IN THE 358th JUDICIAL DISTRICT COURT
OF ECTOR COUNTY, TEXAS
AND
IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

Ex parte	§	
	§	**Trial Court No. D-23,730**
MICHAEL DEAN GONZALES,	§	
	§	
Applicant	§	
	§	**CCA No. WR-40,541-__**
	§	
	§	
	§	

SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS FILED PURSUANT TO TEX. CODE CRIM. PROC. ART. 11.071

****Mr. Gonzales is scheduled to be executed Tuesday, March 8, 2022****

Richard Burr
Texas Bar No. 24001005
Burr and Welch, PC
PO Box 525
Leggett, TX 77350
713-628-3391
dick@burrandwelch.com

Counsel for Michael Dean Gonzales

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes and Rules

Other Authorities

TABLE OF EXHIBITS

EXHIBITS	DESCRIPTION
1	Affidavit of Eduardo Saenz Nino
2	Affidavit of Richard Reyna
3	Third Affidavit of Paulette Sutton, February 25, 2022
4	Motion to Compel Access to Latent Print and Footwear Impression Evidence, May 14, 2021
5	Motion to Terminate the Appointment of the Attorney Pro Tem, December 31, 2020
6	Order Setting Gonzales' March 8, 2022, Execution Date
7	OPD Report on Discovery of Victims
8	Report of Det. Robertson on Stolen Items
9	Bloodstain Pattern Analysis Report of Sgt. Rick Pippins
10	Reports of Cpl. Rexer
11	Report of Det. Robertson on April 23 Luminol Testing
12	Julian Olivarez Statement, May 6, 1994
13	Report of Ranger Sanders on Search of Gonzales Home (218 Schell)
14	OPD Report on Collection of Evidence from 218 Schell
15	January 13, 1995 DPS Preliminary Report
16	Police Photographs of Gonzales' Arms and Hands, April 22, 1994
17	OPD Report on Hospital Canvass for Laceration Wounds
18	May 5, 1994 Jesse Perkins Statement

EXHIBITS	DESCRIPTION
19	May 10, 1994 Jesse Perkins Statement
20	December 6, 1994 Interview with Jesse Perkins
21	Report of Det. Robertson on First Interview of Perkins, May 5, 1994
22	Report of Det. Robertson on Second Interview of Perkins, May 10, 1994
23	Report of Det. Robertson on Search of Perkins' Residence, May 11, 1994
24	Jesse Perkins' May 6, 1994, Ector County Jail Booking Card
25	Jesse Perkins' September 2, 1993, Ector County Jail Booking Card
26	Photographs of Jesse Perkins' Scars, Dec. 6, 1994
27	OPD Property Invoice Log No. 38775
28	May 20, 1994 DPS Physical Evidence Submission Form
29	Sept. 25, 2000 DPS Physical Evidence Submission Form
30	Federal Habeas Testimony of Charles Kenimer
31	Jury Deliberation Note Requesting Clarification
32	October 17, 2003 DPS Laboratory Report
33	First Affidavit of Paulette Sutton, January 31, 2022
34	Report of Det. Robertson, October 14, 1994
35	Report of Det. Robertson, December 6, 1994
36	OPD Report on April 23 Luminol Testing

EXHIBITS	DESCRIPTION
37	DPS Crime Laboratory Files About Merced Aguirre's Housecoat and Gown
38	Witness Statement of Ruby Garza Luna, OPD Narrative, May 13, 1994
39	Det. Robertson Report on Estimate of Time of Death
40	Declaration of Ruby Luna, February 11, 2022
41	Second Affidavit of Bloodstain Pattern Analyst Paulette Sutton, February 12, 2022
42	Affidavit of CSU Supervisor Stephanie Bothwell, February 22, 2022
43	OPD Photographs of Flannel Shirt, February 14, 2022
44	OPD Photographs of Flannel Shirt Under Alternate Light Source, February 22, 2022
45	Affidavit of Forensic DNA Analyst Huma Nasir, February 25, 2022
46	Interview of Epigmenia Gonzales, May 31, 2000
47	Statement of Martha Gonzales, May 7, 1994
48	Affidavit of Rito Suniga
49	Report of Det. Robertson on Olivarez Alibi, June 8, 1994
50	Memorandum from Rebecca Sample to John W. Smith & Preston Stevens
51	Excerpt from May 5, 1995 Interview of Epigmenia Gonzales
52	El Paso PD Personnel Records of Snow Robertson
53	Texas Commission on Law Enforcement Report on Snow Robertson

EXHIBITS	DESCRIPTION
54	Odessa PD Personnel Records of Snow Robertson
55	ECSO Personnel Records of Snow Robertson
56	Plaintiff's Amended Petition, *Homsey v. Robertson*, No. D-80,401 (358th Judicial Dist. Ct., Ector Cty., March 23, 1989)
57	Order of Dismissal, *Homsey v. Robertson* (Nov. 7, 1990)
58	Plaintiff's Original Petition, *Orr v. Robertson*, No. D-82,765 (358th Judicial Dist. Ct., Ector Cty., Jan. 7, 1991)
59	Order of Dismissal, *Orr v. Robertson* (Jan. 7, 1991)
60	Application for 11.07 Writ of Habeas Corpus, *Ex Parte Keith*, No. WR-59, 244-04 (Tex. Crim. App. June 12, 2015)
61	Excerpts of Volume 8, Reporter's Record of *State v. Keith*, Cause No. A-24,045 (70th Judicial Dist. Ct., Ector Cty.)
62	Allen PD Personnel Records
63	Murphy PD Personnel Records
64	Martha Reyes Interview, June 7, 2000
65	Michelle Payne Interview, May 6, 1994
66	Michelle Payne Interview, June 2, 2000
67	History of Gonzales' Efforts to Obtain Fingerprint and Footwear Evidence
68	Affidavit of Latent Print and Footwear Examiner Matt Marvin, May 14, 2021
69	Affidavit of Latent Print Examiner Heather McNeill, February 28, 2022
70	Footwear Examination Report of Matt Marvin, February 11, 2022

EXHIBITS	DESCRIPTION
71	Affidavit of Dr. Jack M. Fletcher
72	Affidavit of Rosa Balderas
73	Affidavit of Rafael Rubalcado
74	Affidavit of Iris Lang
75	Affidavit of Alice Ramirez
76	Affidavit of Elizabeth Reyes
77	Affidavit of Raquel Ruby Rubalcado
78	Affidavit of Adonica Nunez
79	Affidavit of Raquel Gonzales
80	Excerpts from AAIDD Manual, 12th Edition (2021)
81	American Psychiatric Association, Text Updates, Intellectual Developmental Disorder (Intellectual Disability), Sept. 2021
82	*Ex Parte Keith* Writ Application Ex. "E" (Cleaver Article)
83	*Ex Parte Keith* Writ Application Ex. "F" (Robertson/Deaderick Article)
84	Det. Robertson's Report on Consultation with Dr. Villalon
85	Declaration of Forensic Scientist Ed Hueske, May 7, 2020
86	Declaration of Dr. Kevin Crosby, May 8, 2020
87	Report of Dr. Adriana Strutt, PhD
88	Federal Habeas Testimony of Det. Snow Robertson

INTRODUCTION

Michael Gonzales was the easy pick for the Odessa Police Department (OPD) as the prime suspect for the murders of Merced and Manuel Aguirre in their home in 1994. He lived next door. The Aguirres had complained in the past to the OPD about him bothering them. He was seen as the leader of a group of young people in the neighborhood who portrayed themselves as a gang. He had been sent to several Texas Youth Commission facilities prior to his arrest for the murder of the Aguirres at the age of 20. And, critically, he was not sophisticated. He had then and has always had Intellectual Disability. The OPD probably did not know that in a diagnostic sense, but they knew already, or quickly learned from their interactions with him, that he had some vulnerabilities.

Against this backdrop, the only direct evidence the prosecution could muster against Gonzales in his 1995 trial was dubious testimony by a jailer that Gonzales confessed to him. The jailer's statement in the police file was that Gonzales "blurted out … 'I did it'" while he was taking Gonzales back to his cell from a bond hearing. Nothing in the jailer's statement suggested any provocation, enticement, emotional upset, or any other reason that might have led Gonzales to say such a thing out of the blue. Apparently concerned about the jailer's credibility, the prosecution had the jailer testify falsely that the confession occurred under circumstances that seemed to motivate Gonzales to say what he allegedly said. The

problem was that the supposedly motivating circumstances did not occur because those circumstances arose five days after the jailer said Gonzales confessed. The jury did not know this, because the examination of the jailer by the prosecution and the defense failed to reveal it.

To support this faulty evidence, OPD and the prosecution built a circumstantial case against Gonzales based in significant part on falsehoods and misleading argument, including:

- false testimony by the lead detective that tear drop tattoos on Gonzales' face amounted to a confession that he killed two people;
- more false testimony by the lead detective that chile peppers found beneath Mrs. Aguirre's body, outside Gonzales' house, and in Gonzales' refrigerator connected Gonzales to the crime, despite plausible evidence that the peppers had nothing to do with the crime;
- yet more false testimony by the lead detective that a stain on a camper between the two houses was a "blood transfer stain," even though he never had the stain tested to determine if it was blood, rust, or dirt; and
- unwarranted inferences drawn by the prosecutor in closing argument from speculative testimony by the OPD blood stain expert to meet the

State's burden of proving that Gonzales alone killed both the Aguirres.

Behind the prosecution's faulty case was a police investigation led by a detective with a history of falsifying reports, jumping to unfounded conclusions about suspects, manufacturing evidence, and providing false testimony. This person, Det. Sgt. Snow Robertson, testified falsely in Gonzales' trial and led an incomplete investigation, the purpose of which was to bolster the case against Gonzales rather than to discover the truth about the murders. In the process, he failed to direct the testing and analysis of physical evidence that could have revealed the identities of the people who actually killed the Aguirres.

Gonzales was uniquely vulnerable to being set up as the fall guy by Detective Robertson because Gonzales has Intellectual Disability. The investigation and expert assessment to reach this conclusion have only recently been completed. However, traces of the evidence that support this conclusion have been apparent from Gonzales' early childhood, some of which were noted by the defense psychologist before the 1995 trial. As the Supreme Court observed in *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), "some of the characteristics of [people with Intellectual Disability] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." Such "defendants may be less able to give meaningful assistance to their counsel and are typically

poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id*. at 320-21. Thus, defendants with intellectual disability "in the aggregate face a special risk of wrongful execution." *Id*. at 321.

As this application will demonstrate, the Supreme Court's observations seven years after Gonzales was convicted and sentenced to death accurately describe the intersection between police and prosecutorial misconduct and Gonzales' impaired ability to avail himself of "the procedural protections that our capital jurisprudence steadfastly guards." In sum, Gonzales has tested within the range of significantly impaired intellectual functioning every time he was administered a reputable IQ test, from the first such test in 1988 to the last in 2021. His impairments in adaptive behavior made him vulnerable to becoming the prosecutorial target for murders he did not commit. His reading and communications skills were significantly impaired, and he had poor judgment and problem-solving skills. He had significantly impaired social skills—having few friends, continuously ridiculed by most people he thought were his friends, unable to understand how others perceived his behaviors, subject to being used by others to take the blame for wrongful things they did, and always willing to take the blame and not "snitch" on others. In short, Gonzales was a vulnerable target for a myopic police investigation in which his friends could assist the police in charging and prosecuting him with what they had done.

The outcome was that Gonzales was convicted of a crime he did not commit. All the pillars of evidence that appeared to the Court of Criminal Appeals on direct appeal in 1998 to support the conviction have now crumbled. Newly discovered evidence shows that Jesse Perkins, whose involvement in the murders was suspected by the police but never thoroughly investigated, murdered Mrs. Aguirre and, along with two other men, Daniel Lugo and Julian Olivarez, murdered Mr. Aguirre.

The credibility and scope of the newly discovered evidence must be underscored and documented for the Court at the outset. The central piece of new evidence comes from Eduardo Saenz Nino, a friend of Perkins and Gonzales in Odessa. He returned to Odessa from detention in Lubbock County within a few days after the murders. Trying to find Gonzales, Nino went to Julian Olivarez's house and found Perkins there. Perkins boasted to him about the murders. He said that he and two others, Olivarez and Lugo, had killed the Aguirres and that he had killed Mrs. Aguirre. Perkins said he had gotten cut doing so, and got a Gonzales (who lived next door) for a flannel shirt because his shirt was bloody. Affidavit of Eduardo Saenz Nino (Exhibit 1).

Within two months after this, Nino started serving terms of many years in the state and federal prison systems and was so immersed in his own problems that he said nothing about Perkins' confession to anyone. *Id*. ¶ 8. In August 2021, Nino

happened to be at the house where Gonzales' current investigator was interviewing someone else, heard Gonzales' name mentioned, and talked with the investigator about what Perkins told him. *Id*. Two months later, the investigator interviewed Perkins, who admitted that his blood was probably in the Aguirres' house, consistent with what Nino told the investigator. Affidavit of Richard Reyna (Exhibit 2).

On the surface, Nino's account of Perkins' confession may seem incredible. But all the relevant physical evidence corroborates the confession to Nino. This fact has led the defense blood pattern analysis expert who viewed photographs of the flannel shirt and the pants Perkins wore the night of the murders, that had never been available before mid-February of this year, to recently aver:

> The information relayed by Eduardo Saenz Nino in his affidavit dated February 02, 2022 must be that of a clairvoyant in order to relay a version that fits exactly with the findings when the physical evidence was examined on February 17, 2022, fifteen days after Nino gave his statement. At that time, no one knew what would be found when the flannel shirt (Item 121) and the gray pants (Item 89) recovered from 517 South Sam Houston [Perkins' house] were examined. Yet Nino's statement was completely congruent with what was found. First, that the pattern of staining on the exterior of the flannel shirt shows that it was not being worn during the assault, but it was in passive contact with liquid blood from both Mr. and Mrs. Aguirre. When the interior of the shirt was examined, apparently for the first time ever, there are stains that are consistent with blood on the interior of the sleeve in the same location that Nino says Jesse Perkins was injured. When the pattern of bloodstaining on the gray pants (Item 89) was revealed in the February 17, 2022 photographs, Perkins' blood was identified along the exterior of the legs of the pants. This finding confirms that Perkins was indeed bleeding, and the location of the stains is

> indicative of blood dripping from an injury. These findings must also be considered in light of Sgt. Rick Pippins' and Texas Ranger Joe Sanders' opinion that someone was dripping blood inside the Aguirre residence. Their opinion was formulated in 1994 and foretold what Nino would claim in 2022 and what Perkins himself would tell Investigator Richard Reyna in October of 2021. There is simply no way Nino could have knowledge of what the evidence would later reveal. Evidence from a crime is collected, preserved, and analyzed for the simple reason that the evidence never lies.

Third Affidavit of Paulette Sutton, February 25, 2022 ¶ 42 (Exhibit 3).

. . . .

The result is now clear. Michael Gonzales was unconstitutionally and wrongfully convicted of capital murder and unconstitutionally sentenced to death.

In the pages that follow, we will set out the factual and legal basis for a claim under *Atkins* and its progeny that Gonzales is ineligible for a death sentence because he has Intellectual Disability, two claims of state misconduct in presenting false testimony or withholding exculpatory evidence from the defense, and a claim of actual innocence. Together these claims meet one or more requisites under Tex. Code Crim. Proc. art. 11.071, § 5(a) for consideration on the merits in a subsequent application for a writ of habeas corpus.

STATEMENT OF PROCEDURAL HISTORY

On December 8, 1995, Gonzales was sentenced to death after being convicted of the offense of capital murder in Cause No. D-23,730 in the 358th

District Court of Ector County. 1 CR 1-2, 139- 45, 148, 154-61, 196.[1] On June 3, 1998, the Court of Criminal Appeals (CCA) affirmed his conviction and sentence. *Gonzales v. State*, No. AP-72,317 (Tex. Crim. App. 1998) (not designated for publication).

On March 10, 1999, the CCA denied Gonzales' original state habeas application. *Ex parte Gonzales*, No. WR-40,541-01 (Tex. Crim. App. 1999) (not designated for publication).

On federal habeas review, the federal district court conditionally granted relief from Gonzales' death sentence but denied relief from his conviction. *Gonzales v. Cockrell*, No. 7:99-cv-00072-WRF (W.D. Tex. 2003), ECF No. 90. The Fifth Circuit affirmed the district court's judgment regarding the conviction, *Gonzales v. Quarterman*, 458 F.3d 384 (5th Cir. 2006), and the United States Supreme Court subsequently denied Gonzales certiorari review. *Gonzales v. Quarterman*, 549 U.S. 1323 (2007).

Gonzales was retried on punishment and again sentenced to death on May 7, 2009. 5 CR-R 1122–25. The CCA affirmed the sentence on September 28, 2011. *Gonzales v. State*, 353 S.W.3d 826 (Tex. Crim. App. 2011). Gonzales waived state

[1]References to the record below are as follows: "CR" refers to the Clerk's record in the 1995 trial. "CR-R" refers to the Clerk's record in the resentencing trial in 2009. CR-DNA refers to the Clerk's Record in the pending appeal from the denial of DNA testing. "RR-T" refers to the Reporter's Record in the 1995 trial. "RR-R" refers to the Reporter's Record in the resentencing trial.

habeas review, but later filed a habeas application which the CCA dismissed for abuse of the writ. *Ex parte Gonzales*, 463 S.W.3d 508 (Tex. Crim. App. 2015). The United States District Court for the Western District of Texas denied Gonzales habeas corpus relief. *Gonzales v. Davis*, No. 7:12-cv-00126- DAE (W.D. Tex. 2018). The Fifth Circuit then denied a certificate of appealability. *Gonzales v. Davis*, 924 F.3d 236 (5th Cir. 2019). The United States Supreme Court then denied Gonzales' petition for writ of certiorari. *Gonzales v. Davis*, 140 S. Ct. 1143 (2020).

Through 2020 and 2021, Gonzales moved in the trial court for DNA testing of biological evidence, CR-DNA at 5-36; access to latent print and footwear impression evidence, Motion to Compel Access to Latent Print and Footwear Impression Evidence, May 14, 2021 (Exhibit 4); and the termination of the Texas Attorney General's Office as the Ector County District Attorney *pro tem*, Motion to Terminate the Appointment of the Attorney Pro Tem, December 31, 2020 (Exhibit 5). The trial court denied all these motions in 2021. An appeal of the order denying DNA testing is pending in the CCA, *see Gonzales v. State*, No. AP-77,104 (Tex. Crim. App.), as are two mandamus proceedings related to latent print/footwear impression evidence and termination of the attorney *pro tem* appointment, *In re Gonzales*, Nos. WR-40,541-05 & -06 (Tex. Crim. App.).

On September 1, 2021, the trial court entered an order setting Gonzales' execution date for March 8, 2022. Order Setting Gonzales' March 8, 2022, Execution Date (Exhibit 6).

STATEMENT OF FACTS

I. Physical Evidence and Alternate Suspects in the Aguirre Homicide Investigation.

After 9 a.m. on the morning of April 22, 1994, Manuel Aguirre, Jr., discovered his parents, Merced and Manuel Aguirre, stabbed to death in their home in Odessa, Texas, OPD Report on Discovery of Victims (Exhibit 7).

From the moment the Odessa Police Department (OPD) began its investigation of the murders, police investigators focused on next-door-neighbor Michael Gonzales as the prime suspect. But Gonzales, who lived with his mother, denied knowledge of the murders, and none of the physical evidence police obtained pointed to him. The police generated incriminating evidence about alternate suspects Jesse Perkins, Daniel Lugo, and Julian Olivarez, but failed to investigate and develop physical evidence about those suspects.

A. Police investigate the crime scene but fail to collect or document some physical evidence.

On April 22, police documented evidence at the crime scene and canvassed the surrounding area. Police learned that a camera, stereo, microwave, VCR, and gun were missing from the Aguirres' home, Report of Det. Robertson on Stolen Items (Exhibit 8).

A bloodstain pattern analyst reported that Merced Aguirre had defensive wounds consistent with a struggle. Bloodstain Pattern Analysis Report of Sgt. Rick Pippins at 2 (Exhibit 9). He noticed drips of blood in the utility room close to where the bodies were discovered that were consistent with falling from the "person" of the killer. *Id*. at 20. The analyst noted the same drip pattern on the bottom of Mrs. Aguirre's housecoat, as though blood had dripped while the killer was standing over her fallen body. *Id*. The police failed to collect or photograph the drips of blood in the utility room. While Mrs. Aguirre's housecoat was submitted for DNA testing, the drips of blood on it do not appear to have been among the bloodstains tested.

When night fell, police tested surfaces with luminol, which luminesces in the presence of unseen human blood. Reports of Cpl. Rexer at 1 (Exhibit 10). Police noted a track of footprints across the carpeted floor of the Aguirre living room and out the front sliding glass door. They did not take photographs of these prints. *Id*.

Police also said they saw large areas luminesce in the Aguirres' master bathroom, suggesting there was human blood in the sink and bathtub. Report of Det. Robertson on April 23 Luminol Testing at 3 (Exhibit 11). Police photographed the bathroom luminol reaction, but the photographs have never been disclosed to the defense and may be lost.

Police noticed bloody handprints on the wall by the body of Mrs. Aguirre. *Id*. They found several footwear impressions at the scene, including near Mrs. Aguirre's body. Ex. 10 at 1 (April 22 Rexer Report). Police gathered latent fingerprints from the sliding glass door at the front of the house and on numerous objects inside. *Id*. at 1, 3-4.

B. Based on the accusation of the man who possessed the Aguirres' stolen goods, OPD arrests Gonzales.

Police learned that Julian Olivarez had several of the Aguirres' stolen items, including the VCR, stereo, and microwave at his house. Julian Olivarez Statement, May 6, 1994 (Exhibit 12). Olivarez was a friend of Perkins and Lugo. 16 RR-T 244. He would get together with them to "drink" and "mess around." *Id*. Police retrieved the VCR and microwave from Olivarez's home. He told the police he saw the items at Gonzales' house the morning after the murders. Ex. 12 at 1 (Olivarez statement).

Because Olivarez shifted the spotlight from himself by claiming Gonzales sold him those items, the police arrested Gonzales and searched his home. Again, police discovered nothing in Gonzales' house connecting him to the murder—no stolen property and no biological evidence. Report of Ranger Sanders on Search of Gonzales Home (218 Schell) (Exhibit 13). Among other items, police seized a bowl of salsa. *Id.* ¶ 150. They believed the salsa contained chile peppers similar to those found on the floor next to the body of Mrs. Aguirre. OPD Report on

Collection of Evidence from 218 Schell (Exhibit 14). They cut out some areas of carpet that were later determined by the DPS crime lab not to have blood and took the elbow traps from the kitchen and bathroom sink. Ex. 13 ¶ 153 (Sanders Report); January 13, 1995 DPS Preliminary Report at 3 (Exhibit 15).

