bleeding) and abnormal thrombosis (clotting), manifesting in extensive bruising throughout the body. *See* Affidavit of Dr. Michael Laposata (Laposata Dec.) Ex. 5 at 2.

52. DIC can cause spontaneous bleeding and bruising (contusions) with no or minimal force or pressure. *See* Affidavit of Dr. Michael Laposata (Laposata Dec.) Ex. 5 at 2. When a child or adult has DIC, routine handling of their body—a parent lifting or moving their child, even gently, let alone EMS workers performing CPR—can result in bruising and hemorrhaging. *Id.* Mariah experienced many rounds of CPR, both in her home and in the hospital; she was intubated; she had been handled by numerous EMS workers and doctors attempting to revive her by the time of her autopsy. *See* 32 RR 71, 73; 33 RR 86, 91.

53. The new expert evidence shows that bruises from DIC are indistinguishable from bruises caused by intentional force. *See* Affidavit of Dr. Michael Laposata (Laposata Dec.) Ex. 5 at 2.

54. The new evidence credibly explains that the extensive bruising to Mariah's body could have been caused by DIC which she developed after accidentally falling on the stairs. After considering the newly available evidence, the Court finds that the trial testimony categorically excluding a non-abuse cause of Mariah's injuries and death, was false and misleading.

55. The Court finds that DIC provides a credible, scientific explanation for the appearance of the extensive bruising on Mariah's body as well as her internal organs that does not entail abuse, much less rule out all possible causes other than abuse.

56. It was thus incorrect and misleading for the State's expert to tell the jury that no non-abuse explanation was possible.

57. The Court finds that the State's expert incorrectly testified that the extensive bruising to Mariah's body and bruising to internal organs must have resulted from abuse. The State's expert conclusively precluded a fall on stairs from causing Mariah's injuries. Based on the totality of the now-available evidence, including suppressed witness statements, this Court finds that Mariah's extensive bruising could have been caused by DIC which developed after accidentally falling down the stairs. After considering this newly developed evidence, the Court concludes that the medical examiner's testimony categorically excluding a non-abuse cause of Mariah's injuries and death was false and misleading.

58. The State's medical examiner also testified falsely that the absence of hemosiderin deposits and macrophages in Mariah's brain meant her head trauma had to have happened within twenty-four hours of death. *See* 34 RR 55, 57. Thus, according to the testimony of the State's expert, Mariah's injuries could not have resulted from an accidental fall *two days* prior, as Applicant's defense maintained at trial.

59. The Court accepts the evidence presented by sworn affidavit of Dr. Laposata, based on well-established scientific literature, that hemosiderin may not appear for several days post-injury and the timing of its appearance is variable. *See* Affidavit of Dr. Michael Laposata (Laposata Dec.) Ex. 5 at 3. Thus, the absence of hemosiderin deposits and macrophages does not preclude a fall on February 15, 2007, as the cause of Mariah's traumatic head injury, as the State's expert told the jury.

60. The Court finds the absence of hemosiderin in Mariah's brain tissue does not conclusively establish that her injuries occurred within twenty-four hours, as the jury was told, and instead is entirely consistent with an accidental trauma two days before her death.

61. The credible new medical evidence is consistent with a cause of death of head trauma due to an accidental fall two days before Mariah's death. *See* Joint Advisory and Notice of Filing Exhibit, Exhibit A at 19 (Dr. DeWitt Rep.).

62. Additionally, at trial the State presented testimony that an old, healing fracture to Mariah's left humerus (the upper arm bone) was evidence of abusive trauma. In the prosecution's case, the medical examiner characterized this injury as a "spiral" fracture—which had to have come from someone "tugging on" or "twisting" Mariah's arm. 32 RR 15-16.

63. The Court credits the findings of pediatric orthopedic surgeon Dr. Christopher Sullivan that the fracture to Mariah's arm bone is a common injury in walking toddlers, who fall often, and can result from "a basic fall on the arm from a standing position or kids playing rough" with each other. *See* Affidavit of Christopher Sullivan (Sullivan Dec.) Ex. 8 at 2. The Court finds that Mariah's medical history included documented falls related to Mariah's developmental delays and misshapen feet. *See* Ex. 58 (CPS Records Summary). Dr. Sullivan explained that non-displaced fractures, like the one in Mariah's arm, are among the most common childhood injuries. *See* Affidavit of Christopher Sullivan (Sullivan Dec.) Ex. 8 at 2.

64. While Dr. Sullivan concluded the fracture was not a spiral fracture at all, as the medical examiner had testified, he also explained that, even if it were, identifying a fracture as "spiral" does not indicate abuse; spiral fractures can result from simple falls. *See* Affidavit of Christopher Sullivan (Sullivan Dec.) Ex. 8 at 1-2. Dr. Sullivan explained, "there is nothing about the nature of [Mariah's] fracture

that indicates it was the result of an intentional act or abuse." *See* Affidavit of Christopher Sullivan (Sullivan Dec.) Ex. 8 at 2-3. Thus, this Court finds that the trial testimony by the State's expert asserting this injury was caused by abusive trauma was incorrect. This injury could be due to an accidental or non-accidental cause. *See* Affidavit of Christopher Sullivan (Sullivan Dec.) Ex. 8 at 1-2; *see also* Joint Advisory and Notice of Filing Exhibit, Exhibit A at 14 (Dr. Dewitt Rep.).

Testimony Attributing Guilt to Demeanor

65. This Court also finds that at trial, the State presented evidence from Texas Ranger Victor Escalon—one of the interrogating officers who elicited Applicant's custodial statements—that he could, and did, conclusively determine Applicant's guilt based on her demeanor and body language in the interrogation room. *See* 33 RR 115 (Escalon testifying that Applicant was not making eye contact with the investigator and had her head down and, accordingly: "right there and then, I knew she did something. And she was ashamed of what she did, and she had a hard time admitting . . . what had occurred."); *id.* (Escalon testifying that Applicant's slumped posture revealed her untruthfulness and guilt); *see also* 33 RR 116 (testifying that someone who is "hiding the truth" will have "their head down, and like their shoulders are slouched forward, and they won't look at you"). Escalon additionally testified that a suspect who is being "honest" will get upset, tell you "get out of my face. I didn't do anything. Leave me alone. I want my attorney." 33 RR 116. Applicant

did not protest in this way, nor invoke her right to counsel. The difference, he said, between a guilty and innocent suspect, is "black and white." *Id.*

66. This Court finds that this testimony was false. This Court credits the evidence presented through the sworn affidavit of neuroscientist Lisa Feldman Barrett, Ph.D., Professor of Psychology and the Director of the Interdisciplinary Affective Sciences Laboratory at Northeastern University whose expertise is in the science of how the human brain generates instances of emotion, perceives emotions in others, and regulates human behavior. Affidavit of Dr. Barrett, Ex. 9 at 1 (Barrett Dec.).

67. Dr. Feldman Barrett relied on a large body of research on "how the human brain generates instances of emotion, perceives emotions in others, and regulates human behavior" in reaching her conclusion that Ranger Escalon's testimony was "erroneous as a matter of now-established behavioral science and neuroscience" which affirmatively disproves the "emotion reading" ability Escalon claimed to have. Affidavit of Dr. Barrett, Ex. 9 at 2 (Barrett Dec.). "Ranger Escalon's statements that he was able to determine [Applicant's] internal thoughts and emotions from her facial movements, posture, body movements and diction" in the interrogation room after her daughter's death "is scientifically baseless and false." *Id.*

68. Contrary to Ranger Escalon's testimony about "black and white" determinants of guilt and truthfulness, scientists have established that "there is no single template, fingerprint, or signature of physical signals that express guilt or innocence

across all individuals in all situations, regardless of life history and culture." Affidavit of Dr. Barrett, Ex. 9 at 4 (Barrett Dec.). No person "can detect a person's emotional state from a single pattern of facial movements, physiological signals, vocal signals, or even neural signals in a way that generalizes across instances of that emotion category." *Id.* at 5.

69. This Court finds that Ranger Escalon's asserted ability has been "disconfirmed" by a broad range of scientific techniques including "brain imagining studies, cross-cultural studies of emotional expressions, physiology studies and experiments using artificial intelligence algorithms." *Id.* at 3.

Conclusions of Law

70. Having determined, based on the trial and post-conviction records, that the jury heard false testimony, this court now concludes, based on the record and this Court's recollection of the trial, that Applicant has shown by a preponderance of the evidence a reasonable likelihood that the testimony categorically excluding a non-abuse cause of Mariah's injuries affected the judgment of the jury.

71. The primary issue at trial was whether Mariah's fatal head injury was caused by intentional abuse or an accidental fall on stairs. Thus, the Court concludes that the testimony introduced by the state–that, given her injuries it was medically impossible that an accidental fall down the stairs caused Mariah's death—was material and the introduction of that testimony violated the defendant's due process

rights.

72. The Court finds there is a reasonable likelihood that the testimony precluding head trauma more than *24 hours* before death affected the judgment of the jury, as that testimony rendered Applicant's defense—that a fall *two days* before Mariah's death caused her fatal injuries—impossible. Thus, the Court concludes that the false evidence was material and the introduction of that testimony violated the defendant's due process rights.