C. Police fail to investigate numerous alternate suspects.

At the start of the investigation, Gonzales agreed to allow police to search his body for clues that would connect him to the murder. 20 RR-T 29, 31-33 (reporter's record of the testimony of criminalistics technician Brett Lambert in motion for new trial, Feb. 8, 1996). Because it is common for perpetrators to wound themselves in stabbing cases, the police photographed his arms and hands, looking for injuries. Police Photographs of Gonzales' Arms and Hands, April 22, 1994 (Exhibit 16). They found none. Later, other officers were assigned to canvass nearby hospitals for patients with laceration wounds. OPD Report on Hospital Canvass for Laceration Wounds (Exhibit 17).

The police drew blood and took hair samples from Gonzales for future testing and comparison. 20 RR-T 31. They then applied the chemical luminol to Gonzales' arms and hands—a highly unusual procedure. 20 RR-T 30-31. The luminol testing showed no sign of blood, except in the spot where the police had just drawn a blood sample. 20 RR-T 31.

On May 4, the mother of an acquaintance of Gonzales, Jesse Perkins, told police that, roughly an hour before the police were called to the Aguirres' house, Perkins' best friend, Daniel Lugo, went to Jesse's house and asked his mother "if the police had been informed about the bodies" at the Aguirre residence. 15 RR-T at 125-26. A few days later, the police recovered the Aguirres' stolen stereo from Lugo. *Id*. at 126. Although Lugo was, as the lead investigator testified, "the one that we obtained the stereo from," *id.* at 144, he was not charged in the case. *Id*. at 144.

The police also talked to Perkins. In fact, Perkins, who was on probation for a burglary conviction, was interviewed by police on three occasions in 1994—on May 5, May 10, and December 6. *See* May 5, 1994 Jesse Perkins Statement (Exhibit 18); May 10, 1994 Jesse Perkins Statement (Exhibit 19); and Transcript of December 6, 1994 Interview with Jesse Perkins (Exhibit 20). Perkins was treated as a suspect. In each police statement, Perkins gave different stories, each one more incriminating than the last.

First interview. When police first spoke with Perkins on May 5, he had what appeared to be blood on his pants. Report of Det. Robertson on First Interview of Perkins, May 5, 1994 at 1 (Exhibit 21). That blood, however, was not tested until 2000, five years after Gonzales' conviction, when numerous stains on his left pant leg were confirmed to be his blood. *See* Part III *infra* (discussing 2000 DNA

testing). Detective Robertson would also later recall that "Perkins had a small cut on his left wrist."

Second interview. In his second, Perkins said that he received a flannel shirt from Gonzales on the night of the murder. Report of Det. Robertson on Second Interview of Perkins, May 10, 1994 (Exhibit 22). The next day, Perkins' house was searched, and police found a XXXL, insulated "multi-colored flannel shirt" with stains on the front and cuffs. Report of Det. Robertson on Search of Perkins' Residence, May 11, 1994 (Exhibit 23).

The day after the second interview, Perkins' parole was revoked, and he was booked into the Ector County jail. During booking, the sheriff's deputies noted a scar on Perkins' lower left arm. Jesse Perkins' May 6, 1994, Ector County Jail Booking Card (Exhibit 24). Notably, jailers had noticed no scar on Perkins' left arm when he was last booked into the county jail in September 1993. Jesse Perkins' September 2, 1993, Ector County Jail Booking Card (Exhibit 25). Although the police knew that the attacker or attackers they were looking for likely had wounds to their hands and arms, they failed to photograph Perkins' wounds in May 1994, when they would have still been fresh.

In October, over five months after Perkins' second statement and after a long break in the investigation, Det. Robertson inexplicably recalled the suspicious cut on Perkins' left wrist when he was first interviewed. In December 1994, Robertson

obtained a search warrant to take Perkins' blood and hair samples to compare to items found at the crime scene. In seeking the warrant, Robertson declared he believed Perkins "caused, or assisted in causing the death" of the Aguirres. *See* CR-T 334. At the same time, Robertson interviewed Perkins for the third time and had photographs taken of his arms.

Third interview. At his third interview, Perkins was finally asked about the wounds on his arms. Police also photographed the scars on Perkins' arms. Photographs of Jesse Perkins' Scars, Dec. 6, 1994 (Exhibit 26). Perkins said that he suffered one of the large cuts to his arms in an earlier burglary for which he was on probation and one from "metal sheet blinds" covering windows at his work at a car wash.[2] Ex. 20 at 29-31 (Dec. 6 Perkins interview). However, Perkins placed himself *in* the Aguirres' house on the night of the murder, for the first time.[3] *Id*. at *5 ("So that's how I got into the house."). Perkins' mother told police that her son told her he was not just in the house but was present for the murders and witnessed the stabbings.

Thus, by December 6, 1994, OPD knew that:

---

[2] It is unclear which wound is being described from the transcript available to counsel. Although Det. Robertson alludes to a previous time questioning Perkins about his wounds, there is no record of it in Sanders or Robertson's reports.

[3]Perkins also told Det. Robertson that Gonzales and Lugo made incriminating statements in his presence at Gonzales's residence on the night of the murder. However, Perkins' account appears to have been deemed unreliable by Det. Robertson due to numerous inconsistencies between Perkins' recollection of events and the facts.

- While Gonzales did not have the wounds one would expect to find had he committed a stabbing crime, Jesse Perkins did;
- While no clothing seized from Gonzales' home had blood on it, both a flannel shirt in Perkins' closet and a pair of pants Perkins was wearing had what appeared to be blood on them;
- While Gonzales denied being the killer, a friend of Perkins, Lugo, seemed to suggest he knew something about it, and Perkins himself admitted he was present when the murders occurred.

OPD did not charge Perkins in connection with the murders.

D. Police gather numerous pieces of physical evidence with biological material, but no DNA testing is reported.

During the homicide investigation, investigators collected dozens of pieces of evidence. These items were tracked in a "property invoice log." OPD Property Invoice Log No. 38775 (Exhibit 27). Many of these items contained or were likely to contain biological materials, including bloodstain evidence from the crime scene and Perkins' clothing, along with hair, fingernails, and other biological materials from the Aguirres. Police also reported collecting approximately 80 latent print cards, identified multiple footprints in the crime scene, and took several plaster

casts of footwear impressions just outside the Aguirre residence. *See* Ex. 10 at 1-3 (Apr. 27 Rexer Report).[4]

After Gonzales' arrest, OPD investigators sought testing of various items of evidence for the presence of DNA. *See* May 20, 1994 DPS Physical Evidence Submission Form (Exhibit 28) (submitting over 50 items for possible DNA analysis); *see also* Sept. 25, 2000 DPS Physical Evidence Submission Form (Exhibit 29) (submitting 30 items for DNA comparison with suspects). Some of these items of evidence had blood stains; others had human hair.

None of this testing inculpated Gonzales or placed him at the crime scene.

A January 13, 1995 DPS preliminary report explained the results of initial blood type testing and indicated that "[i]tems which were found to contain human blood were submitted to the DNA Lab for PCR testing" and that a report would be made available. *See* Ex. 15. However, OPD and DPS records produced to counsel for Mr. Gonzales in connection with the 1995 trial contain no record of any reported DNA results.

II. Gonzales Is Tried As the Sole Perpetrator.

The State indicted and tried Michael Gonzales on the theory he was solely responsible for the murder of his neighbors Manuel and Merced Aguirre on April

[4] However, many more prints were taken. On February 18, 2022, Mr. Gonzales received 136 newly discovered latent print cards and photographs of these pieces of evidence, which he is reviewing for potentially exculpatory information. *See* Statement of Facts, Part V.K *infra*.

21, 1994. 1 CR-T 1-2 (Indictment). The State, however, expected Gonzales' defense to involve the admittedly complicit Perkins. It opened its case by telling the jurors, "If during the course of this evidence it should become evident to you that others took part, that's fine. Remember, one person at a time is tried. I will deal with the others." 15 RR-T 12. Despite that assurance, the State charged no other suspect for the Aguirres' deaths.

A. The State's only direct evidence of guilt was the misleading testimony about a supposed, ambiguous confession to a jailer.

The State's evidence against Gonzales rested on a dubious, fleeting confession to a jailer and on several pieces of circumstantial evidence. *See Gonzales v. State*, No. AP-72,317, at *2–5 (Tex. Crim. App. 1998).

The alleged "confession." Charles Kenimer, Jr., a former contractor at the Ector County Jail, where Gonzales was housed, testified that Gonzales confessed to the murders shortly after he was arrested for the offense. 16 RR-T 310. Kenimer testified he saw Gonzales emerge "pretty upset" from an interrogation room with Robertson and a Texas Ranger on the date of his arrest. 16 RR-T 309, 311. Kenimer claimed that Gonzales told him in Spanish, "They're trying to pin this rap on me, this murder rap on me. They can't do it. They don't have any evidence. Although I did it, you know, but they don't have anything to go on." 16 RR-T 309. At trial, Kenimer conceded that the meaning of a Spanish phrase could have been lost in translation. 16 RR-T 311.

But the supposed interrogation that, the testimony suggested, flustered Gonzales and led to the confession did not occur on May 7; it occurred *five days later*, on May 12. The prosecutor did not correct that discrepancy.

More conflicts between the records and Kenimer's trial testimony were highlighted through Kenimer's testimony in a 2001 evidentiary hearing in Gonzales' federal habeas corpus proceeding. His trial testimony indicated that he initiated the conversation with Gonzales, but OPD records indicated Gonzales initiated the conversation. *See* Federal Habeas Testimony of Charles Kenimer at *363 (Exhibit 30). OPD records indicated Gonzales confessed because he knew he was related to Kenimer, but Kenimer testified in the federal proceeding that was not true. *Id*. at *375-76, *378. In the federal hearing Kenimer reiterated—incorrectly—that the interview of Gonzales by Robertson and the Texas Ranger was the precipitating event for Gonzales' confession. At the conclusion of Kenimer's testimony, the federal judge observed, "[T]he testimony of Mr. Kenimer [sic] is hopelessly confused. We could go back over this for I think hours and not get anything straight. I mean he is testifying in every direction." *Id*. at *404.

Circumstantial evidence. Lead investigator Detective Robertson testified about several pieces of circumstantial evidence, much of which did not distinguish Gonzales from other suspects. He testified there were "blood transfer stains" on a camper parked in the alley between the Gonzales and Aguirre homes. 15 RR-T

155. Robertson stated that he himself identified the stains as blood, "from a photograph that was taken," although he was unaware if the stains were ever analyzed. *Id*.[5]

Detective Robertson testified about the meaning of two teardrop tattoos on Gonzales' face. Robertson said, "The sign of teardrops means the number of people that an individual has killed." 15 RR-T 139. The prosecution used this evidence to powerful effect in closing argument:

> [G]angsters in their own way have their symbols and they wear them proudly. Two teardrops. What does that mean? That means he has killed two people. And the symbol is there for those of his kind to see and appreciate. He doesn't try to hide it. It is as much as leaping out and saying to you, 'I did it, but they will never prove it.'

17 RR-T 387. Later, at Gonzales' 2001 federal habeas hearing, Robertson admitted his teardrop tattoo testimony was incorrect.[6]

Detective Robertson also testified about the discovery of the small, red chile peppers under Merced Aguirre's body. Robertson testified that he found the same peppers "right next to [Gonzales'] back door," and "crushed" in a bowl in Gonzales' house. 15 RR-T 115. Robertson testified that the peppers "were

---

[5] The State introduced no evidence that the stains were collected or analyzed, and none has been produced to Gonzales. *See* OPD Property Invoice Log (Ex. 27); May 20, 1994 DPS Lab Submission Form (Ex. 28).

[6]Federal Habeas Testimony of Snow Robertson on Tattoos (Exhibit 88); *see Gonzales v. Quarterman*, 458 F.3d 384, 394 (5th Cir. 2006) ("[a]t the federal evidentiary hearing, Robertson testified that, before trial, he did not talk to Gonzales's counsel about the teardrop tattoos. He testified that, if they had asked him about the tattoos, he would have researched the topic more thoroughly and would have discovered that the tattoos had alternative, innocent meanings").

somewhat unique." *Id*. at 121. He tried "numerous locations" to find similar peppers and talked to people "in those establishments [to] help me to locate peppers like that," but could not "locate them." *Id*. On cross-examination, Robertson testified that he consulted with a pepper expert, Dr. Ben Villalon, at Texas A&M, about the peppers. *Id*. at 140-41. Dr. Villalon purportedly told him the peppers are "very, very rare for this area" and are grown primarily in Mexico. *Id*. at 140. Robertson claimed he was "mainly…basing my testimony on what Dr. Ben Villalon from Texas A&M Research Center in Weslaco, Texas, advised me of." *Id.* at 141.

An OPD bloodstain pattern analyst, Sgt. Rick Pippins, testified that he believed Mr. Aguirre was attacked before Mrs. Aguirre because it appeared that Mr. Aguirre "was overcome quite … quickly," while Mrs. Aguirre "put up a greater struggle." 15 RR-T 200-01. In closing argument, the prosecutor turned Pippins testimony about the order in which the Aguirres were killed into "evidence" that one person killed both the Aguirres. Thus, the prosecutor argued:

> Mrs. Aguirre was obviously somewhere else in the house, in the kitchen, in one of the back rooms. I would say that probably she heard a commotion. Mr. Aguirre had to have at least made some sound. She responded to that sound and she was very brutally murdered. And she fought. You can tell, you can listen to the testimony. She fought.
>
> Mr. Pippins, he comes out, he is the blood spatter expert, and he tells you basically just exactly that, that that is what happened, that it was a very swift and very sudden attack and that it was probably by one person.

17 RR-T 362-63.

Additional testimony about property stolen from the Aguirres' home filled out the case against Gonzales. Linda and Julian Olivarez testified that about a week after the Aguirres' deaths, Gonzales sold items—a VCR, microwave, and stereo—to them identified as having been stolen from the Aguirres' house. 16 RR-T 223-26, 233-34. Gonzales later retrieved the stereo from Olivarez when Olivarez did not pay for it. *Id*. at 237. Robertson testified the microwave and VCR purportedly belonging to the Aguirres were recovered from Olivarez. 15 RR-T 111-12. Another detective testified that he retrieved the stereo from Lugo, who told him he had bought it from Gonzales. 16 RR-T 275. A fingerprint technician noted that latent print comparison identified three of Gonzales' fingerprints on the back of the stereo cabinet. 16 RR-T 282-84.

Unobjected-to hearsay testimony reported that Gonzales had sold a handgun from the Aguirre house to a woman named Delia Sanchez. 15 RR-T 69. A firearms toolmark examiner from the DPS Crime Lab testified that shell casings found in Gonzales' home matched this gun. 16 RR-T 269. A police officer testified a potential witness, Rito Suniga, told him Gonzales had shown Suniga a weapon like the one in evidence, but that Gonzales told Suniga he had not killed the Aguirres. 15 RR-T 90-91.

Dr. Sparks Veasey, a forensic pathologist who performed autopsies on the bodies of both victims, did not opine on a murder weapon and could not even say whether the Aguirres were stabbed with the same knife. 16 RR-T 314-19, 327-28, 346-48.

When the State rested its case, defense counsel presented no evidence.

B. The State concedes others were likely involved.

Detective Robertson, the lead investigator on the case, testified he believed Daniel Lugo and Jesse Perkins were involved in the killings. 15 RR-T 143-44. He also testified that Jesse Perkins was a suspect. He said that police had conducted an "extensive" investigation into Perkins that remained ongoing. *Id*.

Det. Robertson testified that many items from Gonzales' residence were sent to the Texas Department of Public Safety (DPS) Crime Laboratory in Austin, Texas, 15 RR-T 162-63, but most tested items returned inconclusive. *Id*. at 172.

C. The jury was instructed that, to convict Gonzales, it had to find he murdered both victims.

The State requested that the jury be instructed only on the theory that Michael Gonzales alone committed both murders. The instructions presented to the jury did not contain instructions permitting them to find Gonzales guilty under a law-of-parties theory of liability. *See* 1 CR-T 139-47.

The Court of Criminal Appeals explained the significance in its opinion on direct appeal. Gonzales was charged with "murdering more than one person during

the same criminal transaction," and "[n]o parties charge was given in this case." *Gonzales v. State*, No. 72,317, slip op. at 2 & n.3. "Therefore, the jury had to find appellant murdered both victims." *Id*. (emphasis in original).[7]

Even though it conceded that others were present and may have played a role in the offense, 15 RR-T 15; 17 RR-T 388, the State minimized the possible culpability of others by focusing on the prior conflicts that Gonzales had with the Aguirres, 17 RR-T 364, and on the fact that Gonzales' fingerprints were found on a stereo that had been recovered several weeks after the incident and known to have been in the hands of Lugo and Olivarez as well. *Id*.

During deliberations, it was evident that the jury struggled with the question of other perpetrators. One note asked the judge: "We need clarification on requirement of capital vs. murder verdict. If Mr. Gonzales murdered one individual only, does [h]is 'association' make him guilty of both." Jury Deliberation Note Requesting Clarification (Exhibit 31). The jury was not given any additional instruction.

[7]A person may be held criminally responsible for the conduct of another under certain circumstances. *See generally* Tex. Penal Code § 7.02. Thus, under a parties theory, a person may be found guilty of capital murder even if the person did not in fact cause the death of the complainant. Absent a parties instruction, however, a jury must find that the defendant himself caused the death. *See Prystash v. State*, 3 S.W.3d 522, 540 (Tex. Crim. App. 1999) ("If a defendant were convicted as the primary actor, he would have necessarily caused the death of the deceased. However, if the accused were convicted under a parties liability theory, then the possibility is raised that the accused did not actually cause the deceased's death.").

The jury returned a conviction for capital murder and, following a sentencing phase, answered the special issues resulting in a punishment of death.

III. In 2000, Exculpatory DNA Evidence Is Found.

A. DNA testing in 2000 excludes Gonzales from every interpretable piece of evidence.

In 2000, the Odessa Police Department reopened its investigation of the Aguirre murders. At that time, police re-interviewed witnesses and submitted the evidence to the Texas Department of Public Safety crime laboratory in Austin, Texas, for DNA testing. OPD submitted blood standards from the victims and Gonzales, Lugo, and Perkins.

Police requested that testing be performed on the following items:

- Item 5: Hairs and fibers from living room
- Item 13: Board from kitchen to living room threshold
- Item 15: Hairs and fibers from kitchen
- Item 16: Broken glass from kitchen of scene
- Item 17: Broken glass from kitchen
- Item 18: Blue house slipper from kitchen
- Item 19: Piece of tile from kitchen
- Item 23: Three pieces of board from utility room
- Item 24: Hair from utility room
- Item 39: Hair from N. W. bathroom in bathtub
- Item 42: Wall section from kitchen
- Item 47: Armchair cover from living room
- Item 49: Grey trousers with belt from Manuel Aguirre
- Item 50: White T-shirt from Manuel Aguirre
- Item 51: Blue jeans with brown belt from Jose Urias
- Item 52: T-shirt from Jose Urias
- Item 53: Shirt from Jose Urias
- Item 56: Pair of white socks

- Item 57: Pair of white shoes
- Item 58: Towel from storage shed (222 W. Schell)
- Item 59: Body bag from Merced Aguirre
- Item 62: Housecoat from Merced Aguirre
- Item 67: Hair from left foot of Merced Aguirre
- Item 76: Latent shoe impression from utility room
- Item 89: Grey pants from 517 S. Sam Houston (Perkins' home)
- Item 91: Hair from Item 89
- Item 94: Brown shorts from Michael Gonzales
- Item 95: Blue tank top
- Item 99: Blue jeans from 218 W. Schell
- Item 121: Multi-colored flannel shirt from 517 S. Sam Houston.

Ex. 29 (2000 DPS Evidence Submission Form).

Of those, the DPS identified the presumptive presence of blood on Items 47, 49, 50, 62, 89, and 121, and extracted DNA from Items 13, 16, 17, 18, 19, 23, 25, 42, 44A, 44B, 47, 49, 50, 51, 52, 53, 58, 61, 62, 63, 72, 73, 76, 89, and 121. The DPS analyzed none of the hair and fiber evidence (5, 15, 24, 39, 67, 91).

The DPS lab performed testing in 2000[8] using the available polymerase chain reaction (PCR) technology, which examined short tandem repeats (STR) at 9 loci. *See* October 17, 2003 DPS Laboratory Report at 2 (Exhibit 32). The DPS report identified Mrs. Aguirre's profile as consistent with the single-source profile in several blood stains on the flannel shirt taken from Jesse Perkins' closet. *Id*. Significantly, Mr. Aguirre was the source of yet another stain taken from the shirt. From the DPS lab notes on Item 121, it is apparent that analysts did not examine

[8] The results were not reported until 2003.

the inside of the shirt. *Id*. *See* Ex. 3 ¶¶ 11-26 (Third Sutton Aff.) (scrutinizing DPS examination of shirt), ¶ 34 ("There is no indication that the interior of the flannel shirt was ever examined by the DPS laboratory for the presence of biological stains.").

No crime-scene evidence with interpretable DNA had Mr. Gonzales' profile. *Id.*[9] DPS retained "the remaining cuttings and DNA extracts" in a freezer in the laboratory. *Id.* at 4.

Although the testing and interpretation was performed in 2000, and a draft report was prepared at that time, the testing results were not reported to OPD until October 17, 2003. Ex. 32.

The State in turn waited five years to disclose the report to Gonzales, only turning it over in 2008 when a court ordered the State to provide the information in pre-trial discovery before Gonzales' resentencing proceeding. 3 CR-R 644-50 (motion requesting lab reports); 7 RR-R (granting discovery).

IV. Gonzales' Efforts To Assert His Innocence at His 2009 Resentencing Trial Are Rejected.

In 2009, Gonzales returned to state court for a resentencing trial. Gonzales' lawyers attempted to challenge the weak case of guilt, but the trial court denied

[9] The DPS report noted that several items of clothing collected from Michael Gonzales—including his shorts, tank top, and blue jeans (Items 94, 95, and 99)—had "no stains of evidentiary value."

their motion to do so. 2 CR-R 263-325 (motion to introduce residual doubt evidence); 3 CR-R 612-616 (supplemental motion); 6 RR-R 7 (overruling motions at August 2008 pretrial hearing); 5 CR-R 1002-1010 (second supplemental motion to challenge evidence of guilt based on State's disclosure of 2000 reinvestigation); 27 RR-R 4-5 (overruling second supplemental motion).