73. The Court also finds there is a reasonable likelihood that the testimony characterizing a healing fracture to Mariah's humorous that could be due to accident as an injury resulting from abuse could have affected the judgment of the jury particularly when considered along with other injuries incorrectly attributed to abuse.

74. Finally, the Court finds that there is a reasonable likelihood that the jury was impacted by Ranger Escalon's misleading and scientifically wrong testimony that he could tell Applicant was hiding the truth and guilty based on her demeanor and body language when interrogated. The Court finds that this testimony, which is contradicted by established science, undermined Applicant's entire defense.

75. This Court concludes that Applicant has proved by a preponderance of the evidence that the false testimony described above was material to Applicant's conviction, either individually or cumulatively, and the introduction of that testimony violated the Applicant's due process rights.

CLAIM 2: New Scientific Evidence

76. Applicant's second claim asserts that she is entitled to relief based on relevant scientific evidence that was not available at trial and which undermines and contradicts evidence presented by the prosecution. First, Applicant asserts that the medical examiner's testimony that injuries on Mariah's back were caused by an adult dragging her or his teeth across her flesh is not scientifically valid. Second, Applicant asserts that the scientific study of false confessions has established that victims of abuse like herself are more likely to succumb to interrogation techniques that produce false confessions. Third, Applicant asserts that the scientific community has reached a consensus that no person can determine whether a person is telling the truth based on their demeanor or posture during an interrogation, contrary to Ranger Escalon's trial testimony.

77. The Court incorporates by reference the Findings in Claims 5 and 1 *supra*.

78. The Court concludes that Applicant has demonstrated by a preponderance of the evidence that newly available scientific evidence (a) undermines the prosecution's bite-mark evidence, (b) would lead a jury to conclude that Applicant was highly susceptible to giving a false confession, and (c) that Ranger Escalon's testimony that he could determine that Applicant was guilty by her demeanor is scientifically disproven. After addressing the governing legal standard, this Court will

make specific findings on each of these issues.

Legal Standard

79. Article 11.073 of the Texas Code of Criminal Procedure applies to relevant scientific evidence that was not available to be offered by a convicted person at the convicted person's trial or contradicts scientific evidence relied on by the State at trial. Tex. Code. Crim. Proc. art. 11.073(a).

80. Article 11.073 authorizes a court to grant habeas relief if an applicant files an application in the manner provided by Article 11.071, and the application contains specific facts indicating that (a) relevant scientific evidence is currently available and was not available at the time of the applicant's trial or previous application because it was not ascertainable through the exercise of reasonable diligence by the convicted person before or during trial or previous application and (b) the scientific evidence would be admissible under the Texas Rules of Evidence at trial held on the date of the application. Tex. Code. Crim Proc. art. 11.073(b)(1)(A)&(B).

81. Additionally, the reviewing court must make findings establishing that, had the scientific evidence been presented at trial, there is a preponderance of evidence that the applicant would not have been convicted. Tex. Code. Crim Proc. art. 11.073(b)(2).

82. Further, in making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence, the court shall

consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since the date on which a previously considered application was filed. Tex. Code. Crim Proc. art. 11.073(d).

New Scientific Evidence Discrediting the Field of "Bite Mark" Analysis Undermines Trial Testimony that Mariah had Adult-Sized Bite Marks on her Body

83. At trial, the medical examiner testified as part of the prosecution's case that two abrasions on Mariah's body were "bite marks" that were caused by an adult who used their teeth to bite and painfully injure Mariah. *See* 34 RR 17 (Mariah had bite marks on her body, caused by an adult who "dragg[ed] . . . th[eir] teeth across [Mariah's] back."). The State's medical examiner testified that her opinion was confirmed by a forensic odontologist. 34 RR 33.

84. The Court finds that, in the years since Applicant's trial and initial application for habeas corpus relief, research published by the National Academy of Science (NAS),[7] the Texas Forensic Science Commission,[8] and the President's

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[7] *Strengthening Forensic Science in the United States: A Path Forward* at 176 ("NAS Report"), available at https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf.

[8] *See* Forensic Bitemark Comparison Complaint Filed by National Innocence Project on Behalf of Steven Mark Chaney—Final Report (Apr. 12, 2016), available at https://www.txcourts.gov/media/1440871/finalbitemarkreport.pdf.

Council of Advisors on Science and Technology,[9] as well as by numerous scientific studies from board certified odontologists,[10] have established that there is no scientific validity to conclusively identify a patterned injury as a human bite mark, as the State's medical examiner did at Applicant's trial. Rather, this Court finds that new scientific evidence establishes that pattern injuries that may appear as if they are bite marks can in fact be caused by contact with inanimate objects, and that there is no reliable mechanism for conclusively determining the source of such an injury by visually analyzing the abrasion.