In the resentencing trial, Gonzales' wife, Martha Reyes, testified for the first time about events relevant to Gonzales' culpability. At the time of the murders, Reyes lived with him and his mother at the Gonzales home. Reyes testified that, to get money for a birthday party and presents for their daughter, Gonzales asked her to get the Aguirres to open the door for him. 27 RR-R 61. Gonzales told her that once inside he was going to "[j]ust push around, you know, get a VCR so he knew he could sell it, pawn it." *Id*. at 62. Reyes did go over to the Aguirres' house "about 9:00," was allowed inside, *id*., and talked to the Aguirres until about 10:00 pm. *Id*. at 64. She knew this because it was close to when the local news was coming on the television. *Id*.

As Reyes was leaving, she kept talking to Mrs. Aguirre, who was standing near the doorway. *Id*. at 64-65. Reyes stood outside talking to her for a few minutes. *Id*. at 65. Reyes saw Gonzales come around the corner. *Id*. She saw no weapons or anyone else with him. *Id*. at 66, 69. Reyes then went into her house until Gonzales returned "shortly thereafter." *Id*. at 65, 66. Reyes testified that

Gonzales had blood on his clothes. *Id*. at 66. When she asked what happened, Gonzales said, "There was an accident." *Id*. She saw that Gonzales had a knife, which he washed and put back in the drawer. *Id*. at 67. She knew that Gonzales had stolen a VCR, but that was the only item she saw. *Id*.

On cross-examination, Reyes testified that a statement she gave to Odessa police on May 7, 1994—that she went to bed about 11:30 p.m. and learned that something had happened when she woke up at 10:00 a.m.—was false. *Id*. at 77-78. She also testified that when defense investigator Nancy Piette spoke to her on September 25, 2007, Reyes told her this same false story. *Id*. at 78-79. She testified further on cross-examination she saw nobody with Gonzales, but she did not know if anybody else was involved. *Id*. at 80. She told police somebody else probably could have helped Gonzales, and that it could have been Daniel Lugo. *Id*. at 79, 82. She did not actually see Gonzales enter the Aguirre house, and she did not know if anyone entered the house with him. *Id*. at 80-81. The decision to rob the Aguirres was a spontaneous idea that Gonzales had while he and Reyes were discussing a birthday for their daughter. *Id*. at 81.

Cross-examination was abruptly interrupted by an outburst from Gonzales and never resumed. *Id*. at 83-86. Although not covered in cross-examination, Reyes told authorities that after his arrest Gonzales repeatedly told her, "I didn't do it." *See* Part V.J. *infra* (discussing 2000 Reyes interview).

Det. Robertson also testified at resentencing that he believed Daniel Lugo was "connected to" the homicides, 27 RR-R 194, that Jesse Perkins had admitted he was in the house, *id*. at 192, and that Perkins was an "accomplice in these murders," although maybe only an accomplice after the fact, *id*. at 194-95.

V. Post-Trial Evidence Relevant to Innocence Changes the Evidentiary Picture.

A. Jesse Perkins confesses to committing the murders and setting Gonzales up.

Gonzales has now discovered evidence that Perkins confessed to two people at separate times that he murdered Mrs. Aguirre, and someone else—not Gonzales—murdered Mr. Aguirre.

Within a few days of the Aguirres' murders, Eduardo Saenz Nino, a longtime friend of Gonzales, tried to find Gonzales at his home. Ex. 1 (Affidavit of Eduardo Nino). Nino had been in jail in Lubbock and had just returned to Odessa. *Id*. ¶ 2. When he could not find Gonzales, Nino went to a close friend of theirs, Adonica Means (now Nunez), to see if she knew where Gonzales was. *Id*. ¶ 3. She told him that Gonzales' neighbors, the Aguirres, had just been murdered but she did not know where Gonzales was. *Id*. Concerned, Nino went to see another friend, Julian Olivarez, to discover what was going on. *Id*.

Jesse Perkins was with Olivarez, and they began talking. *Id*. ¶ 4. Then,

> Jesse told me that he and Julian and Daniel Lugo broke into the Aguirres' house to look for guns. Jesse told me that when they got

> into the house, he (Jesse) attacked the old lady first, and when the old man tried to defend her, he got stabbed. Jesse said that they took the older lady to the restroom and then brought her back to the area where she was stabbed (by Jesse).

Id. Asked about why Perkins would confess to him, Nino averred that Perkins "always loved to brag about what he has done or is going to do." Telling Nino about the murders "is just the kind of person he is." *Id*. ¶ 5.

Nino recalled two other matters from this visit. He noticed "Jesse had a cloth wrapped around the palm of his left hand up to his wrist." *Id*. ¶ 6. Perkins explained, "[H]e got cut inside the Aguirres' house and got blood all over his shirt. *Id.* He said, "'Spider' [the nickname Gonzales went by] gave him the flannel shirt he (Jesse) was wearing." *Id*. Perkins also told Nino "they were going to give 'Spider' a pistol they took from the Aguirres' house to set him up." *Id*. ¶ 7.

Nino did not come forward earlier because, at the time, he "was too concerned about my own problems" to do anything with what he learned *Id*. ¶ 8. Two months after Perkins' confession, he was arrested again and ended up in state prison for several years and in federal prison for years thereafter. *Id*. He happened to be at another witness' house in August 2021 when he overhead Gonzales' investigator talking to that person about Gonzales. *Id*. This conversation "jarred" Nino's memory, and he mentioned to the investigator what he recalled about Perkins' confession. *Id*.

B. Jesse Perkins admits he bled in the Aguirre house, and other evidence supports that admission.

Perkins recently made a new admission consistent with the story he recounted to Eduardo Nino. On October 12-13, 2021, a defense team investigator, Richard Reyna, interviewed Perkins while he was in custody at TDCJ's Rudd Unit. During the interview, Reyna told Perkins that he believed DNA testing showed blood found at the crime scene did not match the DNA of the murder victims or of Gonzales. Ex. 2 (Affidavit of Richard Reyna). "Perkins responded spontaneously, 'That blood is probably mine.'" *Id*. Perkins refused to answer any follow-up questions or sign an affidavit to this effect. *Id.* Perkins' admission about bleeding in the Aguirres' house finds support in other evidence.

Defense bloodstain pattern analysis expert Paulette Sutton, an eminent, nationally, and internationally recognized expert in bloodstain pattern analysis has explained there is a likelihood that the perpetrator of a stabbing will sustain cuts during the attack:

> In a case with multiple stabbing injuries, there is a good probability that the perpetrator will be injured and bleeding. Common household cutlery does not have the hand guard that is found on assault or hunting knives. The sudden cessation caused by unexpectedly hitting a bone or other hard surface while stabbing someone can cause the perpetrator's hand to slide down onto the blade and be cut. Injury may also result simply because their hand or the handle of the knife has become bloody and slippery and slides down onto the blade. During the struggle, assailants may actually stab themselves.

First Affidavit of Paulette Sutton, January 31, 2022 ¶ 58 (Exhibit 33).

Perkins had at least one cut on his left wrist. Det. Robertson first interviewed Perkins on May 5, 1994. Report of Det. Robertson, October 14, 1994 (Exhibit 34). In his October 14, 1994 report, he recalled, "that Jesse Perkins had a small cut on his left wrist when I first interviewed him." *Id*. This cut and a cut on his left arm were photographed when Robertson interviewed Perkins on December 6, 1994, Report of Det. Robertson, December 6, 1994 (Exhibit 35), over seven months after the murders and after the cuts had become scars. *See* Ex. 26 (Photographs of Perkins' scars). When Robertson asked Perkins how he got these cuts, Perkins said that he suffered the large cut in an earlier burglary for which he was on probation and one from "metal sheet blinds" covering windows at his work at a car wash. *See* Ex. 20 at 29-31 (Dec. 6, 1994 interview).

But the record indicates that Perkins was lying. On September 2, 1993, Perkins was booked and then released on bond at the Ector County jail for burglary of a building. *See* Exs. 24 & 25 (Perkins' September 1993 and May 1994 Ector County Jail booking cards). At that time, the sheriff's deputies noted no distinguishing scars on Perkins' lower arms—only a scar or scars on his *upper right* arm. There is no indication in the record that Robertson ever attempted to confirm Perkins' story about being wounded at work. Blinds could not have caused the large gash visible on Perkins' left arm. Even if Robertson had confirmed Perkins' dubious report about the injury at the car wash, it is possible that Perkins

would have made a false report of a work injury to conceal the true cause of his wound—self-injury during a stabbing.

Perkins' statement to Nino that he got cut when he was inside the Aguirres' house is also consistent with the report of the Odessa Police Department's bloodstain pattern expert, Sgt. Rick Pippins. In his December 8, 1994 report (Ex. 9), Sgt. Pippins noted the following:

> There is evidence of dropped bloodstain on the lower front portion of Mrs. Aguirre's blouse. This bloodstain appears to be circular and in the 5mm to 9mm range. This staining was most likely placed on the blouse after Mrs. Aguirre was in the supine position she was found. *It is possible then that the attacker dropped the blood from his person while standing or kneeling over Mrs. Aguirre*.

Ex. 9 at 14 ¶ 6 (emphasis supplied). Sgt. Pippins also found drops of blood on the laundry room floor "indicative of a blood source creating drops falling several feet down to the surface such as a standing man." *Id*. at 17.

It is important to note that the source of the blood drops that Pippins identifies as from the "person" of the perpetrator is most likely from a perpetrator who was himself bleeding from an injury, not from a bloody weapon or the victim's blood on him from the attack. As Ms. Sutton explains, "Contrary to widely held belief, multiple drops of blood rarely originate from a bloodied perpetrator or from a bloody weapon. Due to the effects of surface tension, multiple drops indicate that the source is, instead, an actively bleeding individual." Second Affidavit of Bloodstain Pattern Analyst Paulette Sutton, February 12, 2022

¶ 16 (Exhibit 41) (citing James, Kish & Sutton, *Principles of Bloodstain Analysis* 80 (1st ed. 2005 CRC Press)).

By contrast, Gonzales had no cuts when the police checked him the day after the murders. The police tested Gonzales' arms and hands with luminol on April 22, and there was no indication of any cuts or detectable blood. 20 RR-T 29, 31-33 (testimony of Brett Lambert).

Perkins is thus the only person other than the Aguirres who, based on evidence known thus far, bled in the house. And this was because of cuts he sustained when, by his own admission, he attacked the Aguirres. Based upon the facts now known, he is the only person who Sgt. Pippins could have described as "the attacker [who] dropped blood from his person while standing or kneeling over Mrs. Aguirre." Ex. 9 at 14 ¶ 6. In addition, he is the only known person who could have been the "standing man" who left drops of blood in the laundry room.[10]

Perkins' admission he was the assailant who stabbed Mrs. Aguirre was also confirmed by the statement he made to Eduardo Nino. Nino Affidavit ¶ 4. Thus,

[10]No DNA testing was conducted of the blood drops on Mrs. Aguirre's clothing or of the blood drops from the laundry room floor identified by Sgt. Pippins as likely coming from the perpetrator. The "tiling from the utility room" (Item 25) was submitted in 1994 for DNA testing, but a confirmatory test indicated no blood present. Ex. 15. The OPD did not re-submit the item for testing in 2000. *See* Ex. 29. While blood stains on Mrs. Aguirre's clothing were tested, the stains tested were not those described by Sgt. Pippins as "on the lower front portion of Mrs. Aguirre's blouse." Pippins Report. *See* DPS Crime Laboratory Files About Merced Aguirre's Housecoat and Gown (Exhibit 37) (showing that the DNA testing of Mrs. Aguirre's clothing did not include the drops on the "lower front portion of Mrs. Aguirre's blouse").

there are multiple indications that Perkins was the person likely to have had blood dripping from his wounds on Mrs. Aguirre's clothing.

C. The attack apparently took place in part in the bathroom.

Nino recounts that Perkins said he attacked Mrs. Aguirre first, but the attack was interrupted by Mr. Aguirre, and after Mr. Aguirre was stabbed, "they took [Mrs. Aguirre] to the restroom and then brought her back to the area where she was stabbed (by Jesse)." Nino Affidavit ¶ 4.

The crime scene investigation is consistent with the detail of Mrs. Aguirre being in the bathroom during the attack. On the night of April 22, the police conducted luminol testing in the Aguirres' house, including "the northwest bathroom area." OPD Report on April 23 Luminol Testing at 3 (Exhibit 36). "Some areas luminesced, along the tub and the sink area mainly." *Id*. Thus, there was blood in the bathroom. The police bloodstain pattern expert, Rick Pippins, testified that Mr. Aguirre offered little resistance and was likely killed where he was sitting when the attack commenced. 15 RR-T 200-01. Thus, if the blood in the bathroom came from one of the Aguirres, it likely came from Mrs. Aguirre. From Perkins' account to Nino, it appears that the attack had already begun against Mrs. Aguirre before she was taken or made her way to the bathroom, and she bled in the bathroom from wounds inflicted there or already inflicted. Thus, the presence of

blood in the bathroom confirms this part of Perkins' account. No DNA testing of the blood in the bathroom was undertaken.

D. The flannel shirt found in Perkins' closet with the Aguirres' blood on it connects Perkins, not Gonzales, to the murders.

Perkins told Nino that Gonzales gave him a flannel shirt after the murders, because he "got blood all over his shirt" during the murders. Nino Affidavit ¶ 6. On May 11, 1994, approximately two weeks after Perkins confessed to Nino, officers found the flannel shirt marked Item 121 in Perkins' house. Ex. 23 (Robertson report on search of Perkins' residence) The DPS lab reported in 2003 that DNA testing identified blood stains from both the Aguirres on the shirt. Ex. 32 at 2.

Police investigation appeared to establish that Gonzales was wearing the flannel shirt after the murders when he and Perkins were picked up by a friend of theirs named Ruby Luna around 10:30 pm the night of the murders, Witness Statement of Ruby Garza Luna, OPD Narrative, May 13, 1994 at 1 (Exhibit 38), and Gonzales then gave it to Perkins. *Id*.[11] In opposing DNA testing, the State has argued that these facts mean Gonzales was wearing the flannel shirt, later found in Perkins' closet, during the murders. That has now been disproven.

[11]Based on the Aguirres' nightly routine, investigators established that the murders occurred sometime between 8:00 pm and 10:30 pm on April 21, 1994. Det. Robertson Report on Estimate of Time of Death at *19 (Exhibit 39).

Ruby Luna recently provided a declaration in which she said that the statement the police took from her was inaccurate with respect to a flannel shirt. Declaration of Ruby Luna, February 11, 2022 (Exhibit 40). She stated she "did not tell Det. Robertson" that Gonzales was wearing a flannel shirt when she picked Perkins and then Gonzales up after 10:30 pm on the night of the murders. *Id*. ¶ 10. She states unequivocally, "Michael was not wearing a flannel shirt." "The only person wearing a flannel shirt that night was Jesse Perkins." *Id.* She explains that when she "saw [Perkins] walking that night and offered to give him a ride, I noticed that he had a shirt that covered his arms. After he got in my truck, I saw it was a flannel shirt." *Id*. She "remember[s] thinking that the shirt looked very big on him and that the sleeves to the shirt were pretty long and practically covered his hands." *Id*.[12]

[12]Ms. Luna explains that "[t]hese false statements were in the document because Sgt. Robertson put them there." *Id*. ¶ 14. She did not correct them because she did not read the document. This is what happened:

> After my interview with him, Sgt. Robertson gave me a typed witness statement and told me that everything that we talked about was included in the statement. He then put the statement in front of me and told me to put my initials before and after each paragraph and to put my initials by the changes he made in his handwriting, and then sign it. I did what he told me to do.
>
> At the end of my statement, I said that I read both pages of my statement. This is not true. The truth is that I never read the statement nor was it ever read to me. I was just told to sign it by Sgt. Robertson which I did because I was frightened, and I just wanted to leave.

Id. ¶¶ 14, 15.

Thus, the evidence now shows that Perkins had the flannel shirt sometime before he was picked up by Ruby Luna at 10:30 pm the night of the murders. His statement to Nino that Gonzales gave him the shirt because the one he was wearing in the Aguirres' house "got blood all over [it]" indicates that Gonzales gave him the flannel shirt after the murders. But this occurred before Ruby Luna gave him and Perkins a ride, and he (Perkins) transferred blood from his person/bloody shirt to the flannel.

Bloodstain pattern expert Paulette Sutton provides further corroboration. Ms. Sutton has examined the DPS sketches showing the relative amount and placement of the bloodstains on the flannel shirt to determine whether the shirt could have been worn during the attack on the Aguirres, as the State has argued. Ms. Sutton has concluded that the stains do not support the State's argument that the shirt was worn during the attack on the Aguirres. Exhibit 41 (2d Sutton Aff., 2-12-22). She explains, first, "[t[he distribution of the bloodstains on this flannel shirt is indicative of the shirt being worn during incidental contact with exposed blood belonging to Mr. and Mrs. Aguirre." *Id*. ¶ 14. Second, "[t]he distribution of the bloodstain pattern on this flannel shirt is not indicative of the distribution that would be created during this violent assault." *Id*. ¶ 15.

> There are bloodstain patterns [in the house] that indicate Mrs. Aguirre put forth a considerable struggle with her attacker(s). Such an interaction would be likely to result in a more widespread distribution

> of stains on a perpetrator's garment than is indicated by the laboratory sketches.

Id. The "incidental contact" with the Aguirres' blood on the flannel shirt is thus consistent with the contact Perkins had with the shirt when, bloody from the attack, he got the shirt from Gonzales and put it on.

Recently available evidence provided even more confirmation of this. On February 14, 2022, crime scene technicians with the OPD photographed both the outside and inside of the flannel shirt at the request of Gonzales' counsel. Affidavit of CSU Supervisor Stephanie Bothwell, February 22, 2022 ¶¶ 6, 7, 9 (Exhibit 42). The photographs were then examined by bloodstain pattern analyst Paulette Sutton. Ex. 3 (3d Sutton Aff., Feb. 25, 2022). Her previous opinion that the bloodstains on the outside of the shirt came from "incidental contact with exposed blood belonging to Mr. and Mrs. Aguirre and not during a violent attack," "was reinforced by the photographs of the flannel shirt." *Id*. at 8.

Moreover, never-before-taken photographs of the inside of the shirt reveal staining on the inner lining. *See* OPD Photographs of Flannel Shirt, February 14, 2022 (Exhibit 43).[13] As seen in the photos, the staining is visible on both sleeves.

[13]Due to the size of these files, Gonzales will deliver a disc drive of Exhibit 43 and 44 contemporaneous with filing and serve another copy on counsel for the State.

For the same reason the photos cannot be reproduced here as figures.

The location of these stains on the interior lining does not correspond to the location of the known stains on the exterior of the shirt.

OPD even agreed to examine the inside of the shirt under alternate light source visualization to enhance stains. Bothwell Affidavit ¶ 9. This revealed several more stains not visible in ordinary light to the naked eye. *See* OPD Photographs of Flannel Shirt Under Alternate Light Source, February 22, 2022 (Exhibit 44).

According to Paulette Sutton, some of the staining appears to be blood. "In my experience, I have found that bloodstains deposited on black synthetic material, such as the quilted interior of the flannel shirt, often present as a brownish stain." Affidavit of Paulette Sutton at 8.[14] Further, the location of the stains "on the interior surface of the flannel shirt (Item 121) … is consistent with their being deposited by a person with an injured arm and/or hand wearing the shirt." *Id*. And, these stains are also "consistent with blood on the interior of the sleeve in the same location that Nino says Jesses Perkins was injured." *Id*. at 10. Finally, these

[14] DNA expert Huma Nasir agrees: After reviewing the photographs of the shirt that had been made with an alternative light source, she found, "[t]here are several areas on the inside lining of the shirt including the sleeve that fluoresced under the alternate light source suggesting possible presence of bodily fluids[,] … [s]ome of [which] may be from bloodstains since it is not uncommon for a perpetrator to stab themselves in the process of stabbing a victim." Affidavit of Huma Nasir, February 25, 2022 at 2 (Exhibit 45). (Ms. Nasir previously submitted two affidavits with Gonzales' Chapter 64 filings.)

findings are consistent with the wounds to Perkins' hands that the Ector County jail noted, and Det. Robertson saw and photographed.

These stains on the inner left sleeve of the flannel shirt also connect the blood stains on the lower left leg of Perkins' pants to the cuts on his left arm. As Sutton observes, "Blood dripping from an injured arm/hand as described by Nino in his affidavit dated February 02, 2022 is certainly consistent with the location of the stains found on the outer legs of the pants." *Id*. at 9.

E. Perkins and Olivarez gave Gonzales the property they stole from the Aguirres to set up Gonzales.

Perkins told Nino that "they were going to give 'Spider' a pistol they took from the Aguirres' house to set him up." Nino Affidavit ¶ 7. This statement, too, has corroboration in the record of the police investigation and newly discovered evidence.

Initially, the police investigation appeared to establish that Gonzales had the items taken from the Aguirres' house immediately after the murders. Julian Olivarez told the police in a statement on May 6, 1994, that on April 22, 1994, the day after the murders, Gonzales "told me [and my wife] to go by his house, that he had some things that he wanted me to look at to see if we wanted to buy any." Ex. 12. In a closet in his room, Gonzales showed them "a microwave, VCR, and stereo, and some speakers inside a crib," a camera "[u]nder a pillow," and underneath a

dresser "a silver pistol with white handles … a revolver … a .22." *Id*. All these items were identified as having been taken from the Aguirres' house. Ex. 8.

No one other than Olivarez and his wife claimed to have seen all these items in Gonzales' possession shortly after the murders. Two witnesses said they had each seen one item in his possession the night of the murders. Ruby Luna told the police that Gonzales showed her the pistol when she stopped to give him a ride the night of the murders. Ex. 38 (1994 Luna statement). Martha Reyes, Gonzales' wife, testified at the 2009 resentencing trial she saw he had stolen a VCR from the Aguirres' house the night of the murders. 27 RR-R 67.

All these statements are thrown into question by a police interview with Gonzales' mother, Epigmenia (Pim) Gonzales, as part of their re-investigation in 2000. In that interview, Det. Sgt. Larry Bartlett said to Ms. Gonzales, "It looked like the most damning thing on [your son] was the … having their property over in his bedroom, you know, in your house, that time." Interview of Epigmenia Gonzales, May 31, 2000 at 18 (Exhibit 46).

The colloquy that followed indicated that the property was not there the night of the murders and that it showed up only a week later after Julian Olivarez brought it there:

> PG [Pim Gonzales]: … somebody said that it wasn't here and then, all of a sudden, it came from Julian to here….

PG: … I know there was nothing here. And then, all of a sudden, you know, it--it was here….

LB [Larry Bartlett]: When did you first notice it there? ….