85. This Court credits the evidence presented in the sworn affidavit of Dr. Adam Freeman, former President of the American Board of Forensic Odontology, that scientific literature and studies show that forensic dentists cannot, with any consistency or reliability, determine whether pattern injuries constitute human bite marks. *See* Affidavit of Dr. Adam Freeman (Freeman Rep.) Ex 6. Dr. Freeman also credibly explained that there is no scientifically reliable way to attribute a "half-mooned abrasion" mark to an adult or to a child's dentition. *See* Affidavit of Dr.

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[9] Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods at 87, available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf ("[A]vailable scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury *is* a human bite mark and cannot identify the source of bite mark with reasonable accuracy.").

[10] *See* Affidavit of Dr. Adam Freeman (Freeman Rep.) Ex 6.

Adam Freeman (Freeman Rep.) Ex 6 at 11. The State's medical examiner's testimony in Applicant's case that the "bite marks" were attributable to an adult is now recognized to be "scientifically indefensible." *Id.*

86. The Court finds that there is now scientific consensus that bite mark analysis like that presented in Applicant's case is foundationally invalid and unreliable. *Ex parte Chaney*, 563 S.W.3d 239, 258 (Tex. Crim. App. 2018) (observing that bite mark evidence, "which once appeared proof positive of . . . guilt, no longer proves anything").

87. The Court finds that this scientific consensus did not take hold until 2016 when the Texas Forensic Science Commission completed its year-long investigation and issued a report recommending a moratorium on the use of bite-mark evidence in all criminal cases in the State of Texas, and when, simultaneously, the President's Council of Advisors on Science and Technology concluded bite mark analysis lacked foundational validity.

Conclusions of Law Related to Bitemark Evidence

88. This Court concludes that the new scientific evidence undermining the State's medical examiner's testimony regarding the purported bite marks on Mariah's body was not ascertainable through the exercise of reasonable diligence when Applicant filed her initial application under Article 11.071 in 2011, as the scientific consensus regarding the lack of reliability of this forensic assay was not established

until 2016.

89. This Court concludes that the relevant scientific evidence contradicting the bite mark testimony is admissible under the Texas Rules of Evidence. First, the new scientific evidence here would operate to preclude opinion evidence about the purported bite marks under Rule 702. *See Chaney*, 563 S.W.3d at 256 (adopting trial court conclusion that "such testimony would not be . . . admissible" today).

90. Second, this Court concludes in the alternative that if opinion testimony were permitted as to the purported "adult" "bite marks" on Mariah, then expert testimony reflecting modern scientific consensus would also be admissible at trial, pursuant to *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), to impeach any odontological opinion that were admitted. The Texas Court of Criminal Appeals has recognized the admissibility of precisely this type of evidence. *Chaney*, 563 S.W.3d at 256 (adopting trial court finding that "the current scientific evidence related to bite marks," i.e., recent scientific studies, "would be admissible under the Texas Rules of Evidence").

91. Moreover, the testimony that the "bite mark" was "adult size[d]," thereby excluding the possibility that, if it were a bite, it was made by a child or teenager, was particularly significant, as Mariah was the youngest of nine children living together in the apartment. 33 RR 46 (Cruz testifying there were "approximately 9 kids" and two adults in apartment); 33 RR 72; Ex. 20 at 1 (Arreola report

listing children's ages).

92. This Court concludes that newly available scientific evidence establishes that this testimony—that abrasions on Mariah's body could be identified as bites based on their appearance, and specifically as adult bites—was invalid and unreliable. Accordingly, the Court finds that the State's case would have been meaningfully "weakened had [this] newly available scientific evidence been presented at trial[,]" *Chaney*, 563 S.W.3d at 262, as it would have impeached this prejudicial testimony.

93. Applicant has thus met her burden of showing, by a preponderance of the evidence, that had the new evidence undermining the bite mark testimony been presented in combination with the other new evidence, namely, evidence that demonstrates Applicant's high risk of false confession and that undermines Ranger Escalon's testimony that he knew Applicant was guilty based on her demeanor in the interrogation room, as well as the new evidence demonstrating Mariah's other injuries were consistent with an accidental fall, by a preponderance of the evidence Applicant would not have been convicted.

94. Applicant has, therefore, met her burden to demonstrate by a preponderance of the evidence that she would not have been convicted had the new scientific evidence been admitted at trial, and relief is warranted. Tex. Code. Crim Proc. art. 11.073(b)(2).