PG: … maybe about a week after. Because I know it was not here….

LB: It was not there … after the murder?

PG: It was not here. And then, all of a sudden, it comes … it appears here….

LB: … could it have been there and you not notice it? Did you go in their room often?

PG: … I … sort of glanced in the room…. And, I didn't see anything, you know, and then, all of a sudden, you know, I glanced and something was covered….

LB: And this was about a week later? ....

PG: … yeah….

LB: It wasn't here that Fri-Friday, when all the cops were out there working the scene, are you sure it wasn't there?

PG: No, cause--because, uh, the door was open and they [Michael and Martha] were lyin' down in the bed…. [A]nd the room's not that big….

LB: So, you think it's a possibility … it went from like Julian to Michael, for whatever reasons? ....

PG: Uh-huh.

Id. at 18-20 (ellipses in original).

Further doubt about whether Gonzales had the property from the Aguirres' house immediately after the crime is raised by the recent declaration of Ruby Garza Luna. As with the part of the police statement from her about who was

wearing the flannel shirt the night of the crime, Ms. Luna stated in her declaration that the part of her police statement indicating that Gonzales showed her the gun that night is not true. 2022 Luna Decl. ¶ 9. "Michael did not show me, or anyone else while he was in my truck, a silver gun or any other type of gun." *Id*. ¶ 11.

Finally, Martha Reyes' testimony at the resentencing trial about having seen Gonzales with the Aguirres' VCR the night of the murders, April 21, 1994, conflicts with the statement she gave the police on May 7, 1994. Statement of Martha Gonzales, May 7, 1994 (Exhibit 47). She said nothing in her 1994 statement about seeing Gonzales with the Aguirres' VCR the night of the murders. She did report seeing items consistent with the property stolen from the Aguirres in her house two days later after some men apparently came to the door of her and Michael's house:

> On Saturday, April 23, 1994, around 9 or 10 pm, I heard voices and Michaels [sic] voice at the front door of our home. It sounded like men's voices at the door. I do not know who was at the door. After bathing my daughter, I went into her room and I saw some things covered with a blanket or a towel. I could see some black stereo speakers sticking out slightly. I did not look at the things under the blanket and I did not ask Michael about them.

Id.

While the time frame differs from the time frame Gonzales' mother recalled, Ms. Reyes' statement is consistent with Ms. Gonzales' in recounting that the

property appeared some days after the murders and, critically, that the appearance of the property in the Gonzales home was associated with other men being there.[15]

Taken together, the police interview with Gonzales' mother during their reinvestigation, Exhibit 46, the declaration from Ruby Luna, Exhibit 40, and the May 7, 1994, statement by Martha Reyes, Exhibit 47, support the statement by Perkins to Nino that "[we] were going to give 'Spider' a pistol [we] took from the Aguirres' house to set him up." Nino Affidavit ¶ 7. The property showed up in Gonzales' room "from Julian [Olivarez] … a week after [the murders]," Ex. 46 at 18 (Pim Gonzales 2000 interview), or two days later when some men came to the front door of Gonzales' house, *see* Ex. 47 (Martha Reyes Gonzales statement).

F. Independent evidence confirms that Lugo and Olivarez were involved in the murders

The police investigation developed evidence that Lugo knew about the murders before the police did. At trial, Robertson testified that the ODP received information that Lugo had asked "a lady … if the police had been informed about the bodies next to Michael's house." 15 RR-T 125-26. Critically, "this was approximately an hour before the police were notified." *Id*. at 126. This testimony demonstrates there was independent evidence supporting Perkins' statement to

[15]It is also telling that, while Ms. Reyes saw in the same place (her daughter's room) one of the same things Julian Olivarez said he saw—"some speakers inside a crib," Statement of Olivarez, she saw it more than a day later than he claimed to have seen it. That Ms. Reyes had not seen it at the time Olivarez claimed he did thus calls Olivarez's statement into question.

both Nino and Nunez that Lugo participated in the murders along with Olivarez and him.

On January 28, 2022, Rito Suniga provided an affidavit to Gonzales' investigator. Suniga recounts an incident that occurred two or three days after the murders. Affidavit of Rito Suniga (Exhibit 48). He was with Gonzales in Gonzales' front yard "when a car pulled up." *Id*. Olivarez and another man called "Diablo" got out of the car with guns. Olivarez pointed his gun at Gonzales and said, "'You better not say nothing, and you better keep your mouth shut.'" *Id*. Both men then got back in their car and drove off. *Id*.

Suniga reported this incident to the Odessa police and recalled that Det. Robinson interviewed him. *Id*. Nothing, however, appeared in the police report about this.

A few months later, a similar incident occurred, this time directed toward Suniga's wife. Daniel Lugo "went to where my wife worked and threatened her." *Id*. He said, "'You better keep your mouth shut,' and then left." *Id*.

Lugo and Perkins apparently did not assert alibis for the time of the murder. The OPD file contains no indication that either claimed an alibi. By contrast, Olivarez did maintain an alibi. In his statement to the police, he stated that the day of the murders he "went to work at 8 am and got home about 11 pm." Statement of Olivarez. Police waited until June to ask his boss whether Olivarez was in that

night and received no confirmation. Report of Det. Robertson on Olivarez Alibi, June 8, 1994 (Exhibit 49).

G. Suppressed evidence disproves the uniqueness of the chile peppers

According to Detective Robertson, peppers expert Dr. Villalon purportedly told him the peppers are "very, very rare for this area" and are grown primarily in Mexico. 15 RR-R 140.

New evidence shows that Dr. Villalon did not tell Robertson that the peppers were "very, very rare" for the Odessa area. In a file memo from the Ector County District Attorney's file, a staff member of the DA's office reported about a call she made to Dr. Villalon on November 30, 1995. Memorandum from Rebecca Sample to John W. Smith & Preston Stevens (Exhibit 50). Dr. Villalon told her only that Robertson had asked him to look at various peppers and tell him "if the peppers were the same." *Id*. Dr. Villalon said that "all he could say was that the peppers appeared to be the same to him." *Id*. He said nothing to Ms. Sample about whether the peppers were rare for the Odessa area. "[H]e didn't see how he would be useful in this case when he can only say that the peppers seem to be the same." *Id*. A handwritten note at the bottom of this memo states, "Snow [Robertson] said" that Villalon told him the peppers "were very rare for this area." That is not what Villalon told Ms. Sample that he told Robertson. Neither this memo nor the information in it was provided to Gonzales' counsel until 2020.

Robertson thus likely lied, and gave false testimony, about what Dr. Villalon told him. Moreover, he ignored the innocent explanation for how the peppers appeared at Gonzales' back door and in the refrigerator in his house. Robertson interviewed Gonzales' mother, Epigmenia Gonzales, on May 5, 1995. Excerpt from May 5, 1995 Interview of Epigmenia Gonzales (Exhibit 51). He asked Mrs. Gonzales about the peppers, and she identified them as "chile piquin." *Id*. at *118. Mrs. Gonzales said she uses them to make "Menudo and then pizza or whatever." *Id*. at *119. She also said, "you can crush [them]" or "buy crushed," but she "usually [bought] crush[ed]" ones. *Id*. at *120. When Robertson told Mrs. Gonzales he "found some of those red peppers right next to you backdoor," Mrs. Gonzales said if they fell on the floor, she would "sweep [them] out…" *Id*. at *139.

H. Bloodstain pattern expert concludes that the bloodstain testimony and argument at trial were false and misleading.

Bloodstain pattern expert Paulette Sutton has examined the testimony of Det. Robertson about, and the photographs of, the "blood transfer stains" that Det. Robertson identified on the camper between the Gonzales and Aguirre houses. Ex. 33 at 10-12 (First Sutton Aff., 1-31-22). Ms. Sutton observes, "There is no evidence to support that these stains are, in fact, blood," *id*. at 10, and doubts that they are: "These stains are lighter in coloration than whole blood and are not visually consistent with blood." *Id.* Ms. Sutton explains that "[i]n the absence of testing, it is impossible to determine that these stains are, in fact, blood." *Id*. Even

though "[s]ampling of the stains and further testing is imperative in this situation," *id*., "[n]o samples of the stains on the camper were collected or analyzed even though 128 other samples were collected at the scene." *Id*. at 11.

After explaining the standard practice that should have been undertaken to determine whether these stains were from blood, *id*., Ms. Sutton notes that Robertson was not qualified in the field of bloodstain pattern analysis. *Id*. She then concludes:

> Det. Sgt. Robertson should not have offered an opinion regarding the mechanism by which these stains were deposited. Det. Sgt. Robertson had no evidence that the stains were really blood and apparently no training to determine their mechanism of deposition.

Id.

Because of these deficiencies in the investigation and in Robertson's testimony, Ms. Sutton states, "Sampling of the stains and further testing is imperative in this situation." *Id*. at 10. That is no longer possible, because the camper is no longer on the property where the Gonzales' house stood, and to the extent records are available, it appears that the camper has been destroyed.

Ms. Sutton also examined the other bloodstain pattern evidence presented in the 1995 trial by an OPD bloodstain pattern expert: Officer Rick Pippins' testimony that Mr. Aguirre was very likely attacked first because Mrs. Aguirre had more injuries and appeared to have struggled more than her husband. She notes, "Neither of these observations indicate any useful information about the number of

attackers or the order of attacks." Jan. 31, 2022 First Sutton Affidavit at 13 (Ex. 33). Since Mr. Aguirre was very weak after heart surgery, "[i]t is [just as] plausible that the attacker or attackers would view Mrs. Aguirre as the greater threat and attacked her first because the more robust and greater threat would need to be eliminated first." *Id.*

She also said that "[n]othing about the evidence eliminates the possibility that two or more attackers assaulted Mr. and Mrs. Aguirre." *Id.* She then laid out plausible scenarios:

> These attacks could have occurred roughly simultaneously. One attacker could be apt to carry out a frenzied attack such as the attack on Mrs. Aguirre and one might be more able to control the weakened Mr. Aguirre. Or perhaps more than one attacker assaulted Mr. Aguirre first making the assumption that the man will be harder to take out.

Id. Because "Sgt. Pippins' report and testimony do not entertain these hypotheses or test them against the available evidence," *id*., his testimony provides no "useful information about the number of attackers or the order of attacks." *Id*.

Thus, the expert testimony that the prosecution relied on to carry its burden to show a single person committed both murders was nothing more than unscientific and unfounded speculation.

I. Det. Robertson's history of falsifying reports and conducting shoddy investigations—not disclosed to Gonzales' trial counsel—undermines his credibility in the Gonzales investigation.

Before he became the lead investigator in the murder of the Aguirres, Det. Robertson had a long history of falsifying reports and unprofessional investigations. The State disclosed none of this information to the defense at either of Gonzales' trials.

1. Robertson is forced out of the El Paso Police Department after multiple incidents of misconduct (1973-1978).

Snow Robertson's law enforcement service records detail a 40-year history of shoddy and dishonest work performance and civilian abuse allegations. He started his law enforcement career as a peace officer with the El Paso Police Department (El Paso PD) in 1973. El Paso PD Personnel Records of Snow Robertson at 1 (Exhibit 52). In 1974, Robertson graduated from El Paso Police Academy to enter the El Paso Police Department. Texas Commission on Law Enforcement Report on Snow Robertson (Exhibit 53). In his first performance evaluation, his evaluator noted that he "needs a lot of improvement…plan, observe rules, learn to make decisions…sense and accept more responsibilities." El Paso PD Personnel Records at 11. Specifically, the evaluator found Robertson's performance deficient in several areas, including: "ability to make sound decisions and work assignments," "accuracy, neatness, and thoroughness of work," and "work knowledge and job skill level." *Id*. Two months later, Robertson's

performance did progress, although his "performance in new situations" and "work knowledge and job skill level" still required attention. *Id*. at 12.

In 1976, El Paso PD received an abuse allegation regarding Robertson. In a letter addressed to the mayor of El Paso, the assistant city attorney noted several arrestees accused Robertson of abuse. *Id*. at 23. However, the city attorney concluded the allegations were baseless. *Id*. In the same year, a Personnel Incident Report was filed against Robertson for repeatedly cursing at a gas pump attendant who requested a work order to repair his patrol vehicle. *Id*. at 13-14. After investigating the incident, El Paso PD Lieutenant Cueller recommended an investigation by El Paso PD Internal Affairs. *Id*. at 14.

The El Paso PD documented another 1976 Personnel Incident Report against Robertson, based on a civilian complaint of excessive force, making threats, and false arrest without a warrant. El Paso PD Personnel Records at 15-16. The incident concerned Daniel Chacon, a boy with Intellectual Disability. Around midnight, Robertson knocked on the door of Chacon's home. When no one responded, Robertson entered through the window. *Id*. at 15, 20. Chacon, frightened, remained in his room while Robertson and his partner roamed the dark house with flashlights and guns drawn. *Id*. at 15, 21.

Robertson located Chacon in his bedroom and handcuffed him without providing a warrant or the probable cause for the detention. *Id*. at 20. Chacon

resisted and attempted to show the officers his social security card. The officers then punched Chacon, knocking him down. While he was on the ground, Robertson kicked Chacon in the ribs twice. *Id*. at 15-16. According to Chacon, Robertson then stuck the barrel of his gun into Chacon's mouth, chipping a tooth and bruising his mouth. Robertson took Chacon to the police car when a next-door neighbor confirmed Chacon lived at the house Robertson entered. *Id*. at 16. Upon verifying this information, he released Chacon from custody but threatened to jail Chacon for two years if he reported the incident. *Id*.

Robertson was issued a notice of termination for the Chacon incident on August 25, 1976. *Id*. at 17-21. The El Paso PD found reasonable cause to dismiss Robertson for violating federal, state, and municipal laws in the encounter and his use of extreme verbal and physical abuse against Chacon. The department also determined Robertson provided false statements to investigators about the incident. *Id*. at 21. During his 3-year tenure with the police force, the department emphasized that community members had lodged 15 other complaints against Robertson. *Id*. These complaints included five verbal or physical abuse cases, one civil rights case, and at least six brutality cases. *Id*. But the Civil Service Commission heard Robertson's appeal and overruled his termination. Instead, the Commission ordered the El Paso PD to reduce Robertson's termination to a suspension for 9 months. *Id*. at 24-25.

On June 26, 1978, the El Paso PD gave Robertson a 60-day suspension. He was suspended for lying about his involvement in a car crash when attempting to escort an ambulance by driving against a red light. *Id*. at 7-10. Immediately after the collision, Robertson washed the car to avoid notifying his superiors of the accident. *Id*. at 9. A month after his car accident, Robertson received a poor performance review highlighting he "does not follow departmental rules and regulations" and that he "does not follow directions, tries to do as he pleases." *Id*. at 26. Robertson resigned from the El Paso PD on July 14, 1978. *Id*. at 2-4.

2. Robertson is accused of multiple acts of misconduct as an Odessa police officer (1978-1999).

On July 17, 1978, Robertson started as a police officer with the Odessa Police Department. Odessa PD Personnel Records of Snow Robertson at 1,3 (Exhibit 54). He stayed there for two years before resigning for undisclosed reasons. *Id*. at 2 ("vol. resignation" "10-20-80"). In October 1980, Robertson applied for a Deputy Sheriff position within the Ector County Sheriff's Office (ECSO). He reportedly sought "better working conditions." ECSO Personnel Records of Snow Robertson at 2-3 (Exhibit 55). When asked his reason for leaving El Paso on the ECSO form, Robertson cited "better pay" without mentioning his record of misconduct. *Id.* at 3. The ECSO hired him, but he worked there for only a matter of days before resigning because of a "personal" matter. *Id*. at 1. On

December 1, 1980, OPD reinstated him as a police officer where he remained employed until 1999. OPD Personnel Records at 3.

In October 1987, Robertson was disciplined for an allegation of abuse against a civilian as an OPD officer. OPD suspended Robertson from pay for three days, likely in connection with the allegation. OPD Personnel Records at 3.

In a 1989 lawsuit filed in the 358th Judicial District Court, a juvenile alleged that Robertson assaulted him with no probable cause or justification. *See* Plaintiff's Amended Petition, *Homsey v. Robertson*, No. D-80,401 (358th Judicial Dist. Ct., Ector Cty., March 23, 1989) (Exhibit 56). Among the grounds for the suit, the complainant alleged the City of Odessa was negligent in hiring Robertson given his past misconduct at the El Paso PD. *Id*. at 3. The parties eventually settled out of court. Order of Dismissal, *Homsey v. Robertson* (Nov. 7, 1990), at 2 (Exhibit 57).

Robertson was sued again for a May 1988 incident in which it was alleged he physically assaulted a woman during a routine traffic stop. Plaintiff's Original Petition, *Orr v. Robertson*, No. D-82,765 (358th Judicial Dist. Ct., Ector Cty., Jan. 7, 1991) (Exhibit 58), at 3-4. The City of Odessa and the plaintiff settled out of court. Order of Dismissal, *Orr v. Robertson* (Jan. 7, 1991) (Exhibit 59).

In November 1995, the month before Gonzales' trial commenced, Robertson was suspected of having manufactured evidence and providing false testimony to gain a conviction in Lincoln Keith's homicide case. Keith, a teenager at the time of

the offense, was convicted for his role as the alleged triggerman in a murder-for-hire plot. *See* Application for 11.07 Writ of Habeas Corpus, *Ex Parte Keith*, No. WR-59, 244-04 (Tex. Crim. App. June 12, 2015) (Exhibit 60). Robertson worked the case as a lead investigator. In 2015, Keith filed a subsequent application for writ of habeas corpus in this Court, raising several bases for relief on newly discovered evidence about Robertson's false testimony. *Id*. at 18.

Keith alleged the prosecution's only evidence to support its theory of his involvement was accomplice testimony of a third-party and, significantly, Robertson's testimony regarding Keith's "blurted" confession. *Id*. In an incident strikingly similar to Gonzales' supposed "confession" to jailer Charles Kenimer, Robertson testified that Keith "blurted out" an extensive statement in which he confessed to all elements of the charge against him when several police officers were within earshot. Yet, no one else could verify this statement. *Id*. *See* Excerpts of Volume 8, Reporter's Record of *State v. Keith*, Cause No. A-24,045 (70th Judicial Dist. Ct., Ector Cty.), at 22-25, 41-52 (Exhibit 61) ("Keith Transcript") (Robertson testifying other officers were near, but he did not know whether they heard Keith's statement); *id.* at 66-68 (OPD Sergeant Matt Andrews testifying he was in the same room as Robertson and Keith but did not hear Keith's statement).

Robertson's colleague, Ector County Medical Examiner Investigator B.J. White, testified he rode to the station with Robertson and Keith following the

"blurted" confession, and Robertson never mentioned it to him. Ex. 60 at 18; 8 Ex. 61 at 91, 93. White only heard Robertson recite to Keith warnings under *Miranda v. Arizona* 384 U.S. 436 (1966). Ex. 60 at 19, Ex. 61 at 94.

Keith also alleged Robertson maintained a pattern of claiming that "suspects 'blurted out' spontaneous statements that no one other than he himself had heard." Ex. 60 at 19. As proof, Keith revealed that another young suspect named Cleaver had supposedly made a spontaneous, unverified statement confession to a murder in front of Robertson in similar circumstances. *Id*., *Ex Parte Keith* Writ App. Ex. "E" (Cleaver Article) (Exhibit 82), However, Cleaver's attorney successfully struck Robertson's testimony because Cleaver's "confession" mirrored Keith's. *Id.* Cleaver's trial judge also presided over Keith's trial. *Id*. Keith also alleged Robertson was romantically involved with the prosecutor in Keith's case, Linda Deaderick, during Keith's 1995 trial. Snow Robertson and Linda Deaderick were later married in 1996. *Ex Parte Keith* Writ App. Ex. "F" (Robertson-Deaderick Article) (Exhibit 83).[16]

[16] Deaderick served as an assistant district attorney at the time of Gonzales' prosecution but did not work on the 1995 trial. She became First Assistant and was working on the case when the Ector County District Attorney moved to recuse itself in November 2008 based on her marriage to Robertson. Mot. to Recuse, Nov. 13, 2008, 3 CR-R 651.

In July 1998, OPD placed Robertson on unpaid suspension for undisclosed reasons. Ex. 54 at 3. On June 14, 1999, Robertson resigned from the Odessa Police Department. *Id*.

3. Robertson disciplined at the Allen Police Department (1999-2006).

Three weeks later, Robertson joined the Allen Police Department ("APD") as a police officer. Allen PD Personnel Records at 1 (Exhibit 62) (starting 1999). In July 2002, APD suspended Robertson for a week for providing a colleague's social security number to a third-party. *Id.* at 2-5 (July 5, 2002 Order of Suspension). Robertson retired from the APD in September 2006, *id.* at 6 (Notice of Retirement), and started at the Murphy Police Department in October 2006. Murphy PD Personnel Records at 2 (Exhibit 63).

4. Robertson's poor performance continues at the Murphy Police Department (2006-2015).

Robertson was again cited for poor work habits at the Murphy Police Department (2006-2015). *See generally id.* 2-13. At the time of the resentencing, Robertson's supervisors found his work unsatisfactory. *Id.* at 9 (Mar. 30, 2010 evaluation). Robertson showed "a lack of integrity" by not taking "responsibility as a supervisor." *Id.* at 12. In 2011, Robertson was reprimanded for ordering an officer to shoot a caged bobcat without contacting supervisors or considering other options. *Id*. at 15.

J. Based on the post-trial evidence set forth above and police records, Martha Reyes' testimony at the resentencing trial is not credible.

Reyes testified only in the 2009 resentencing trial, not the 1995 trial. In 2000, the Odessa Police Department reinvestigated the case at the insistence of the Aguirre family. On June 7, 2000, Reyes was interviewed by two officers, Larry Bartlett and Buzzy Abalos. Martha Reyes Interview, June 7, 2000 (Exhibit 64). In this interview, she provided the story that she eventually gave in abbreviated form in her testimony at the resentencing trial, detailed *supra*.

In sum, Reyes testified that Gonzales asked her to go to the Aguirres' home the night of April 21, 1994, to visit with the Aguirres for a while. When she left the Aguirres, Gonzales would come into their house. His plan was "to push [them] around … get a VCR … and pawn it," 27 RR-R 62 to get enough money to celebrate their daughter's upcoming birthday. Reyes went to the Aguirres' house about 9:00 p.m., and as she left at about 10:00 p.m., she saw Gonzales coming toward the door. When he came back, "[h]e had blood on his clothes" and told her "[t]here was an accident." *Id*. at 66. The only property that she saw he had stolen was a VCR. *Id*. at 67.

This story is not credible, because additional details Reyes provided in her 2000 interview, which were omitted from her testimony, are contradicted by other

facts, and because her testimony conflicts with a critical element of her 1994 statement to the police.