Findings of Fact on New Scientific Evidence Revealing that Trauma Survivors are at Heightened Risk of Falsely Confessing Undermines the State's "Confession" Evidence

95. This Court finds that, after several hours of police interrogation during which she initially insisted she was innocent and did not know how her daughter died, Applicant ultimately told officers that she had slapped, pinched, and bitten Mariah and agreed that she was "responsible" for what happened. The Court finds that Applicant never made an express admission to causing her daughter's death. The Court finds that Applicant's admissions were, however, relied on by the State at trial as a critical piece of evidence establishing her guilt. *See e.g.*, 36 RR 21 (prosecution arguing in summation that the custodial statements conclusively proved that "[Applicant] is the one that did it and no one else.").

96. The Court finds that there is a documented history establishing that Applicant was subjected to physical and sexual abuse as a child and as an adult, and that this abuse included domestic violence at the hands of her adult male partners. Ex. 14 (Dr. Bethany Brand report), at 7-8.

97. The Court finds that Applicant has been diagnosed with chronic Post-traumatic Stress Disorder (PTSD). Ex. 14 (Dr. Bethany Brand report), at 7-8.

98. In recent years, scientific research has established a correlation between a history of trauma and a trauma survivor's heightened levels of suggestibility and

compliance[11]—both of which increase a person's risk of false confession. *See generally* Otgaar, H., et. al., *The link between suggestibility, compliance, and false confessions: A review using experimental and field studies*, 35(2) Applied Cognitive Psych. 445-455 (2021).

99. Recent advances in neuroscience have allowed scientists to understand the specific cognitive deficits that typically result from trauma exposure, and particularly from chronic exposure during childhood or adolescence, such as Applicant experienced. *See e.g.*, McLaughlin, K. A., Sheridan, M. A., & Lambert, H. K., *Childhood adversity and neural development: Deprivation and threat as distinct dimensions of early experience*, 47 Neuroscience & Biobehavioral Reviews 578-59 (2014).

100. As a result of these developments, trauma exposure was cited by relevant experts as a distinct "risk factor" for false confession for the first time in 2018. Affidavit of David Thompson Ex. 11 at 12 (Thompson report) ("Subjects who have experienced trauma are also more likely to be susceptible to coercive interrogation techniques"); Gudjonsson, G.H., *The development of the science: The evidence base—Personal risk factors*, The Psychology of False Confessions: Forty Years of Science and Practice, John Wiley & Sons, 124-133 (2018).

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[11] *See e.g.*, Vagni, M., Maiorano, T., & Pajardi, D, *Effects of post-traumatic stress disorder on interrogative suggestibility in minor witnesses of sexual abuse*, Current Psychology, 1-14 (2021); Monia Vagni et al., *Immediate and delayed suggestibility among suspected child victims of sexual abuse*, Personality & Individual Differences, 79, 129-133 (2015).

Conclusions of Law Regarding Trauma Survivors Heightened Risk of Falsely Confessing

101. The Court concludes that, at the time of her trial and previous application under Article 11.071, significant aspects of the science necessary for a full analysis of Applicant's risk of false confession was not "ascertainable through the exercise of reasonable diligence." Tex. Code Crim. Proc. art. 11.073(c). Specifically, the Court concludes that, at the time of Applicant's 2011 application, relevant empirical research and scientific understanding of the neurological deficits associated with trauma exposure and its corresponding impact on vulnerability in the interrogation room had not yet been adequately developed, and thus was not ascertainable by Applicant.

102. This Court concludes that, today, a false-confession expert's testimony regarding Applicant's profound vulnerability to false confession in light of her trauma history is admissible in evidence pursuant to Tex. R. Evid. 702. Applicant would be able to proffer the testimony of a false-confession expert that would testify to the impact of her significant trauma history and PTSD diagnosis on her response to the interrogation and, correspondingly, her exceptionally high levels of suggestibility, compliance, and risk of false confession. *Accord See Ex parte Boutwell*, No. WR-90,322-01, 2021 WL 5823379, at *1 (Tex. Crim. App. Dec. 8, 2021) (unpublished) (overturning the conviction of a man who was denied effective assistance of counsel because his trial attorney neglected to proffer expert testimony regarding,

inter alia, the risk of false confession involved with the coercive interrogation techniques used); *see also e.g.*, *State v. Perea*, 322 P.3d 624, 640 (Utah 2013) (concluding that expert testimony regarding established "risk factors" of false confession is admissible, reasoning that "expert testimony about factors leading to a false confession assists a trier of fact to understand the evidence or to determine a fact in issue" (internal quotation marks and citation omitted)).