In her 2000 interview, Reyes said when Gonzales went to the Aguirres' home, he "had a flannel on." 2000 Reyes Interview at 8. He came back from the Aguirres with "blood all over him." *Id.* at 4, 9. "[H]e had blood here. Blood there. Everywhere." *Id*. at 17. Neither observation, about the flannel shirt or about the blood on him, can be true. If he was wearing a flannel shirt, it too would have been covered in blood. However, the flannel shirt traced back to Gonzales was not covered in blood. As bloodstain pattern analysis expert Paulette Sutton has found, "[t[he distribution of the bloodstains on this flannel shirt is indicative of the shirt being worn during incidental contact with exposed blood belonging to Mr. and Mrs. Aguirre," Ex. 41 ¶ 14 (2d Sutton Aff., 2-12-22), and "[is] not indicative of the distribution that would be created during this violent assault." *Id*. ¶ 15. Thus, the shirt was not worn during the attack on the Aguirres. Instead, Gonzales gave the shirt to a bloody Jesse Perkins, by Perkins' admission to Nino, soon after the attack.

Moreover, it appears there are stains on the inside of the shirt consistent with the wounds Perkins suffered during the attack on the Aguirres—stains that would also be consistent with Perkins putting the shirt on after the attack. These facts show that Reyes' story, in critical part, cannot be true.

Reyes' statements that Gonzales came back from the Aguirres with "blood all over him," and that "he had blood here[,] [b]lood there[,] [e]verywhere," 2000 Reyes Interview at 4, 9, 17, cannot be true for yet another reason. As we have detailed, *supra*, the day after the murders, the police tested Gonzales' arms, hands, clothing, and shoes with luminol. 20 RR-T 29, 31-33. On May 7, the day of Gonzales' arrest, the police conducted more luminol testing in Gonzales' house, finding what they believed to be a bloodstain on the carpet. Ex. 13 (Sanders Report of 218 Schell Search). Further analysis revealed that no blood was present on Gonzales, on any article of Gonzales' clothing, or in any place in the house. Ex. 15 (Jan. 13, 1995 DPS Report). Had Gonzales returned from the Aguirres' house with blood on him in the quantity Reyes described, then washed a bloody knife in the sink, and then cleaned up, as she said he did, the police investigation would have found traces of blood in their effort to find it.

As we have noted, Reyes gave a statement to the police on May 7, 1994. Exhibit 47. Nothing in that statement mirrors what she told the police in 2000 and her testimony in 2009. However, she does mention in that statement that she first noticed items in her house that appeared to be some of the items taken from the Aguirres on April 23, 1994—two days after the murder. *Id*. Those items appeared only after she heard Gonzales talking with other men outside their house that night. *Id*. Thus, her testimony in 2009 about seeing a VCR the night of the murders is in

sharp conflict with that very specific memory recounted to the police only two weeks after the incident occurred—an account that more closely matched the memory of Gonzales' mother.

The other set of facts contradicting Reyes' story concern a visit by Gonzales' sister Michelle Payne to the Gonzales/Reyes home the night of April 21, 1994. Ms. Payne did not testify at either trial, but OPD officers interviewed her twice, on May 6, 1994, and on June 2, 2000. Michelle Payne Interview, May 6, 1994 (Exhibit 65); Michelle Payne Interview, June 2, 2000 (Exhibit 66). Payne recounts in her first interview that she came to visit Michael and Martha at their house at about 8:30 pm on April 21, 1994 (the night of the murders) and was there "for about thirty minutes." 1994 Payne Interview at *163. When she arrived, Michael, Martha, and their daughter Unica "were all siting in there just watching TV in the dark." *Id*. at *164. While she was there, Gonzales asked her if she wanted to buy a camcorder and an expensive camera with a long lens, acknowledging that both were "stolen stuff." *Id*. at *163, *165, *166.[17] Payne left about 9:00 pm but came

[17]A camcorder was not among the items reported stolen from the Aguirres. An expensive camera with a long lens was. In her second interview in 2000, however, Payne discussed the camera again. In that interview she told the police that she walked through the house the night of April 21 and noticed no VCR or any other property there that seemed to be from someone else. Ex. 66 at 20. She also recalled in this interview that the occasion when Gonzales asked her if she wanted to buy the camera with the long lens was at Unica's birthday party, the Saturday after Unica's April 27 birthday. *Id*. at 21. That would have been April 30, 1994, which coincides with the time that Epigmenia Gonzales told the police she first noticed property consistent with the Aguirres' stolen property in her house—after Julian Olivarez was there. *See* Interview of Epigmenia Gonzales, May 31, 2000.

back about five minutes later because she thought she had left her purse. *Id*. at 164. When she arrived, she "pulled up and honked," and Gonzales come from the back of their house with "a friend…" *Id*. at *164-65. In her 2000 interview, she recounted that Gonzales came to her car, went back into the house to look for her purse and came back to tell her it was not there, after which she found her purse in the trunk of her car. Ex. 66 at *20. During all this time, Gonzales "seemed just fine." *Id*. at *21.

Payne's very consistent and detailed accounts completely contradict Reyes' account of Payne's visit in Reyes' 2000 interview. In that interview, Reyes said that Payne came by that night but came by *after* the murders had occurred. Reyes Interview at 9. By that time, Gonzales had "already cleaned up." Ex. 64 at 10 (2000 Martha Reyes Interview). When she got there Payne "never got off [sic] the car," *id*., and Gonzales did not go out to see her but talked to her from inside the door of their house. *Id*. at 10-11. Payne wanted him or Martha to go to the store with her, and when Gonzales refused, Payne "got mad and she took off…." *Id*. at 11.

The contradictions between Payne's and Reyes' account are obvious. According to Reyes, when Payne arrived, the murders had already occurred, Gonzales had brought the Aguirres' property into their house, and he had cleaned up. By Reyes' timeline of events, this would have been 10:30 pm or later, because

Gonzales went into the Aguirres' at 10:00, came back 10-15 minutes later, made two more trips to bring back property, and then got cleaned up. By contrast, Payne said she got there about 8:30 and was there, including coming back to find her purse, until about 9:15. Reyes said Payne stayed in her car, and Gonzales talked with her from inside the front door. Payne said she went into their house and was there for about 30 minutes, saw no extraneous property in the house, and saw that Gonzales, Reyes, and Unica were watching TV—and that Gonzales seemed fine. Any effort by Gonzales to sell her a piece of property from the Aguirres did not take place that night, but nine days later.

Both Payne's and Reyes' accounts of Payne's visit to the Gonzales/Reyes house on the evening of April 21, 1994, cannot be true. The details and consistent story of that evening from Michelle Payne in interviews by the police over a six-year period stand in stark contrast to the wholly inconsistent stories from Reyes in interviews by the police over that same period.

In sum, Reyes' trial testimony, built as it was on her 2000 interview, is not credible.

K. Police have just provided Gonzales newly discovered fingerprint evidence that could exonerate him.

Just a few weeks before Gonzales' execution, after diligent efforts by counsel for Gonzales,[18] police have finally disclosed a large tranche of new documents regarding fingerprint and footwear comparison in the case. *See* Ex. 42 (Bothwell Aff.). Odessa Police Crime Scene Supervisor Bothwell believed the latent print cards from the case had been lost. But in early February, she discovered them, placed out of order in a storage box, and the City of Odessa released them in response to a public records request.[19] Gonzales has now learned that Odessa Police had the following:

- 136 latent print cards taken from the crime scene and from the stolen property.
- 19 sets of known fingerprints from the victims, victim's family, witnesses, and several suspects besides Gonzales. These include the

[18] *See* History of Gonzales's Efforts to Obtain Fingerprint and Footwear Evidence (Exhibit 67).

[19] This disclosure is especially remarkable because it was made in spite of the obstruction posed by the attorney for the State, who—when asked about fingerprint and footwear evidence—stated he had no obligation to learn of any potentially exculpatory information contained in the police's file. The District Attorney Pro Tem has refused to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see* CR-DNA 66 (District Attorney Pro Tem only assuring that he will disclose evidence that "comes to [his] attention"); CR-DNA 84 (District Attorney Pro Tem disclaiming "authority to tell [Odessa police] what to do or not do").

fingerprints of suspects Jesse Perkins, Daniel Lugo, but inexplicably not Julian Olivarez.

- footwear test impressions from Manuel Aguirre, Jr.'s shoes taken on April 22, 1994.
- Documentation of 12 searches of latent prints against the AFIS database.

This is far more prints than the State had disclosed. *See* Affidavit of Matthew Marvin, May 14, 2021, ¶¶ 9-11 (Exhibit 68) (summarizing OPD reports on fingerprint and footwear evidence collection; estimating about 80 prints). Of the 136 latent print cards,[20] latent print examiners working with Mr. Gonzales' team have identified at least **66 latent prints suitable for comparison—of which 60 have never before been compared**. Affidavit of Latent Print Examiner Heather Mcneill, February 28, 2022 ¶ 6 (Exhibit 69).[21] To conduct a reliable forensic

[20] These do not include the latent print card lifted from the stereo that identified Gonzales—presumably because that card was admitted in evidence as SX 60.

[21] This is the first step in the standard latent print examination procedure:

> The examiner makes a determination, based upon previous training, experience, understanding, and judgments, whether the print is sufficient for comparison with another print. If one of the prints is determined to be insufficient, the examination is concluded with a determination that the print is insufficient for comparison purposes.

See National Institute of Justice, *The Fingerprint Sourcebook* 9–13 (2011), https://www.ojp.gov/pdffiles1/nij/225320.pdf/; *see also id.* Appendix D: SWGFAST Standard Terminology of Friction Ridge Examination, v. 3.0 ("Suitable. The determination that there is sufficiency in an impression to be **of value** for further analysis or comparison.") (emphasis added).

examination, examiners use a methodology called "ACE-V"-- Analysis, Comparison, Evaluation and Verification. *Id.* ¶ 7. It is a time-consuming process to make comparisons for purposes of identification or exclusion, but the results could be strongly exonerating for Gonzales.

Matt Marvin is a lab director at Ron Smith & Associates, a private accredited lab that assists law enforcement and consults in post-conviction cases in several forensic disciplines. Marvin is one of only a handful of forensic specialists in the country with the highest credentials in footwear and fingerprint examination. *See* Ex. 68. Heather Mcneill is another latent print examiner with Ron Smith & Assocs. She has previously earned the same high credentials in latent print examination and is an expert print examiner. The Ron Smith laboratory—which is the only accredited private lab capable of handling this review—estimates that "a complete examination of the latent print evidence will require at least 6 months." Ex. 69 ¶ 7.

This newly discovered print evidence provides critical context that minimizes the significance of the identification of Gonzales' prints on the stolen stereo. The police had discovered dozens of other prints that were suitable for comparison but utterly failed to investigate the significance of any other print. The State cannot say how many other identifications it could make from the stolen property, because the police apparently did not even try to do so.

What is more, for the few prints that the police did enter into the law-enforcement database for fingerprint matches, OPD had a practice of not documenting any result that did not result in a match. According to the supervisor of the Odessa Police Department Crime Scene Unit, "at the time of the Michael Gonzales case, the practice was to write a report on AFIS entries that resulted in a positive identification. A report was not written when a latent was entered into AFIS." Bothwell Affidavit ¶ 4. This practice had the effect of concealing potentially exculpatory information (non-matches) that the police were aware of.

Finally, based on the newly available test footwear impression, Mr. Marvin has been able to exclude Manuel Aguirre Jr. as the person who left the bloody footwear impression between the living room and the kitchen. *See* Footwear Examination Report of Matt Marvin, February 11, 2022 at 2 (Exhibit 70). This is significant, because if the victims' son did not leave the impression upon discovering the crime on the morning of April 22, it makes it far more likely that the person who left that impression was an assailant on the night of April 21. This new information further underscores the impact of the police's failure to adequately conduct an investigation of the homicide: had they collected footwear impressions from alternate suspects Perkins, Lugo, and Olivarez during their investigation, they may well have been able to identify the real perpetrators.

CLAIMS FOR RELIEF

I. Michael Gonzales Has Intellectual Disability, and Because of This, His Death Sentence Cannot Stand.

A. General principles underlying the assessment of Intellectual Disability

In *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), the Supreme Court held that "adjudications of intellectual disability should be 'informed by the views of medical experts[,]'" and this "instruction cannot sensibly be read to give the courts leave to diminish the force of the medical community's consensus." 137 S.Ct. at 1044 (quoting *Hall v. Florida*, 572 U.S. 701, 721 (2014)). As Dr. Jack Fletcher, Gonzales' expert on Intellectual Disability, explains in his affidavit, Affidavit of Dr. Jack M. Fletcher (Exhibit 71), the criteria set forth in two manuals—American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* (12th Ed. 2021) [AAIDD (2021)] and American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th Ed. 2013) [DSM-5]—"represent current medical and psychological diagnostic criteria routinely used in clinical practice and are very similar." Fletcher Affidavit at 2.

Intellectual Disability (known as Mental Retardation when *Atkins* was decided) [hereafter ID] is a disability that originates during the developmental

period of a person's life, before age 22, AAIDD (2021),[22] and is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. Fletcher Affidavit at 2, 3, 5.

Significantly subaverage intellectual functioning (often called "Prong 1" of the definition of ID) is defined as two standard deviations below the mean on an IQ test (i.e., an IQ score of approximately 70 or below), taking into account the standard error of measurement, which is generally plus or minus 5 points from the obtained score. *Id*. at 2-3. The convention within the field of Intellectual Disability, stated in both AAIDD (2021) and DSM-5, is that full-scale IQ scores within the standard error of measurement range of two deviations below the mean (a score of 75 or lower), establish Prong 1. *Id*.

To accurately assess an individual's intellectual functioning level, one must correct full scale IQ test scores to compensate for the obsolescence of a test's standardization scale. *Id*. at 7. As IQ tests age, the norms on which they are based become outdated, people's scores on the tests become higher, and the obtained IQ scores become artificially inflated. This phenomenon, known as the Flynn Effect,

[22] Dr. Fletcher notes that while DSM-5 specifies no "specific upper limit …, it is still understood a manifested in the developmental period." Fletcher Affidavit at 5.

requires a downward adjustment of an IQ score of .3 points per year between the date the test was initially normed, and the date the test was administered. *Id*.[23]

In addition, every testing instrument has a standard error of measurement, also referred to as a "confidence band," within which there is a 95% certainty that a person's true level of intellectual functioning falls. That confidence band is typically plus or minus five points from the score obtained on an IQ test and explains why AAIDD (2021) and DSM-5 place the cut point for intellectual disability five points above 70, at 75. *Id.*

The second prong of the definition of ID, significant limitations in adaptive behavior, requires limitations in at least one of three major domains of adaptive behavior. These are the **conceptual domain**, which includes language, reading and writing, money concepts, and self-direction; the **social domain**, which includes interpersonal relations, empathy, responsibility, self-esteem, gullibility (vulnerability to being tricked or manipulated), naivete, following rules, obeying laws, avoiding victimization, friendships, and social judgment; and the **practical domain**, which includes daily living activities (eating, mobility, toileting, dressing), instrumental activities of daily living (preparing meals, housekeeping,

[23] Dr. Fletcher has noted, "The scientific consensus about the need to correct for the Flynn Effect is strong and virtually uniform, leading to near-unanimous agreement that the Flynn Effect should be used in determining intellectual disability." *Id*. at 8.

transportation, taking medication, using the phone), occupational skills, and maintaining safe environments. Fletcher Affidavit at 12, 16, 17.

The third prong of the definition of ID is that the problems with intellectual development and adaptive behavior are manifested in the developmental period. *Id*. at 19.

B. The expert who has evaluated Gonzales for Intellectual Disability and how he conducted the evaluation.

Dr. Jack Fletcher oversaw assessing Gonzales for ID and made the diagnosis. His qualifications are outlined in his affidavit, at 1-2. Dr. Fletcher has held many leadership positions at the University of Houston, including serving as the Chair of the Department of Psychology. His expertise is summarized as follows:

> For the past 40 years, I have completed research on children and adults with neurodevelopmental disabilities, including congenital brain disorders, traumatic brain injury, intellectual disability, and learning and attention disorders. I have published four books and over 400 articles, usually involving children and adults with a variety of disabilities, addressing classification and definition of neurodevelopmental disabilities, cognitive and neurobiological correlates, assessment, and intervention. At the University of Houston, I taught courses on the assessment of children and adults, including developmental disabilities. These courses include content related to intelligence testing, adaptive behavior, neuropsychological assessments, and their application to intellectual and developmental disabilities. I operated a clinic for the assessment of children with disabilities in which I trained graduate students in assessment for many years.

> I routinely conducted assessments for intellectual and other disabilities in clinical settings, almost exclusively outside forensic settings.

Id. at 1-2.

To determine whether Gonzales has ID, Dr. Fletcher reviewed prior examinations of his intelligence (from 1988, 1995, and 2021). He interviewed Gonzales and conducted additional testing with him in 2021. He also reviewed ten recently obtained affidavits concerning Gonzales' adaptive behavior during the developmental period (and interviewed two of the people who provided affidavits), reviewed an affidavit from his half-sister from 2009, and reviewed reports of 1995 interviews with his wife, mother, half-sister, and aunt. Additionally, Dr. Fletcher reviewed Gonzales' prior mental health evaluations conducted in connection with his 1995 trial and the 2017 hearing on competency-related issues in federal court. *Id*. at 9-10.

C. The assessment of Gonzales for Intellectual Disability.

1. Prong 1: Intellectual Functioning.

The most recent evaluation of Gonzales' intellectual functioning was performed by Dr. Adriana Strutt in July 2021. Report of Dr. Adriana Strutt (Exhibit 87). Dr. Strutt administered the current edition of the Wechsler Intelligence Scale, the WAIS-IV. Affidavit of Dr. Fletcher at 10. The test "yielded a Full Scale IQ of 68, which is clearly in the range associated with intellectual disability." *Id*. Even though the WAIS-IV is 14 years old, Dr. Fletcher did not

correct this score for the Flynn Effect, because the effect cannot be determined until the next version of a test is published, and the WAIS-V has not yet been published. *Id*. The 95% confidence interval for this score is 64-72. *Id*. Dr. Strutt regarded "this evaluation as an accurate estimate of [Gonzales'] current level of functioning," because the four effort tests she administered all "indicated [he] was putting forth adequate effort during testing." *Id.*

In the 1995 testing by Dr. Cunningham, Gonzales obtained a Full Scale IQ score of 79 on the WAIS-R. *Id*. Since this version of the WAIS was 17 years old in 1995, Dr, Fletcher corrected for the Flynn Effect by adjusting the Full Scale score to 74, with a confidence interval of 69-79—which is also within "the confidence interval associated with an intellectual disability." *Id*.

The 1988 testing of Gonzales at North Texas State Hospital on the WISC-R yielded a Full Scale IQ score of 81. *Id*. at 11. Corrected for the Flynn Effect, the adjusted score is 76, and the confidence interval is 70-82. Dr. Fletcher noted that "[e]ven though the lower range of the 1988 WISC-R score [fails to] meet[] the [Prong 1] criteria, less credence should be given to this score because of the credentialing of the administrator." *Id*. at 12.[24]

[24] Dr. Fletcher's concern about the credentials of the administrator was this: "No details of the assessment were available and the test administrator was not adequately credentialed since she only had a bachelor's degree. No details of her supervision were provided, although the report was reviewed by a doctoral level clinical psychologist." *Id*. at 11.

Based on these tests, Dr. Fletcher concluded, "Mr. Gonzales meets Prong 1 of the intellectual disability criteria." *Id*.

2. Prong 2: Adaptive Behavior.

a. Conceptual Domain: language, reading and writing, money concepts, and self-direction.

Language: In the interview with Gonzales, Dr. Fletcher found that "Gonzales was able to communicate effectively. However, his vocabulary was simple and he did not use elaborate grammatical constructions, with his speech consisting of short declarative and sometimes agrammatic statements." *Id*. at 12. In "reports from multiple informants, there is clear documentation of an early delay in speech and indications that he received speech therapy in school." *Id*. at 13. "His mother reported to Dr. Cunningham that he had a speech delay with limited vocabulary and articulation problems…." *Id*. "Many informants noted that his speech was hard to understand and simple." *Id*. *See, e.g.*, Affidavit of Rosa Balderas ¶¶ 21, 22 (Exhibit 72) ("Michael wasn't one to talk much. He didn't really engage in conversation. I don't remember ever having a full-on conversation with him…. If Michael ever used more than a few words, it was hard to understand him because he always spoke real fast."); Affidavit of Rafael Rubalcado ¶ 15 (Exhibit 73) ("Michael mumbled a lot. His speech was not clear. I don't remember him even talking a lot. I never had a long conversation with him. I don't believe that he really had the ability to have a long conversation with me or anyone.");

Affidavit of Iris Lang ¶ 28 (Exhibit 74) ("Michael didn't do much talking and was not the kind of student who could express himself."); Affidavit of Alice Ramirez ¶ 12 (Exhibit 75) ("[Though I was two years younger] I had a larger vocabulary than Michael. There were times I would speak with Michael and he didn't know some of the words I would say. I would have to choose my words carefully so that I could explain something as if I was speaking to a 5-year-old."); *id*. ¶ 9 ("Michael mumbled when he spoke. He didn't stutter, but it took him a bit of time to get his words out.").

Gonzales' aunt Elizabeth Reyes, who took care of him frequently when he was 3-10 years old, provided stark examples of problems with his speech:

> Michael had a speech problem when he was little. Michael could not pronounce some letters, like the 's' sound. He'd call me Aunt 'Litha' instead of Lisa….
>
> Michael could not speak well. As an example, I remember that he would mix up the word 'gate' for 'door.' He would say 'I shut the gate on the refrigerator.' Another one was 'I shut the back gate' when he meant the back door.

Affidavit of Elizabeth Reyes ¶¶ 8, 28 (Exhibit 76).

Reading: Gonzales told Dr. Fletcher that "[h]e always had trouble with reading and would read the material several times, although he now likes to read when he can concentrate." Affidavit of Dr. Fletcher at 12. *See also* Iris Lang Aff. ¶ 17 ("Michael could not read very well. His reading was between average and below average. In the 5th grade, I consider below average to be at the 2nd grade

level."); Rosa Balderas Aff. ¶ 17 ("[His mother] Pam would say that Michael had problems reading. She would try to get him to read with her, but she could never get him to read out loud. According to Pam, he didn't like reading out loud. Whenever I went over, Michael would usually be watching TV or playing video games..... He was not reading books or anything like that. I never heard him read out loud."). Elizabeth Reyes noticed that he was significantly behind in reading proficiency:

> I remember reading with Michael after school. He had trouble grasping the concepts. The school would send home 'readers' which would have 3-word phrases and some 'readers' were more advanced with full sentences. [My daughter] Peaches [close in age to Michael] read 16 'readers' one year and Michael only read 3. Peaches would offer to read it with him. I remember this because he was so far behind.