103. The Court concludes that Applicant has demonstrated by a preponderance of the evidence that, had such expert testimony been admitted at trial, she would not have been convicted. The new scientific evidence regarding Applicant's heightened vulnerability to interrogative pressure casts doubt upon the reliability of her custodial admissions. With relevant expert testimony to explain how her lifetime of trauma resulted in significant vulnerability in the interrogation room, a jury is more likely than not to have rejected the State's insistence that her "confession" proved she was guilty of capital murder and, instead, conclude that her vague, cryptic admissions reflect merely her acquiescence to officers' demands for a confession.

104. This Court concludes that, in addition, had the new evidence demonstrating Applicant's heightened risk of false confession been presented in combination with the other new evidence that was not previously ascertainably, discussed in Claims 1, 2 & 5, Applicant has shown by a preponderance of the evidence that she would not have been convicted.

105. Applicant thus met her requisite burden to demonstrate by a preponderance of the evidence that, had the new scientific evidence been admitted at trial, she would not have been convicted and thus relief is warranted. Tex. Code. Crim Proc. art. 11.073(b)(2).

Findings of Fact Regarding New Scientific Developments in the Field of Neuroscience Contradict Ranger Escalon's Trial Testimony that he Knew Applicant was Guilty based on her Demeanor

106. The Court incorporates by reference its findings of fact contained *supra* in paragraphs 66-70 regarding the trial testimony of prosecution witness Texas Ranger Victor Escalon that he could, and did, conclusively determine Applicant's guilt based on her demeanor and body language in the interrogation room. *See* 33 RR 115-116

107. The Court finds that, today, there is modern neuroscientific consensus that there is no singular, fixed, universal way that all people express an emotion and, therefore, an interrogating officer cannot conclusively determine, simply by observing a suspect's body language and behavior in response to interrogation, whether that suspect is guilty or innocent. The Court finds that this scientific consensus was first established in a peer-reviewed consensus paper published in 2019, which methodologically analyzed over 1,000 relevant neuroscientific studies, including studies using brain imaging technology. Barrett, L. F., Adolphs, R., Marsella, S., Martinez, A. M., & Pollak, S. D., *Emotional expressions reconsidered: Challenges to inferring*

emotion from human facial movements, 20 Psychological Science in the Public Interest 1, 46 (2019) (concluding that there is no scientific basis to assume that there are facial "fingerprints" or "diagnostic displays that reliably and specifically signal particular emotional states regardless of context, person, and culture").

108. This Court finds that as there is no singular, detectable difference in body language and demeanor between a guilty person and an innocent person and, therefore, Escalon's testimony that he knew Applicant was guilty based on her passivity and slouched posture is unsupported.

Conclusions of Law Regarding Emotion or Demeanor Reading

109. This Court concludes that the neuroscientific consensus that now exists debunking Escalon's "emotion reading" testimony was not available at the time of Applicant's 2008 trial nor at the time of her previous application in 2011 because the relevant neuroscientific consensus was first established in a 2019. *See* Barrett et. al., *Emotional expressions reconsidered: Challenges to inferring emotion from human facial movements*, 20 Psychological Science in the Public Interest 1, 46 (2019).

110. This Court further concludes that new neuroscientific evidence regarding the inability to detect guilt based on demeanor and emotion reading is admissible through qualified expert testimony, to impeach Escalon and educate the jury about the relevant neuroscientific studies. *See* Tex. R. Evid. 702.

111. This Court concludes that Applicant has demonstrated by a preponderance of the evidence that she would not have been convicted if the new neuroscientific evidence establishing the unreliability of demeanor reading testimony was presented at trial, and she is therefore entitled to relief. Tex. Code Crim. Proc. art. 11.073 § (b)(2). This Court concludes that this testimony likely impacted the jury's verdict, in that it served as independent evidence of her guilt and added false credence to the State's "confession" and medical evidence—which, today, as detailed *supra,* has been revealed as unreliable and/or false.

112. This Court concludes, in addition, that had the new evidence undermining Ranger Escalon's demeanor testimony been presented in combination with the other new evidence that was not previously ascertainably, discussed *supra*—including evidence that undermines the "bite mark" testimony, as well as the new evidence which demonstrates Applicant's high risk of false confession due to her history of trauma—Applicant has shown by a preponderance of the evidence that she would not have been convicted.

113. Applicant has thus plainly met her burden to demonstrate by a preponderance of the evidence that she would not have been convicted if the new scientific evidence was admitted at trial. Relief is therefore warranted pursuant to Tex. Code. Crim Proc. art. 11.073(b)(2).