Ex. 76 (Elizabeth Reyes Aff.) ¶ 12.

Writing: Gonzales told Dr. Fletcher he was "not good at … writing." Affidavit of Dr. Fletcher at 12. He struggles to write but has found a way to do so:

> Even now, he writes by copying material that he wants to express … from a magazine or book and adapting it to his needs. He uses a dictionary to check spelling. He learned this strategy since he was placed in his current setting in 1995 and uses it to write letters.

Id. Dr. Fletcher found Gonzales' "[w]riting samples from 1995-2009 were consistent with [my] observations of his speech. The sentence structure reflected short declarative sentences, often using the same phrase across letters. There were

many grammatical errors, misspelled words, and some sentences did not make sense." *Id*.

Money Concepts: Gonzales told Dr. Fletcher "he was not good at math and struggled to manage money as a child. He never had a bank account, but he says he has learned money management skills in prison." *Id*. at 13. His 5th grade teacher Iris Lang reported, "In the 5th grade, children should know their times tables. I don't think Michael knew his times tables." Ex. 74 (Iris Lang Aff.) ¶ 20. Rosa Balderas' observations confirmed how poor his math skills were:

> As for Math, Michael could do okay, as long as he could use his fingers. If it was addition or subtraction from 1-10, he was okay. Anything more than that, I don't think he could comprehend.
>
> One time, Pam called me over because Michael needed help with Math, and she didn't know how to help him. It was fractions. Michael was just sitting at the table saying, 'Mom, I don't understand this.' I sat down with him, and I was writing in his spiral notebook, showing him what ¼ meant, and what ½ meant, but he just wasn't getting it. I was trying for about five minutes before he got really frustrated and closed the book. He just said he wasn't going to do it. That's how he was; he would just kind of shut down if he didn't get something. He was maybe about 13 years old at that time.

Rosa Balderas Aff. ¶¶ 18, 19.

Gonzales' difficulties in math underpinned his difficulties in managing money. His cousin, Ruby Rubalcado, is about the same age as Gonzales. She recounts in her affidavit,

> I don't think Michael knew how to count money…. Pim would sometimes reach in there [a small purse] and pull out some change

> and give it to Michael so we could go buy candy from the comer store. I used to buy Reese's Pieces peanut butter cups w[ith] my change. They cost five cents back then, so I would set aside my nickels and count up to maybe one dollar.
>
> Michael would grab all the change and just put it on the counter for someone else to count. Michael would just grab whatever he wanted and put it on the counter next to his change. He never knew if he had enough or not. Sometimes, the clerk would tell him he didn't have enough, and he would have to put it back. If he did have enough, the clerk would count his money and then pass back the change to him across the counter. He never counted his change, just pocketed it and left.

Affidavit of Raquel Ruby Rubalcado ¶¶ 21, 22 (Exhibit 77). Gonzales' younger neighbor and lifelong friend Adonica Nunez, had similar experiences:

> Michael didn't know how to manage his money for anything. Every time we went to a store, Michael didn't know how much he could buy with the amount of money he had. For example, we would go to 7-11 and Michael would grab a bag of chips, nachos, candy, and a drink. He didn't know whether 5 dollars would cover it and would hand it to the cashier. The cashier would always tell him he didn't have enough. I always covered the rest. There were a couple of times I counted change for him, or the cashier would do it for him. He wouldn't count change when he got it back.

Affidavit of Adonica Nunez ¶ 14 (Exhibit 78).

Gonzales' impairments in math and managing money also gave rise to difficulties in telling time on an analog clock. Gonzales told Dr. Fletcher "he could not tell time on an analog clock and even now, uses a stop watch with a digital display." Affidavit of Dr. Fletcher at 13. In his interviews with Adonica Nunez, Dr. Fletcher found evidence confirming this: "Ms. Nunez reported that he gradually learned to keep up with time based on her school schedule and a digital clock. He

had no ability to tell time on an analog clock." *Id*. at 14. Dr. Fletcher found further that Gonzales' "report of difficulty telling time was corroborated by Dr. Strutt. She found that he could draw a clock but could not correctly place the hands to tell time." *Id*.

Self-Direction: Dr. Fletcher noted that "[s]everal respondents described examples of poor judgment and problem-solving skills." *Id.* The examples he gave are illustrative:

> He was very dependent on his mother to do things for him and showed little independence. He had to be told what to do and even then, needed multiple repetitions to learn. Ms. Nunez described an incident when he made a swing for her when they were young by tying her up by her wrists with string and rope. She reported that he mixed toxic chemicals together when he was older. When he was angry, he would lose control or express himself with poor bowel control, such as the time he was not selected to play on a baseball team and responded by defecating on first base (Ruby Rubalcado).[25] Rafael Rubalcado said he always needed outside help to manage daily activities.[26] Rosa Balderas reported that he 'didn't think' and 'didn't understand consequences.'[27]

Id. Rafael Rubalcado had the same observation as Rosa Balderas: "Michael could be like a bull in a china shop. For example, he ate his food like it was the last thing he'd eat, just rushing through to eat as much as he could…. [He] did other things this way, kind of without thinking. If he wanted a toy and it meant climbing over

[25] *See* Affidavit of Ruby Rubalcado ¶ 8.

[26] *See* Affidavit of Rafael Rubalcado ¶ 25.

[27] *See* Affidavit of Rosa Balderas ¶ 30.

the kitchen table to get it, he'd do that. He was going to get whatever he needed right at that moment, regardless of how he got there." Rafael Rubalcado Aff. ¶¶ 13, 14.

Dr. Fletcher also noted that Gonzales "indicated that he had never had goals or plans in his life. He would have liked to learn to do body shop work, but it was hard for him to follow all the steps." Affidavit of Dr. Fletcher at 13. And "[w]hen asked what he would do if ever released from prison, Mr. Gonzales expressed feelings of hopelessness, indicating that he had no goals and plans and nobody to help since his mother was deceased." *Id*. *See also* Rosa Balderas Aff. ¶ 35 ("Michael never talked about his future: where he was going to work, where he was going to live with Martha and Unica, what he wanted that to look like.").

Academic Achievement Testing: Dr. Fletcher explained that "[f]ormal tests of academic achievement can be used to assess the conceptual domain." *Id*. at 14. However, he cautioned, "These tests are measures of attainment and should not be confused with IQ tests. Achievement tests are moderately correlated with IQ tests, but do not measure intelligence." *Id*. "This is especially true at the lower end of intelligence, where it is common to find individuals with achievement scores that are higher than levels that would be expected based on their IQ scores." *Id*. He explains why this is the case:

> This is partly due to a statistical phenomenon known as 'regression to the mean,' in which scores that are correlated with a lower score (in

> this case, IQ) move towards the average of the scoring distribution (in this case, achievement). It is also because IQ scores do not establish the upper limit on how well a person can learn basic academic skills in school or another structured environment.

Id. Accordingly, "[t]here is no expectation that scores on the two types of tests be higher or lower than one another." *Id*.

With these principle in mind, Dr. Fletcher reviewed the various administrations of the Wide Range Achievement Test (WRAT) with Gonzales over the years. *Id*. at 15. He concluded:

> Different administrations of the WRAT show similar scores in reading on the recent assessments by Fletcher and Strutt. Word reading subtest scores range from 72 (Fletcher, 2021) to 70 (Strutt, 2021) to 87 (Cunningham, 1995) to 91 (Vernon, 1988). There is also some variation in Spelling and Arithmetic tests, but not as much as in reading. All of these scores are at a level that would be considered impaired despite representing different versions of the test with different items and normative samples. To reiterate, there is no expectation that the scores align with IQ testing, and it is not surprising that they tend to be higher because of regression to the mean.

Id. at 15-16.

Conclusions Concerning the Conceptual Domain: Dr. Fletcher concluded there is "clear evidence for significantly subaverage adaptive behavior in the Conceptual Domain." *Id*. at 16. He summarized this evidence:

> In both the self-report and the reports of others who knew him during the developmental period, it is apparent that Mr. Gonzales had a language delay, poor language and communication skills, and problems with reading, writing and math in terms of school performance and formal testing. He was retained twice. The school

> wanted to evaluate him for special education. Money and time management skills were virtually nonexistent. There were many examples of lack of self-direction, problem solving skills, and poor judgment.

Id.

b. Social Domain: interpersonal relations, empathy, responsibility, self-esteem, gullibility, naivete, follows rules, obeys laws, avoids victimization, friendships, and social judgment.

Interpersonal Relations and Friendships: Gonzales reported to Dr. Fletcher "he was a 'loner' growing up. He indicated that he had no friends and that no one liked him. Other children made fun of him and called him a 'fucking retard.'" *Id*. These behaviors were confirmed by others. *See* Iris Lang Aff. ¶ 29 ("Michael was kind of a loner. He was always on his own. He just didn't associate with other kids like others do."); Affidavit of Raquel Gonzales ¶ 16 (Exhibit 79)[28] ("The other children never liked Michael. They never paid attention to him…. They didn't like him because of the way [he] behaved, or the way he talked, or how he meddled. I think he antagonized them."); Rosa Balderas Aff. ¶¶ 6, 7 ("I remember Michael … would always be wandering around outside, walking up and down the street by himself. He was kind of a loner…. Other times, I might see Michael sitting by himself on his back porch…. There were a lot of other kids in

[28] Ms. Gonzales' provided her statement in Spanish. An affidavit translation by investigator Alma Lagarda is attached to the affidavit and used here.

the neighborhood, but he's the only one I would see like that, by himself, walking alone with his head down."); Raphael Rubalcaba Aff. ¶ 11 ("Michael was kind of a loner even within our family. Our group of us cousins … could be sitting around the kitchen table eating, and Michael would be off in his own little world. He didn't seem to belong."); Ruby Rubalcado Aff. ¶ 7 ("[N]o one wanted to play with Michael, I guess because he was just different. He was the kid that no one wanted to be around, kind of like the last kid to be picked for games.").

Social Judgment and Victimization: Gonzales often had no appreciation of how others saw his behavior, and his behavior often led to victimization. Many people reported he was called names and bullied. *See, e.g.,* Alice Ramirez Aff. ¶ 10 ("At the Alternative Center, people would call him names. Michael wouldn't do anything."); Elizabeth Reyes Aff. ¶ 24 ("Everyone, the kids and even the adults, used to make fun of Michael. They'd call him a 'tonto' (stupid) or 'retrazado' (retarded) because he would just sit and grin…. Even our mother would call him a 'sonso' (moron). He was the butt of everyone's jokes.").

Gonzales' lack of appreciation of how others perceived his behavior led him to repeat behaviors that others found annoying, disgusting, or aggravating. Ruby Rubalcado remembered this vividly:

> Michael would do stupid things. To him, farting was funny. He would fart in front of everyone and just laugh. We all thought that was gross, but then he would do it again because of our reaction. We would get

> away from him, which would make him mad, which would make him do it again out of anger.
>
> These are the kinds of things Michael did that caused other kids to not want to be around him…. Not one person wanted to be around Michael. I used to be embarrassed to say that I was cousins with Michael….

Ruby Rubalcado Aff. ¶¶ 13, 14. Elizabeth Reyes recounted a related experience her brother had with Gonzales:

> When Michael was around 12 years old or maybe a little younger, Pim sent him to California to live with my brother, Joe…. Joe called Pim and told her not to ever send him to his house again. He said Michael was a retard, he was putting boogers and feces on the walls. He'd fart anywhere and wipe his butt with towels and shower curtains.

Elizabeth Reyes Aff. ¶ 23.

The degree to which Gonzales failed to understand others' reactions was captured poignantly by Alice Ramirez:

> Michael didn't realize when people were making fun of him. For example, Michael would say his dad was Al Capone, that he could do better than his dad, that his dad was a gangster. In his mind, he believed it.

Alice Ramirez Aff. ¶ 17.

Self-Esteem: Gonzales always longed for acceptance and others to think well of him. Alice Ramirez recalls this vividly:

> Michael was used because he had the party house. Most of the people that went over there saw him more of a loser. Once the beer ran out, the older people would leave. Michael really wanted to be accepted. It seemed the younger kids liked to stick around with Michael. They looked up to him and Michael seemed to really like that because he wasn't getting that from the rest of the people that he hung out with.

Id. ¶ 14. And again, from Ramirez:

> Even as big as he was, Michael was nothing. He was more mouth than hands. He was just a follower. In the gang he was part of, Michael was not the leader, just the mouth. He wanted people to think he was the leader, but he was just a soldier.

Id. ¶ 18. Adonica Nunez saw Gonzales' often saying he was related to Al Capone as an example of the need to gain self-esteem:

> He'd say he's going to make it big time like Al Capone…. [T]hinking back, I think he was just saying that because he wanted to be somebody. He was trying to impress everyone and feel respected. I think he was trying to feel important.

Adonica Nunez Aff. ¶ 32.

Gullibility: Dr. Fletcher reported that when he asked Gonzales questions about gullibility and naivete, "Mr. Gonzales reported that people tricked him and he was often blamed for things he did not do. He described himself as being used." Affidavit of Dr. Fletcher at 16. Adonica Nunez confirmed this in her interview with Dr. Fletcher. She told him that the "men in the [gang he was in] were not really his friends because they would get him to do things he shouldn't and take the blame for things that they did." *Id*. at 17. Alice Ramirez put it pointedly:

> Michael was an easy target for people to put the blame on because he wasn't a snitch. He was the type of person used as a decoy to make the noise, distract, he was always making a scene. While he did that, the guys would go and get into trouble while Michael took the blame. He did this to feel accepted and important.

Alice Ramirez Aff. ¶ 20. For this reason, "Michael's closest friends were girls. Guys were usually using him." *Id*. ¶ 21.

Follows Rules: In Elizabeth Reyes' interview with Dr. Fletcher, Ms. Reyes graphically described Gonzales not understanding simple rules as a child: "When he was in the 3-8 year age range, [he] didn't seem to know how to play with other children. He often just stood watching them, with his jaw open and drooling." Affidavit of Dr. Fletcher at 16. Reyes also "related a story of other kids playing with a beach ball, with Mr. Gonzales experiencing difficulty because hand-eye coordination was poor and he didn't understand a game involving just tossing around the ball." *Id*. Rafael Rubalcaba recounted a pattern of difficulty following rules:

> Even though Michael was told again and again not to do certain things, he still did them anyway…. If Pim told him to sit down, he didn't sit. If she told him to eat, he wouldn't eat. He would play with his food instead….
>
> Michael might do what was expected of him at that moment, but then he would do the same thing the next time. He would say 'okay' one day, but the next time, he'd be getting up from the table again, or playing with his food again, or bothering Michelle again. Or he would be going to the bathroom in public again. He might obey initially just to be left alone, and just because he knew that's what his mom needed to hear, but he wouldn't make the connection that this is what was expected of him all the time.

Rafael Rubalcaba Aff. ¶¶ 18, 21.

Conclusions Concerning the Social Domain: Dr. Fletcher concluded that the evidence "show[s] significantly subaverage adaptive behavior in the Social Domain." *Id*. at 17. He summarizes this evidence:

> Throughout these reports and records, there are numerous examples of difficulties following rules and directions at school, not doing what was expected, poor social judgment, and lack of awareness of how his behavior was seen by other people. In addition, there were severe deficits in interpersonal relations throughout the developmental period. There is evidence of gullibility and naivete in dealing with other people. He had few friends.

Id.

c. Practical Domain: daily living activities; instrumental activities of daily living; occupational skills; maintaining safe environments.

Daily Living Activities: Dr. Fletcher documented many problems Gonzales had in daily living activities "beginning at a young age." Affidavit of Dr. Fletcher at 18. Based on the account of Elizabeth Reyes, who cared for Michael from ages 3 to 10, Fletcher reports numerous problems with toileting:

- "His toileting was delayed, and he still had bouts of encopresis in early elementary school, the latter corroborated by several respondents."
- "School records indicate problems with 'bladder control,' as reported by his mother, on school enrollment cards as late as the 8th and 10th grades."
- "Ms. Reyes indicated that he was not toilet trained until he started kindergarten but learned it quickly when he was formally taught. Her

> other children were trained by 18 months. He was never embarrassed by dirty diapers or accidents."

Affidavit of Dr. Fletcher at 18.

In addition, Dr. Fletcher notes Gonzales' issues with dressing:

> He had difficulties as a young child dressing himself, especially zippers and buttons, the latter until he was 10 years old. He had trouble learning to tie his shoes. Eventually he used pullup clothes and shoes with Velcro. Michelle Payne described how he would take a bottle to bed even at the age of 6 years and that it took a long time to get him off the bottle.

Id.

Even when he was older, Gonzales "could take a bath, but confused shampoo and conditioner, resorting to just using soap for his hair. He would put deodorant all over himself and not just in pertinent places on his body." *Id*. (Dr. Fletcher's interview with Adonica Nunez).

Other hygiene issues were described by Ruby Rubalcado: "Whenever Michael talked, he kind of spit a lot. When he laughed, he laughed funny and always had saliva around his mouth. He was kind of slobbering. I remember his face being kind of dirty, like he wouldn't clean his boogers." Ruby Rubalcado Aff. ¶ 10. Ruby's mother Raquel Gonzales recounted an incident in a store where Michael urinated and defecated:

> One time, Pim and I were out shopping when Michael went to the bathroom in a store. He was already older, he might have been about 4 or *5* years old. First, he urinated…. Pim and I were walking down one

> of the aisles, and we felt water coming on to us from the other aisle. My children came running, saying 'Michael's going pee!' He had pulled down his pants right there and with his penis pointing up, he peed over to our side.
>
> He left again, and we lost him. Then later we were in another part of the store and we could smell feces. And here my kids come again. Just like that without any shame, Michael had pulled down his pants and he was going poo, and he made a lot.

Raquel Gonzales Aff. ¶ 10, 11. *See also* Rafael Rubalcado Aff. ¶ 17 ("I remember a time when we were at Michael's house, and Michael just opened the back door, walked out, and peed off the back porch like it was nothing. He acted like that was normal…. Michael was maybe 7 or 8 years old….").

Instrumental Activities of Daily Living: Adonica Nunez reports a multitude of problems with these kinds of activities of daily living:

- Cooking: She cooked for Michael regularly from the time she was 13 and Michael was 19 years old. "I don't think he knew how to cook anything." For example, "[H]e didn't know how to cook eggs. He didn't know he needed to use oil to cook eggs. I would have to tell him 'You have to put oil or butter in the pan, then you crack the egg and wait for it to cook.' Michael wouldn't know when to flip the eggs and they would burn." Adonica Nunez Affidavit ¶ 10. He could not peel potatoes without cutting "a lot of the potato with the skin." *Id*.
- Washing dishes: He did not know to use hot water when washing greasy dishes. *Id*. ¶ 15.

- Household cleaning: "He once tried to clean the toilet using bleach and Comet.… Michael had poured Comet powder on the lid of the toilet instead of inside the toilet. Michael tried to wipe the toilet with bleach water, but he didn't know he had to rinse the towel and then clean it again. So, he just wiped the toilet lid but left it [with] clumps of Comet…. Michael had also poured a gallon of bleach in the toilet and the smell was so strong that we had to go outside." *Id*. ¶ 16. When trying to vacuum the floor, "[he] thought he was vacuuming but he didn't vacuum anything because he didn't know how to put the handle down to push the vacuum back and forth…. He had been shown how to do it before, I remember Pam teaching him. Michael was about 17 years old at the time." *Id*. ¶ 18.

- Baby care: Gonzales "really tried hard" to learn how to put the diaper on his baby daughter Unica, "but he couldn't seem to get things right." *Id*. at 21. Also, "When Michael would prepare a bottle for Unica, he would use a spoon instead of the scoop in the formula container and would not use the right amount of formula powder to water. He didn't seem to notice that the consistency was wrong and the milk was too watery." *Id*. at 22.

- Using a mop: When Gonzales tried to help his mom mop the floor at the Arby's Restaurant she managed, he "didn't know how to … [use the] wringer to help squeeze out extra water…." *Id*. ¶ 28. "He tried it but didn't get it right and the mop would still be real wet…. He also kept mopping with dirty water. We told

him you have to mop in sections, mop back and forth and empty the dirty water, get clean water and do it again. He wouldn't do it." *Id*.

Occupational Skills: In his interview with Dr. Fletcher, "Mr. Gonzales reported that he had not worked much in the developmental period." Affidavit of Dr. Fletcher at 17. According to Adonica Nunez, "Michael didn't work. He hustled once which lasted a month or two, but it stopped because he started using the drugs." Adonica Nunez Aff. ¶ 26. Rosa Balderas recalled that Gonzales used to hang out at a local body shop, and though "I never saw [him] work on any cars, I think he wanted to learn." Rosa Balderas Aff. ¶ 33. Because of an incident with Gonzales and her husband, she saw he could not learn these skills. When a friend's car needed to have the grill repaired, Ms. Balderas' husband, who was a mechanic, "tr[ied] to show Michael how to do it, but he ended up just [doing] the whole thing himself. My husband told me that Michael seemed interested in learning but that he wasn't really catching on, so he just did it himself." *Id*. at 34.

Conclusions Concerning the Practical Domain: Dr. Fletcher concluded that the evidence "show[s] a significantly subaverage development of adaptive behavior in the Practical Domain." Affidavit of Dr. Fletcher at 19. He summarized this evidence:

> Mr. Gonzales showed problems with activities of daily living from early in his development, including toileting, self-care skills, and hygiene. Even when he was older, he did not develop cooking or cleaning skills. He cannot attend to his own medical needs and shows

> poor judgment in the management of his diabetes. He did not maintain safe environments and engaged in high risk, unsafe behavior. His occupational history is virtually nonexistent. These problems are not just a manifestation of oppositionality. Even when motivated and instructed, Mr. Gonzales had difficulty mastering activities of daily living.

Id.

d. Dr. Fletcher's conclusion concerning adaptive behavior.

Dr. Fletcher concluded that "Mr. Gonzales meets Prong 2 of the criteria for an intellectual disability." *Id*. at 19. His summary of the findings compelling this conclusion is instructive:

> Mr. Gonzales shows clear evidence of adaptive behavior deficits in the Conceptual, Social, and Practical Domains. These problems were apparent from early in his development and were either delayed or persisted despite efforts to teach him different adaptive behaviors related to independent living. Mr. Gonzales has never been able to live independently without the support of others. He had and continues to show significant difficulties with language, reading and writing, and math. He had significant problems independently managing money. Socially, he had few friends and showed major deficits in socialization. It is important to recognize that these difficulties were apparent from a very young age and do not simply reflect oppositional or rule-breaking behavior or laziness, but a genuine inability to learn independent living skills described by Elizabeth Reyes and Adonica Nunez. Although Mr. Gonzales' home environment was certainly difficult, other children in the family experienced a similar environment and did not develop adaptive behavior deficits.

Id.

3. Prong 3: Manifestation of Limitations During the Developmental Period.

Dr. Fletcher concluded that the evidence also satisfies Prong 3. *Id*. Intellectual limitations "were manifested by early language difficulties, poor school performance, and poor development of reading, math, and writing skills." *Id*. Adaptive behavior limitations "were apparent early in his development with delayed toileting, difficulty learning basic self-care skills, problems with money and time management, poor communication abilities, poor interpersonal skills, and problems with numerous activities of daily living." *Id*. Accordingly, "the problems with intellectual development and adaptive behavior were manifested in the developmental period." *Id*.

In reaching this conclusion, Dr. Fletcher considered whether "[t]he fact that he was not previously identified with an intellectual disability" was probative. He concluded that it was not, especially in Gonzales' case:

> As his teacher noted, had he been tested for special education, he may have qualified. However, it is well-known that schools are reluctant to identify and label students with an intellectual disability (MacMillan & Siperstein, 2002). This was clearly apparent when his mother denied permission for a special education evaluation in Grade 1.

Id.

D. Gonzales has Intellectual Disability.

Dr. Fletcher concluded, based on the foregoing evidence, that Gonzales has Intellectual Disability: "Mr. Gonzales is an individual with significantly

subaverage intellectual functioning. He has major deficits in the conceptual, social, and practical domains of adaptive behavior. These deficits are apparent from an early age and during the developmental period. Mr. Gonzales meets contemporary medical, scientific, and psychological criteria for a mild intellectual disability as laid out in the DSM-5 and AAIDD criteria." *Id*. at 21.

In *Moore I*, the Supreme Court held that "adjudications of intellectual disability should be 'informed by the views of medical experts.'" 137 S. Ct. at 1044 (quoting *Hall v. Florida*, 572 U.S. 701, 721 (2014)). Moreover, this "instruction cannot sensibly be read to give the courts leave to diminish the force of the medical community's consensus." *Id.* Dr. Fletcher has utilized the diagnostic criteria around which there is a consensus in the medical and psychological community. Under the two *Moore* decisions, the adjudication of Gonzales' claim of Intellectual Disability "should be 'informed by the views of'" Dr. Fletcher.

1. Prong 1: The determination that Gonzales has significant limitations in intellectual functioning is in keeping with the medical principles that guide such a determination.

Gonzales has had three IQ tests that meet the standards for diagnosis of intellectual functioning, in 2021, 1995, and 1988. The full-scale IQ scores were 68, 79, and 81, respectively. The 1995 and 1988 scores must be corrected for the Flynn Effect. The scores are 74 (in 1995) and 76 (in 1988), with corrections. Dr. Fletcher explained why the scores must be corrected for the Flynn Effect: "Current medical,

psychological, and scientific standards clearly support correction of IQ test scores for outdated norms (henceforth the Flynn Effect; Flynn 1987) in the determination of intellectual disability." Fletcher Affidavit at 8. *See also* AAIDD (2021) at 42 ("in cases in which an IQ test with aged norms is used as part of the diagnosis of ID, a correction of the full-scale IQ score of 0.3 points per year since the test e-norms were collected is warranted") (citing, *inter alia*, Fletcher at al. 2010—a study led by Dr. Fletcher and referenced in his affidavit, at 8).

Applying the standard error of measurement to each of these scores, the confidence interval for each score is **64-72** (in 2021), **69-79** (in 1995), and **70-82** (in 1988). Fletcher Affidavit at 10-11.

Specifically, with respect to Prong 1, the Supreme Court held in *Moore I*, in keeping with medical consensus, "[W]e require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." 137 S. Ct. at 1050. On remand from the Supreme Court in *Moore I*, the CCA implemented this as follows, where Mr. Moore's full-scale IQ scores on reliable tests were 74 and 78:

> The Court admonished that, if any part of the range of scores yielded by the standard error of measurement was 70 or below, then an examination of adaptive functioning was required to resolve the issue of intellectual disability. Because the five-point standard error of measurement applicable to the test with a score of 74 yielded a range of 69–79, an examination of adaptive functioning was required.

Ex parte Moore, 548 S.W.3d 552, 559 (Tex. Crim. App. 2018), *rev'd on Prong 2 grounds in Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*).

A "part of the range of scores yielded by the standard error of measurement," for all of Gonzales' prior full-scale IQ scores was "70 or below." *Id*. Accordingly, under *Moore I* and the unaffected reasoning of the CCA's 2018 decision on remand, Gonzales has established that he has significant limitations in intellectual functioning. The court must now consider Prongs 2 and 3.

2. Prong 2: The determination that Gonzales has significant limitations in adaptive behavior is in keeping with the medical principles that guide such a determination.

The assessment of Prong 2 must focus on limitations, not strengths. AAIDD provides clear guidance about this: To avoid "making an incorrect diagnosis of … a false negative (the diagnosis of ID is not made when the person does in fact have ID)[,] [t]he following strategies can assist in avoiding these potential errors: …. Recognizing that all people with ID have strengths, but that the diagnosis of ID focuses on their significant limitations." AAIDD (2021) at 39-40.

In *Moore I*, the Supreme Court explained that the Court of Criminal Appeals had failed to follow this principle:

> In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore's perceived adaptive strengths. The CCA recited the strengths it perceived, among them, Moore lived on the streets, mowed lawns, and played pool for money. [Citation omitted.] Moore's adaptive strengths, in the CCA's view, constituted evidence adequate to overcome the considerable objective evidence of

> Moore's adaptive deficits…. But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. [Citations omitted.]

137 S. Ct. at 1050 (emphasis in original). In the remand decision, the CCA mistakenly continued to consider Moore's strengths in examining Prong 2. In *Moore II*, the Supreme Court found that to be error. *Moore v. Texas*, 139 S. Ct. 666, 670 (2019) (*Moore II*) ("the court of appeals again relied less upon the adaptive deficits to which the trial court had referred than upon Moore's apparent adaptive strengths").

In assessing adaptive behavior, AAIDD (2021), calls for the use of a standardized instrument, scored like an IQ test, in the assessment of adaptive behavior. AAIDD (2021) at 31. AAIDD (2021) explains that the appropriate person with whom a standardized instrument is to be used must "know the person being assessed very well, and have had the opportunity to observe the individual on a daily or weekly basis in a variety of community settings and over an extended period of time." *Id*. at 38. If there is no person "able or available to provide comprehensive information needed to complete a standardized adaptive behavior scale,"

> an alternative assessment should be used and proceed with caution and adaptive behavior information should be obtained from:
>
> (a) interviewing multiple respondents (e.g., family members, teachers, neighbors, job supervisors, etc.) who may have more discrete but overlapping information about the person's typical performance across all three domains of adaptive behavior (conceptual, social, and

> practical); and (b) reviewing thoroughly all available records, including educational, social, and medical, that might contain collateral information regarding the person's adaptive behavior.

Id. at 38-39.[29]

By the time Dr. Fletcher was asked to assess Gonzales, the only person who could have served as a respondent for a standardized adaptive behavior scale, Gonzales' mother, was deceased.[30] There were no other respondents who met the criteria for completing a standardized adaptive behavior scale. Dr. Fletcher had no alternative but to utilize Gonzales' records and the affidavits provided by people who had known Gonzales well during his developmental years—relatives, teachers, and longtime friends. He selected the two most knowledgeable people

---

[29]Dr. Fletcher addressed this as well in his affidavit:

> When possible, formal assessments should be completed through administration of rating scales and semi-structured interviews with reliable caregivers, such as the Adaptive Behavior Assessment System {ABAS), the Vineland Adaptive Behavior Scales, and the AAIDD's Diagnostic Adaptive Behavior Scales {Olley, 2015)….
>
> In many instances, however, it is not possible to conduct retrospective assessments using formal instruments because of sociocultural factors where the semi-structured interview does not make sense to the respondent, a lack of appropriate norms, or the absence of appropriate reporters (AAIDD, 2010, pp. 41-42).

Id. at 4-5. In such instances, "The assessment of adaptive behavior involves the compilation of a variety of sources of information focused on reliable informants who had a position of responsibility or strong knowledge of the persons functioning during the developmental period (e.g., caregivers, family members, close friends, and teachers)." *Id*. at 5.

[30]Ms. Epigmenia Gonzales died in 2004.

who provided affidavits, his aunt Elizabeth Reyes, and his lifelong friend Adonica Nunez, to interview by telephone.

In assessing Gonzales' adaptive behavior, Dr. Fletcher did not utilize the "*Briseno* factors" to make his assessment. *Moore I* and *II*, of course, prohibited the use of these factors, because they "had no grounding in prevailing medical practice, and because they invited 'lay perceptions of intellectual disability' and 'lay stereotypes' to guide assessment of intellectual disability. *Moore I*, 137 S. Ct., at 1051. Emphasizing the *Briseno* factors over clinical factors, we said, 'creat[es] an unacceptable risk that persons with intellectual disability will be executed.'" *Moore II*, 139 S. Ct. at 670 (quoting *Moore I*, 137 S. Ct. at 1051). Dr. Fletcher knew what the Supreme Court had held in *Moore*, but he had a clinical basis not to employ them:

> The use of the Texas Briseno factors is not appropriate in an adaptive behavior assessment….
>
> These factors extend well beyond the domain of adaptive behavior assessment. They lead to consideration of strengths in adaptive behavior, co-occurring disorders, criminal behavior, and prison behavior as reasons to reject the presence of intellectual disability. As such, they are not aligned with contemporary medical and psychological criteria and extend the requirements for diagnosis to unfair levels not used in clinical settings.

Fletcher Affidavit at 4, 5.

Dr. Fletcher's determination that the evidence of Gonzales' adaptive behavior met the diagnostic principles for Intellectual Disability is, accordingly, in complete harmony with established clinical practice.

In *Petetan v. State*, the CCA adopted an additional requirement that "there must be a showing that adaptive deficits are related to subaverage intellectual functioning to satisfy the *Atkins* exception to the imposition of the death penalty." 622 S.W.3d 321, 332 (Tex. Crim. App. 2021). The CCA stated that the relatedness standard was required under the then-current diagnostic criteria found in the APA's DSM-5, but the AAIDD had omitted such a requirement. *Id.* at 331 & n.59. The Court elected to follow the DSM-5's approach.

In September 2021, the American Psychiatric Association announced revisions to the text of the DSM-5 which removed the relatedness language. *See* American Psychiatric Association, *Text Updates, Intellectual Developmental Disorder (Intellectual Disability)*, September 2021, available at https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/IDD-Text-Update.pdf (Exhibit 81). The APA removed this language because the relatedness phrase "appears to inadvertently change the diagnostic criteria for Intellectual Disability to add a fourth criterion." *Id.*

Petetan recognized that the Court's "analysis must be informed by the current medical diagnostic framework for assessing intellectual disability." 622

S.W.3d at 357 (citing *Hall*, 572 U.S. at 721; *Moore I*, 137 S. Ct. at 1048). Because neither the current DSM-5 nor the current AAIDD Manual uses the relatedness requirement, the medical diagnostic basis for *Petetan*'s holding has been removed and it is no longer appropriate to impose this requirement to satisfy *Atkins*. *See id.*

Nevertheless, Dr. Fletcher's findings and conclusions show that Gonzales' adaptive deficits are "associated with" his intellectual functioning. In a section recounting co-morbidities, Dr. Fletcher addresses several "cognitive and psychiatric difficulties" that coincide with Gonzales' intellectual disability. Affidavit of Dr. Fletcher at 20. Dr. Fletcher recognized that Gonzales also has a communication disorder and poor academic skills. But these problems could only "affect narrow aspects of adaptive functions and are not associated with the broad and pervasive adaptive function impairments identified for Mr. Gonzales." *Id.* By implication, Gonzales' significant limitations in intellectual functioning (Prong 1 deficits), *are* plainly "associated with the broad and pervasive adaptive function impairments identified for Mr. Gonzales." *Id*.

3. Prong 3: The determination that Gonzales' limitations in intellectual functioning and adaptive behavior manifested during the developmental period is in keeping with the medical principles that guide such a determination.

Dr. Fletcher's determination that Gonzales' intellectual limitations and adaptive behavior deficits were apparent during the developmental period was supported by all the available evidence. Nothing suggests that these limitations

occurred outside of the developmental period, because he was still in that period of his life when he was arrested for the murders of the Aguirres at the age of 20.

E. Gonzales' death sentence cannot stand.

As these facts show unequivocally, Michael Gonzales has Intellectual Disability. Under the Eighth Amendment, as originally held in *Atkins v. Virginia*, 536 U.S. 304 (2002), and as later clarified in *Moore I*, 137 S. Ct. 1039 (2017), and *Moore II*, 139 S. Ct. 666, 668-69, people with Intellectual Disability are not eligible for the death penalty. Accordingly, Gonzales' death sentence must be vacated and his death "reform[ed] … to a sentence of life imprisonment." *Ex parte Moore*, 587 S.W.3d 787, 789 (Tex. Crim. App. 2019).

F. Gonzales' *Atkins* claim should be authorized under Texas Code of Criminal Procedure Article 11.071 § 5(a)(1) and/or § 5(a)(3).

Article 11.071 § 5 allows for a court to consider the merits of a subsequent application for writ of habeas corpus when the application contains sufficient facts to establish either:

> (a)(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed... because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; [or]
>
> (a)(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have [found the applicant eligible for a capital sentence].

Only one of these standards must be met to receive merits review; Gonzales satisfies both. The new legal basis established in *Atkins* (2002) was not available at the time he filed his state habeas application in 1998 after his conviction. Moreover, the new legal basis established in *Moore I* (2017) was not available when he could have filed, but waived, his state habeas application in 2010 after his resentencing, or at the time he filed a subsequent state habeas application in 2014. In addition, this claim pleads sufficient facts to show by clear and convincing evidence that Gonzales has an intellectual disability that prevents him from being legally executed under the Constitution.

1. *Moore* established a new legal basis that entitles this intellectual disability claim to receive further proceedings under Art. 11.071 § 5(a)(1).

When the Supreme Court held that execution of an intellectually-disabled offender was unconstitutional in *Atkins*, it left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). Two years later, in the absence of state legislation, the CCA heeded the task as it developed its legal standard for bringing an *Atkins* claim in *Ex parte Briseno*. 135 S.W.3d 1 (Tex. Crim. App. 2004). In addition to incorporating the definition for assessing intellectual disability in the 1992 edition of the American Association on Mental

Retardation manual (AAMR–9), the court formulated seven "factors" applicable to an intellectual disability inquiry. *Moore I*, 137 S. Ct. at 1046 (discussing *Briseno*).

In *Briseno*, the CCA effectively created a three-part test for showing intellectual disability: (1) the offender suffers from significantly sub-average general intellectual functioning, generally shown by an intelligence quotient (IQ) of 70 or less; (2) his or her significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen. *Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015), *vacated and remanded sub nom. Moore v. Texas*, 137 S.Ct. 1039 (2017) (*Moore I*). Thus, *Briseno* became the legal basis for an *Atkins* claim in Texas after 2004. *See, e.g., Ex parte Cathey*, 451 S.W.3d 1 (Tex. Crim. App. 2014) (referring to the test "under *Atkins* and *Briseno*"). In 2017, however, the Supreme Court invalidated the *Briseno* standard in *Moore*—creating a new basis for relief in *Atkins* claims in Texas. 137 S. Ct. at 1049–53.

Article 11.071 § 5(d) provides that the legal basis of a claim is unavailable "if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date."

The legal basis articulated in *Moore I* could not have been reasonably predicted by Gonzales' attorneys at the time he filed his previous state habeas application (2014). The *Briseno* standard was so engrained in Texas that even after *Moore*, the CCA still utilized the *Briseno* framework when attempting to apply *Moore I*'s new legal standard. *See Ex parte Moore*, 548 S.W.3d 552, 562 (Tex. Crim. App. 2018), *cert. granted, judgment rev'd sub nom. Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*). Furthermore, it is irrelevant if Gonzales may have been able to bring a successful *Atkins* claim prior to the new legal basis tendered in *Moore*. *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App.), *cert. denied sub nom. Barbee v. Texas*, 142 S. Ct. 258 (2021). As *Barbee* explained further, "a legal basis was previously unavailable if subsequent case law makes it easier to establish the claim and renders inapplicable factors that had previously been weighed in evaluating its merits." *Id*.

Moore I created a new legal basis for an *Atkins* claim by requiring an intellectual disability determination be "informed by the medical community's diagnostic framework." 137 S.Ct. at 1048 (quoting *Hall*, 572 U.S.at 721). In doing so, it precluded the use of criteria at odds with that framework: the *Briseno* factors,[31] the use of the obtained IQ score rather than the range of scores that

[31]These factors "had no grounding in prevailing medical practice, and because they invited 'lay perceptions of intellectual disability' and 'lay stereotypes' to guide assessment of intellectual disability, … over clinical factors, [this] 'creat[es] an unacceptable risk that persons

account for an IQ test's standard error of measurement,[32] and the focus on both adaptive strengths and deficits rather than just deficits to adjudicate Prong 2.[33]

For these reasons, the CCA has repeatedly held that *Moore* constitutes a new legal basis for an *Atkins* claim under § 5(a)(1) to merit further review. This has occurred where, as in Gonzales' case, the applicant has raised an ID claim for the first time in a subsequent habeas application, *see Ex parte Milam,* WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019), and where the claim was raised and rejected in a prior habeas application. *See Ex parte Bridgers*, No. WR-45,179-05, 2021 WL 2346539 (Tex. Crim. App. June 9, 2021); *Ex parte Busby*, No. WR-70,747-06 (Tex. Crim. App. Feb. 3, 2021); *Ex parte Escobedo*, No. WR-56,818-03, 2020 WL 3469044 (Tex. Crim. App. June 24, 2020); *Ex parte Guevara*, No. WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. June 6, 2018).

Accordingly, *Moore I* established a new legal basis for an *Atkins* claim previously unavailable to Gonzales. *Moore I* "makes it easier to establish the claim and renders inapplicable factors that had previously been weighed in evaluating its

---

with intellectual disability will be executed.'" *Moore II*, 139 S.Ct. at 670 (quoting *Moore I*, 137 S.Ct., at 1051).

[32] "[W]e require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore I*, 137 S.Ct. at 1050.

[33] "But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Moore I*, 137 S.Ct. at 1050 (emphasis in original).

merits." *Ex parte Barbee*, 616 S.W.3d at 839. As this application has presented sufficient facts, Gonzales' current *Atkins* claim clears the procedural bar of Article 11.071 § 5(a)(1) and should be provided a merits review.

2. If not authorized under § 5(a)(1), Gonzales' *Atkins* claim should be authorized under § 5(a)(3) because he has made a threshold showing sufficient to support the conclusion that no rational factfinder could fail to find he is intellectually disabled.

In addition to the new legal basis provided by *Moore*, § 5(a)(3) allows Gonzales a review on the merits of his *Atkins* claim brought for the first time in a subsequent writ application if he presents "evidence of a sufficiently clear and convincing character that we could ultimately conclude… that no rational factfinder would fail to find he is in fact [intellectually disabled]." *Ex parte Blue*, 230 S.W.3d 151, 162 (Tex. Crim. App. 2007). As the *Blue* court explained, this threshold only requires showing evidence that would be "*sufficient* to support an ultimate conclusion." *Id.* at 163 (emphasis in original). In other words, the court is only reviewing the adequacy of the pleading itself. *Id.* ("It would be anomalous to require the applicant to actually convince us by clear and convincing evidence at this stage."). While a higher bar than § 5(a)(1), this procedural threshold must comport with the holdings found in *Moore*—something this Court has found with multiple applicants since the *Moore* ruling established the new law. *See, e.g., Ex parte Mays*, No. WR-75,105-02 (Tex. Crim. App. May 7, 2020); *Ex parte*

Williams, No. WR-71,296-03, 2020 WL 7234532 (Tex. Crim. App. Dec. 9, 2020) (at a minimum, satisfied § 5(a)(3)).

Here, Gonzales has made a clear threshold showing of his intellectual disability. Under the showing made here, the Court could ultimately conclude no rational factfinder could fail to find that Gonzales has ID. Accordingly, his *Atkins* claim should be authorized under § 5(a)(3) if not already authorized under § 5(a)(1).

II. The State Suppressed Material Exculpatory and Impeaching Information in Violation of *Brady v. Maryland* and Gonzales' Due Process Rights.

The State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and Gonzales' due process rights when it deprived Gonzales of critical exculpatory and impeaching information in the State's possession. A new trial is required to remedy the State's misconduct.

A. The *Brady* standard.

A *Brady* violation occurs when (1) the State fails to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to the defendant (impeaching or exculpatory); and (3) the evidence is material to determining guilt or punishment. *Brady*, 373 U.S. at 87; *United States v. Bagley*, 473 U.S. 667, 683 (1985); *Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim. App. 2001).

The suppressed evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The materiality inquiry is *not* a sufficiency of the evidence test. *Id.* Moreover, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *Bagley*, 667 U.S. at 682); *Pena*, 353 S.W.3d at 812 & n.11.

The court must review the impact of suppressed evidence collectively. *Kyles*, 514 U.S. at 436; *Pena*, 353 S.W.3d at 812. Assessing the materiality of the suppressed evidence requires a court "to weigh the strength of the exculpatory evidence … against the evidence supporting conviction." *Pena*, 353 S.W.3d at 812. In addition, the court must assess the weight of the suppressed evidence considering "how disclosure could have affected defense preparation." *Pena*, 353 S.W.3d at 812. Finally, whether the suppressed evidence is material under *Bagley* is determined by evaluating the cumulative effect of the evidence as it bears on the

question of "reasonable probability" of a different outcome. *Kyles*, 514 U.S. at 436-37.[34]

The State has an affirmative duty "to disclose [*Brady*] evidence ... even though there has been no request [for the evidence] by the accused," which may include evidence known only to police. *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Kyles*, 514 U.S. at 438.

B. The State suppressed damning impeachment evidence of lead investigator Detective Snow Robertson's history of dishonesty and misconduct in violation of *Brady v. Maryland* and Gonzales' due process right at his trial and resentencing.

First, the State suppressed evidence favorable to Gonzales' defense. Information about Robertson's personnel records was in the State's possession but was not disclosed to any of Gonzales' counsel. The suppressed evidence includes Robertson's El Paso Police Department (El Paso PD) personnel records (Ex. 52), his Odessa Police Department (OPD) personnel records (Ex. 54), and multiple civil suits against Robertson involving civilian complainants. The State also suppressed false testimony allegations regarding Robertson in the trials of two other young Odessa defendants.