Claim 3: Actual Innocence

114. Applicant is actually innocent; she did not kill her daughter.

Legal Standard

115. 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.*

116. An applicant can obtain relief on the basis that she is actually innocent of the crime of which she was convicted in light of newly discovered evidence. *Id.*

117. The test for whether an applicant has demonstrated actual innocence in habeas proceedings is whether, in light of the new evidence, there is such clear and convincing evidence of innocence that no rational juror would have convicted Applicant. "[I]n Texas cases, the term 'actual innocence' applies only in circumstances where the accused did not actually commit the charged offense *or* any possible lesser included offenses." *Ex parte Mable*, 443 S.W.3d 129, 130 (Tex. Crim. App. 2014) (citing *State v. Wilson*, 324 S.W.3d 595, 598 (Tex. Crim. App. 2010)) (emphasis in original); *Ex parte Fournier*, 473 S.W.3d 789, 792 (Tex. Crim. App. 2015); *Ex parte Hicks*, 640 S.W.3d 242 (Tex. Crim. App. 2022) (overturning habeas court's innocence determination because applicant was guilty of lesser-included offense of attempt, but, as in *Mable*, granting relief from guilty plea); *Ex parte Kussmaul*, 548 S.W.3d 606, 641 (Tex. Crim. App. 2018).

118. "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." *Young v. State*, 648 S.W.2d 2, 3 (Tex. Crim. App. 1983) (en banc) (quoting *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979)); *Elizondo*, 497 S.W.2d at 212 (Baird, J., concurring).

119. When evaluating whether Applicant has satisfied her burden of presenting clear and convincing evidence of her innocence under *Elizondo*, this Court must consider the totality of evidence and determine "whether the new evidence persuasively establishes innocence when comparing it to the evidence establishing guilt." *Ex parte Mayhugh*, 512 S.W.3d 285, 285-86 (Tex. Crim. App. 2016); *Thompson*, 153 S.W.3d at 417 (explaining that a court must "assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole, [by] . . . weigh[ing] such exculpatory evidence against the evidence of guilt adduced at trial") (quoting *Elizondo*, 947 S.W.2d at 206).

120. "[M]ultiple pieces of newly discovered evidence can together make a meritorious case for relief." *Mayhugh*, 512 S.W.3d at 285-86 (internal citations and quotation marks omitted); *see also Ex parte Cook*, 691 S.W.3d 532, 561 (Tex. Crim. App. 2024), reh'g denied (July 31, 2024).

Findings of Fact

121. The Court incorporates by reference the findings made *supra* as to

Claims 5, 1, and 2. In addition, to address difference between the legal burden required for Applicant's innocence claim and her other claims, this Court will restate or summarize the findings pertinent to this claim.

122. The prosecution's case against Applicant rested on two points. First, the State presented observations of Applicant that remarked on her flat affect and her seeming lack of emotion when confronted and questioned by law enforcement, and then the State presented her custodial statements and interrogators' interpretations of Applicant's demeanor during the interrogation. The point of this part of the State's case was to persuade the jury that Applicant was not distraught over Mariah's death because, as she ultimately said after many hours of custodial interrogation, she was responsible for it.

123. Second, the State presented testimony through the county medical examiner that, as a matter of medical/scientific certainty, Mariah's death could *only* have been result of a head injury incurred during significant and ongoing abuse.

124. The State presented no witness or forensic evidence that identified Applicant as Mariah's abuser, neither at trial, nor in these habeas proceedings. Only Applicant's statement that she pinched, bit, and spanked Mariah linked Applicant to any bruise or other sign of trauma on Mariah's body.

125. None of the acts Applicant confessed to during her extended custodial interrogation constitutes "an act clearly dangerous to human life that cause[d] the

death of an individual." Tex. Penal Code § 19.02(b)(2).

126. The new medical evidence supports a non-abuse cause of death which the jury never heard: that Mariah's extensive bruising and death resulted from the effects of an accidental traumatic brain injury incurred after a fall down some stairs two days before she died.

127. The State's evidence outlined above was aimed at refuting Applicant's claim that Mariah died as the result of complications from an accidental fall. Through that evidence, the State argued that Mariah had to have died from a fatal head injury inflicted within 24 hours of her death by Applicant.

128. The jury was instructed that it had to find, beyond a reasonable doubt, that Applicant "intend[ed] to cause serious bodily harm" to Mariah and, in fact, "commit[ted] an act clearly dangerous to human life" that caused her death. Tex. Penal Code § 19.02(b)(4). Based on the evidence presented at trial, the verdict reflects that the jury accepted the State's evidence that Mariah's death was caused by an intentionally inflicted a blow to the head inflicted by Applicant.

129. The Court adopts for purposes of Claim 3 the following findings made on review of Claims 1, 2, and 5:

- There is clear and convincing evidence that Mariah fell on some stairs two days before she died, just as Applicant told police;
- There is clear and convincing evidence that Applicant was highly susceptible to making a false confession under the interrogation techniques

used on her;

- There is clear and convincing evidence that Mariah's extensive bruising was not caused by abuse but rather a complication of her fall;

- There is clear and convincing evidence that Mariah's fatal head injury was caused by an accidental fall on stairs two days before she died; and

- There is clear and convincing evidence that the injuries to Mariah that Applicant could have caused based on her confession, even if true, were not clearly dangerous to human life and did not cause Mariah's death.

Conclusions of Law

130. Having engaged in the analysis required by *Elizondo* and its progeny, this Court finds that Applicant has satisfied her burden and produced clear and convincing evidence that she is actually innocent of the offense of capital murder pursuant to Tex. Penal Code §§ 19.02(b)(1), 19.03(a)(8), for "intentionally and knowingly" causing Mariah's death by "striking, shaking, or throwing [Mariah] with [her] hand or foot or other object." 1 CR 9.

131. This court finds that no rational juror could have convicted Applicant of capital murder without the State's unconstitutional presentation of Dr. Farley, the medical examiner's false testimony that physical abuse was the *only* explanation for Mariah's death, that Mariah had adult-sized bitemarks on her body, and that the abuse that purportedly caused Mariah's death had to have occurred within twenty-four hours of her death, making it impossible for Applicant's defense that Mariah's

health declined after an accidental fall two days earlier. Additional scientific evidence that the jury never heard, which further casts significant doubt on Applicant's guilt includes: (1) evidence that Mariah's injuries were entirely consistent with head trauma incurred by an accidental fall and declining health over the two days before her death;

132. The new evidence regarding the Applicant's exceptionally high risk of falsely confessing, rendering her custodial admissions unreliable; and the new scientific evidence that Ranger Escalon's testimony where he claimed he could discern Applicant's "guilt" by her demeanor and reactions is false as a matter of now scientific consensus.

133. Since new scientific advancements, informed by newly disclosed evidence, have debunked and disproved the primary evidence relied upon by the State at trial—namely, the States medical examiner's testimony and the interrogating officer's conclusion of guilt through his "demeanor" testimony, and Applicant's custodial admissions—there is no eye witness or reliable, probative evidence to support a finding that Applicant intentionally and knowingly caused Mariah's fatal injuries and therefore, a conviction for capital murder cannot stand.

134. The Court therefore 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 as no rational juror could have convicted Applicant of

killing her daughter after hearing all of the evidence from her original trial alongside all of the new evidence she has presented.

135. The Court takes judicial notice of the record in *State of Texas v. Roberto Antonio Alvarez*, Cause No. 08-CR-1622-A, in which Applicant's husband was convicted of causing serious bodily harm by omission to a child—Applicant's daughter Mariah. The omissions of each parent were the same. Regardless of whether Mr. Alvarez told Applicant to take Mariah to the hospital, neither parent acted to obtain medical care in the two days between the fall on the stairs and Mariah's death.

136. The Indictment of Applicant did not state any facts that would have supported a lesser included offense of causing serious bodily injury by omission to a child.

137. Substantial bodily harm to a child by omission is not a lesser included offence of murder because, as stated *supra*, murder requires that the defendant commit an act clearly dangerous to human life, and that act caused the victim's death. *Rodriguez v. State*, 454 S.W.3d 503, 507-508 (Tex. Crim. App. 2014); *Avellaneda v. State*, 496 S.W.3d 311, 318 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

138. For all these reasons, this Court concludes there is clear and convincing evidence that no rational juror could convict Applicant of capital murder or any lesser included offense.

ORDERS OF THE COURT

In implementing the Court's findings of fact and conclusions of law, the Clerk will:

1. Prepare a transcript of the papers in this cause and transmit the following to the Court of Criminal Appeals:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

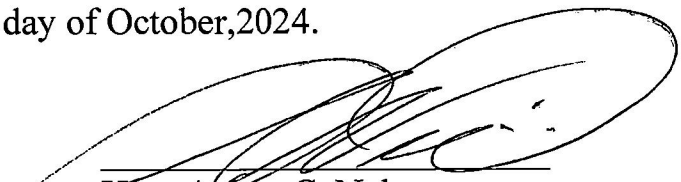
(F) the findings of fact and conclusions of law entered by the court;

(G) any sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact. Tex. Code Crim. P. art. 11.071 § 9(f)(1).

2. Send a copy of these Findings of Fact and Conclusions of Law, and the Order thereon, to the State and the Applicant's counsel by depositing the same in the United States Mail.

Signed and entered this the 16th day of October,2024.



Hon. Arturo C. Nelson
Presiding Judge

FILED
07-CR-00000885
October 16, 2024 3:00pm
LAURA PEREZ-REYES
CAMERON COUNTY DISTRICT CLERK
BY:Anzaldua, Susana