[34] Because the District Attorney or prosecutor alone knows what evidence may be undisclosed and has the first opportunity to determine whether such evidence is material, they have a duty to actively seek out and learn of any evidence favorable to the accused and known to anyone acting on the State's behalf. *Stickler v. Greene*, 527 U.S. 263, 280-81 (1999). Ignorance of what is known to other agents of the State involved in the prosecution is no excuse.

Documents obtained from Robertson's personnel files and court records show his longstanding history of abusing suspects and witnesses, lying in reports, and concocting critical witness statements at the time of Gonzales' original trial and before his 2009 resentencing. *See* Section V.I. of the Statement of Facts, *supra*.

Lynn Homsey filed a civil suit in the 358th Judicial District against Robertson and the City of Odessa, claiming he assaulted her 16-year-old son, David Homsey, in October 1987. She alleged Robertson beat him with no probable cause or justification. *See* Ex. 56 at 2 (1989 *Homsey* Petition). Homsey asserted the City of Odessa was negligent in hiring Robertson given his termination from the El Paso PD for multiple abuse allegations. *Id*. at 3. In the same month, OPD suspended Robertson's salary for three days in possible connection with the Homsey suit. OPD Personnel Records at 3.

Seven months later, in May 1988, Robertson was alleged to have physically assaulted another civilian during a routine traffic stop. Ex. 58 at 3-4 (*ORR-T* Petition). The City of Odessa settled out of court in both cases. Ex. 57, Ex. 59.

On August 1, 1994, trial judge Bill McCoy issued the first pre-trial orders in Gonzales' case. *See* 1 CR-T 4-9. The trial court ordered the district attorney to provide defense counsel contact information for witnesses and suspects, including persons who arrested Gonzales, investigated the crime, or are crime witnesses. 1

CR-T 6. Under section II.B. of the "First Pre-trial Orders" entitled "Exculpatory Evidence," the trial court ordered the production "of all evidence not otherwise covered elsewhere in these orders, that is favorable to the accused on the issue of guilt or innocence, or that is inconsistent with the guilt of the Defendant." 1 CR-T 7. Under "Supplemental Discovery," the trial court imposed on the district attorney the continuing duty to supplement the discovery as soon as new evidence was reasonably known. *Id*.

Therefore, while Gonzales' trial on his conviction and original sentencing was pending, the trial prosecution team and other agents of the State knew of the civil suits involving Robertson and the obligations imposed by the trial court on the State regarding these court records. The State and its agents knew of Robertson's abuse allegations as an OPD officer and were aware of his termination from El Paso PD for similar conduct. The State had sufficient documentation to begin an investigation into the history of the allegations against Robertson. Yet, there is no further record of any prosecutorial investigation into Robertson's professional conduct or reputation.

There is no sign Gonzales' counsel at his trial or resentencing knew of Robertson's abuse allegations, history of lying to police officers, or falsely testifying regarding defendants' confessions. In a January 23, 1995, pre-trial motions hearing, defense attorney Lowe noted he visited the district attorney's

office, reviewed files, and believed he was diligent in obtaining necessary records. 3 RR-T 5-6. Further, he thought the district attorney largely fulfilled the trial court's order to supplement discovery under the State's continuing duty. 3 RR-T 6. The State later stated that it maintained an "open file policy" before Gonzales' trial and provided Gonzales' counsel the State's "entire file." 20 RR-T 81.

Despite the facts that Robertson was a named party on multiple occasions for police brutality and the references in his personnel files to other kinds of misconduct, the Ector County District Attorney's office failed to meet its clear obligation to make an affirmative disclosure.

The State likewise withheld Robertson's pattern of claiming that "suspects 'blurted out' spontaneous statements that no one other than he himself had heard."' Ex. 60 at 19 (Lincoln Keith writ). In November 1995, the month before Gonzales' trial began, Robertson was suspected of having manufactured evidence and providing false testimony in the capital murder case of Lincoln Keith, a juvenile at the time of arrest. *Id.*

Robertson was the assigned lead detective in Keith's case, like here. According to Keith, Robertson's testimony regarding his "blurted" confession served as a linchpin to the State's presentation *Id*. Robertson testified that, in an incident mirroring Gonzales' supposed "confession" to jailer Charles Kenimer, Keith "blurted out" an extensive statement in which he confessed to all elements of

the charge against him when several police officers were within earshot. Yet, no one else could verify this statement. *Id*. *See* Keith Transcript at 22-25, 41-52 (Robertson testifying other officers were near, but he did not know whether they heard Keith's statement); Keith Transcript at 66-68 (OPD Sergeant Matt Andrews testifying he was in the same room as Robertson and Keith but did not hear Keith's statement).

As proof of Robertson's testifying falsely, Keith presented an article detailing Robertson's role in Cornell Cleaver's case. *Ex Parte Keith* Writ Application Ex. "E" (Cleaver Article) (Exhibit 82). Cleaver, a juvenile, was arrested in 1996 for murder. *Id*. Robertson again testified that Cleaver had made a spontaneous, unverified statement confessing to the murder in front of him. *Id*. However, Cleaver's attorney successfully moved to strike Robertson's testimony because Cleaver's "confession" mirrored Keith's, *id*., and Cleaver's judge also presided over Keith's case.

The State was on notice of Robertson's false testimony in these two cases. In both cases, Ector County District Attorney tried each defendant for homicide near the time of Gonzales' trial and relied upon Robertson as the lead investigator. Further, Robertson was extremely well known to the District Attorney's office. As Keith noted in his application, Ex. 60 at 19, Robertson was romantically involved with the prosecutor in Keith's case, Linda Deaderick, during Keith's 1995 trial.

They were later married in 1996. *Ex Parte Keith* Writ Application Ex. "F" (Robertson-Deaderick Article) (Exhibit 83). The relationship between Robertson and Deaderick caused former District Attorney R.N. "Bobby" Bland to move to recuse himself and his office because of a potential conflict of interest arising from the "prior marriage between the First Assistant District Attorney . . . and one of the lead investigators in this case," Mot. to Recuse, Nov. 13, 2008, 3 CR-R 651, before Gonzales' resentencing trial.

These circumstances unequivocally establish that the State knew of the evidence favorable to the defense in Robertson's personnel files and in civil and criminal court records and, despite that knowledge, suppressed it.

Although the civil suits detailing the abuse allegations were available to counsel already aware of their existence, that does not affect the suppression analysis. *See Strickler*, 527 U.S. at 286 (rejecting argument that defense counsel has "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred"); *Graves v. Dretke*, 442 F.3d 334, 342-43 (5th Cir. 2006) (even a prosecutor's "oblique reference to suppressed evidence" is "insufficient to put the defense on notice to inquire further, particularly in light of the state's discovery disclosure" under open file policy). "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a

system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).[35]

The second element of the *Brady* analysis requires the withheld evidence be favorable to the accused. Here, the evidence was clearly favorable.

"Favorable evidence" includes both exculpatory and impeachment evidence. *See Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). Had the court records detailing the abuse allegations and the personnel files been disclosed, Gonzales could have pursued various lines of inquiry before the original trial court and at his 2009 re-sentencing trial. His attorneys could have presented evidence to show that Robertson was behind the apparently false testimony as to Gonzales' alleged "confession." In addition, defense counsel would have been able to cross-examine and impeach Robertson regarding his investigation's lack of efficacy and thoroughness. *See*, *e.g.*, *Kyles*, 514 U.S. at 449 (evidence of a suppressed statement of the witness was material to impeach the credibility of the investigation and the reliability of the lead detective).

[35] In any case, the availability of the court files does not excuse the State from its affirmative obligations. It is the State's *continuing* obligation to disclose favorable, potentially exculpatory evidence to the defense. *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (citing ABA Code of Professional Responsibility §§ 7-13 (1969); ABA Standards § 3.11)). ABA Criminal Discovery Standard 11-4.1(c) (3d ed. 1996).

More importantly, trial counsel could have used the court records documenting Robertson's abuse allegations and his personnel records to shake the sturdiest foundation of the State's case against Gonzales—Robertson's testimony as the lead investigator.

The State leaned heavily on Robertson's testimony throughout the trial. Once officers were dispatched to the Aguirres' residence on April 22, 1994, Robertson oversaw significant decisions in the homicide investigation. Assigned as the lead investigator on the case, 15 RR-T 95, he immediately secured the scene and observed the victims. 15 RR-T 96. He determined the evidence collected for analysis. 15 RR-T 107-24. Robertson supervised the delivery of forensic and biological evidence to the Department of Public Safety (DPS) laboratory. 15 RR-T 163-68; 16 RR-T 265. And Robertson conducted the bulk of witness interviews, including alternate suspects. *See* 15 RR-T 143-44; 27 RR-R 192-195.

In his opening statement, ADA Smith bolstered the quality and reputation of Robertson's work when he remarked, "I think the evidence is going to show you that some splendid police work, work that you as citizens can be proud of, led to this man, Michael Dean Gonzales." 15 RR-T 15.

Under Texas Rule of Criminal Evidence 608(a), defense counsel could have used the suppressed records to impeach Robertson's character for truthfulness. *Dixon v. State*, 2 S.W.3d 263, 271 (Tex. Crim. App. 1998), on reh'g (Sept. 15,

1999). When the defendant or the prosecutor makes blanket statements about exemplary conduct, he "opens the door" to being impeached by relevant questions that would show he has left a false impression with the jury of what his past criminal conduct might have comprised. *King v. State*, 773 S.W.2d 302, 308 (Tex. Crim. App. 1989). Here, trial counsel fairly relied on the assumption—bolstered by the State—that Robertson never received disciplinary action for lying to law enforcement or that his abuse against citizens of Odessa led to adverse settlements for the city. *See Michael v. State*, 235 S.W.3d 723, 725 (Tex. Crim. App. 2007) ("At the outset, every witness is assumed to have a truthful character.").[36]

As discussed in part II.D below, the collective impact of this suppressed evidence regarding Det. Robertson's record and the suppressed evidence concerning Det. Robertson's false testimony on physical evidence in this case would have devastated the State's case for Gonzales' guilt and could well have altered the outcome.

[36] *See Milke v. Ryan*, 711 F.3d 998, 1018 (9th Cir. 2013) ("Indeed, suppression of the personnel file and suppression of the court documents run together. Had Milke been given the full run of evaluations in [the lead investigator's] personnel file, she would have found cases [the lead investigator] worked on… But without the full personnel file, we can't know, even now, the full extent of the misconduct that could have been used to impeach [the lead investigator].").

C. The State suppressed evidence contradicting Detective Robertson's testimony on the similarity of chile peppers in the Aguirre and Gonzales homes in violation of *Brady* and due process.

The State's case for Gonzales' guilt rested in part on an outlandish theory that peppers found in a salsa in the Gonzales family's refrigerator and scattered near the back door of the Gonzales house were connected to other peppers found by happenstance near the body of Merced Aguirre. According to the State, these peppers were evidence (in Gonzales' own house, no less) that Michael Gonzales committed the murder of the Aguirres. To make this theory work, the State hoped to secure an expert who would endorse the view (1) that the peppers were the same and (2) that the peppers were rare enough that their identity was not coincidental. When the expert the State consulted concluded he would not testify and that he could not support the State's theory, the State sponsored false testimony from Detective Snow Robertson and suppressed communications from the pepper expert that proved Robertson's testimony was false.

1. Ector County District Attorney's Suppressed Memorandum.

On April 22, 1994, when the police were collecting and photographing evidence at the crime scene, police noticed a broken glass mug and small, red chile peppers around victim Merced Aguirre's body. Police also saw red chile peppers near the backdoor of the Gonzales residence, just off the alleyway between the two

homes. When police searched the Gonzales home a few weeks later, they found more red chile peppers in a bowl of salsa in the Gonzales family fridge, and confiscated it.

In July 1995, Detective Snow Robertson contacted Dr. Ben Villalon, a research scientist at Texas A&M University's Research Center in Weslaco, Texas. Dr. Villalon is "more affectionately known as 'Dr. Pepper'" for his research on chile peppers. http://www.subplantsci.org/a-t-potts-award/award-recipients/dr-benigno-ben-villalon/. According to Robertson's report, Villalon agreed to examine the peppers and stated they "were the same peppers" and were "very rare" for Odessa. Det. Robertson's Report on Consultation with Dr. Villalon (Exhibit 84). Robertson wrote down very general information: the peppers were "Capsicum annum L."—which, without additional information, is the species designation for everything from bell peppers to habaneros.[37]

The defense moved to exclude this pepper evidence when it learned of Robertson's meetings with Villalon. 1 CR-T 87.

On November 30, 1995, Rebecca Sample, with the Ector County District Attorney, called Dr. Villalon about testifying. Sample Memorandum (Ex. 50). Dr. Villalon told Ms. Sample that Robertson had asked him to look at various peppers

[37] "Capsicum anuum L." Kew Royal Botanic Gardens, *Plants of the World Online*, https://powo.science.kew.org/taxon/316944-2

and tell him "if the peppers were the same." *Id*. Dr. Villalon said that "all he could say was that the peppers appeared to be the same to him." *Id*. He said nothing to Ms. Sample about whether the peppers were rare for the Odessa area. "[H]e didn't see how he would be useful in this case when he can only say that the peppers seem to be the same." *Id*. A handwritten note at the bottom of this memo states, "Snow [Robertson] said" that Villalon told him the peppers "were very rare for this area." That is not what Villalon told Ms. Sample he told Robertson. Neither this memo nor the information in it was provided to Gonzales' counsel.

Robertson testified that he found "the same type of peppers" in three places: "right next to [Gonzales'] back door," "crushed" in a bowl in Gonzales' house, and "next to Mrs. Aguirre's body" at the crime scene. 15 RR-T 115, 116. Robertson testified that the peppers "were somewhat unique." *Id*. at 121. Robertson testified that he consulted with a pepper expert named Dr. Ben Villalon, at Texas A&M about the peppers. *Id*. at 140-41. According to Robertson, Dr. Villalon told him the peppers are "very, very rare for this area" and are grown primarily in Mexico. *Id*. at 140. Robertson said he was "mainly" "basing my testimony on what Dr. Ben Villalon from Texas A&M Research Center in Weslaco, Texas, advised me of." *Id.* at 141.

2. The State's failure to disclose this favorable evidence to the defense violated Gonzales' due process right to be informed of exculpatory information.

The Due Process Clause of the United States Constitution required the State to disclose the Ector County District Attorney Office's memo detailing Ms. Sample's conversation with Villalon to the defense. The State did not do so.

The evidence described above was in the State's possession but was not disclosed to the defense. There is no evidence that trial counsel received or reviewed the file memo. Defense counsel would have noticed the memo. Their case theory aimed to challenge the State's assertion that Gonzales entered or was near the Aguirres' home the evening of the homicides. Therefore, defense counsel were keen to investigate any information that could refute the State's assertions otherwise. Indeed, defense counsel specifically moved to exclude evidence regarding peppers upon learning of Snow Robertson's report of his consultation with Dr. Ben Villalon.

The evidence is also plainly favorable. The undisclosed report is exculpatory and could have constituted impeachment evidence within the purview of *Brady*. Information from the memo would have: 1) discredited Robertson's reliability given his apparent false report in July 1995; 2) led trial counsel to hire a pepper expert to challenge the State's chile pepper theory, and 3) permitted trial counsel to knock away the spurious link the peppers created between the Gonzales and

Aguirre residences to support its theory that Mr. Gonzales was guilty for the Aguirres' deaths.

D. There is a reasonable probability of a different outcome had the State disclosed the evidence of Robertson's history of misconduct and the Sample Memorandum.

To secure relief based on the State's suppression of favorable evidence, Gonzales must show a "reasonable probability of a different result" had the evidence been disclosed to him. *Kyles*, 514 U.S. at 434. This is emphatically *not* a sufficiency of the evidence inquiry: a defendant "need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id*. at 434-35. Here, "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435. This is so for both the original trial on Gonzales' guilt or innocence, and the resentencing trial in 2009.

1. Materiality at Gonzales' 1995 trial.

The State's suppression of the Snow Robertson personnel records, court files, and reports and documents referenced therein, and the suppression of the Sample Memorandum regarding her call with Dr. Villalon, undermines confidence that the jury would have convicted Gonzales.

The cumulative impact of Snow Robertson's history of dishonesty and misconduct combined with his dishonesty, in this case, would have had a powerful

effect on jurors' assessment of the weak case for Gonzales' guilt. This is not an instance in which the impeachment information was only glancingly relevant to the trial. Defense counsel could have argued that the very same pattern of misbehavior evident in Robertson's checkered history was leading to the wrongful prosecution of an innocent man in this case.

Indeed, as explained in Claim III below, the State's case depended on false testimony by Robertson—

- That teardrop tattoos on Gonzales' face amounted to a confession he killed two people.
- That chile peppers found beneath Mrs. Aguirre's body, outside Gonzales' house, and in Gonzales' refrigerator connected Gonzales to the crime despite plausible evidence that the peppers had nothing to do with the crime.
- That a stain on a camper between the two houses was a "blood transfer stain," even though he never tested it to determine if it was blood, rust, or dirt.

No physical evidence other than a fingerprint on a stereo connected Gonzales to the crime scene. No weapon was found connecting Gonzales to the Aguirres murders. The only direct evidence of Gonzales' guilt was the alleged confession he made to the jailer, Kenimer. Information from Robertson's personnel

files and the court records would have helped expose the false and misleading character of the evidentiary picture the State painted at Gonzales' trial.

Robertson's record showed that he fabricated confessions by accused people. Here, the supposed confession Gonzales made to Kenimer had Robertson's fingerprints on it. Gonzales was said to have "blurted out" the confession to Kenimer, just as false confessions were in Robertson's other cases. Robertson wrote Kenimer's statement about the confession being blurted out He also embellished it with "facts" that, in federal habeas proceedings, Kenimer said were false—facts designed to show that Gonzales would have been comfortable confessing to Kenimer. And, Robertson acquiesced in Kenimer's own fabrication at trial when he testified that the Gonzales confessed because he was emotional after a stressful interrogation by Robertson and Ranger Joe Sanders, even though Robertson knew that the interrogation occurred five days after Gonzales allegedly confessed to Kenimer.

Moreover, the information from Robertson's personnel records would have made more understandable why the investigation overlooked or superficially followed leads that pointed to other people instead of Gonzales as the perpetrators—because Robertson had a history of jumping to conclusions and not investigating carefully after that. With Robertson's record, the defense could have shown that before there was an investigation, Robertson believed Gonzales was the

perpetrator and disregarded or falsified any evidence that might call that into question.

In an investigation that the prosecution stated was built on "physical evidence," the Robertson-led investigation was more remarkable for the physical evidence *not* collected, documented, or preserved. The investigation was marred by sloppiness and constricted by its lead investigator's tunnel vision.

According to a seasoned crime-scene investigator, the Odessa Police Department's investigation failed to take rudimentary steps.

> "No photo log has been found that indicates either the sequence of scene photography or the circumstances involved and not all the photographs appear to have been received."
>
> "No scene diagram has been found that indicates the location and interrelationship of evidence items and gives pertinent measurements." *Id.* ¶ 11(c).
>
> "No indication was found … that would indicate that proper attention was given to footwear evidence in this case such as attempting to determine the brand and size of the responsible shoe(s)." *Id.* ¶ 12.

Declaration of Forensic Scientist Ed Hueske, May 7, 2020, ¶¶ 11(b), 11(c), 12 (Exhibit 85).

Police did **not** do any of the following obvious investigative tasks:

Jesse Perkins

- Did not attempt to verify Perkins' stories about where he got the wounds on his arms.

- Did not photograph the cuts on Perkins arms that were visible in early May or ask Perkins to show them any other wounds he had until long after the murder.
- Did not photograph or videotape their search of Jesse Perkins' residence.
- Did not photograph the bloody flannel shirt recovered from Jesse Perkins' closet.
- Did not search for blood evidence in Ruby Luna's truck, despite knowing that both Perkins and Gonzales had been in the truck and despite having information that the shirt was bloody.

Crime scene evidence collection

- Did not photograph their luminol testing on April 22 (at the Aguirre crime scene) or on May 6 (at the Gonzales house).
- Did not develop any useable photos of the April 23 luminol testing at the Aguirre crime scene or else destroyed or lost the remaining prints and negatives.
- Did not otherwise document what the luminol testing produced.
- Did not collect evidence from the sink or bathtub (besides hairs) in the bathroom of the Aguirre house, even though luminol testing revealed presence of blood in sink and bathtub

- Did not take photographs or videos of rooms in the Aguirre household in which investigators found important clues, including the master bathroom and utility room.

Latent print and footwear impressions

- Did not report any comparison of the footwear evidence that they collected, including the plaster casts outside the Aguirre residence or the bloody footprints inside it.
- Did not record any comparison of known prints with latents until the eve of trial—the first and only reported comparison in the police file occurred on December 1, 1995.
- Did not track the number of latent print cards developed in the evidence log.
- Did not report the comparison of three latent prints from the stereo that Cpl. Joe Rexer testified about at trial.
- Did not fingerprint Julian Olivarez even though he was a suspect and in possession of several pieces of the Aguirres' stolen property.
- Did not attempt to lift any latent fingerprints from surfaces and objects in the Aguirres' bathroom, even though police detected human blood there that apparently connected the bathroom to the murder.

Camper

- Did not collect the stain on the camper trailer in the alley between the homes, let alone test it using a readily available presumptive blood test.
- Did not photograph the camper in a manner to establish where the stains were.

DNA testing

- Did not insist that DPS perform forensic DNA testing of the evidence in 1995, even though OPD had requested the testing and did not explain DPS's failure to do so.

In sum, the OPD homicide investigation was shoddy. Robertson's testimony about the "blood transfer stain," the chile peppers, and the tattoos was all false.

Had the prosecution disclosed the chile pepper information from Dr. Villalon yet persisted in offering Robertson's testimony about the chile peppers, defense counsel would have been able to soundly counter that testimony, including with expert evidence. Gonzales' post-conviction counsel asked Dr. Kevin Crosby, a horticulturist, and plant geneticist, to review the chile peppers evidence to address: 1) whether the chile peppers found near the Aguirres were "unique" to Mexico as alleged by the prosecution; and 2) whether the peppers found in their residence were of the same varietal as those found near and in Mr. Gonzales' home. *See* Declaration of Dr. Kevin Crosby (Exhibit 86).

According to Dr. Crosby, his review of the record shows that the fruits found in the residences of the Aguirres and Mr. Gonzales are those of commonly grown

pepper plants. Like Villalon said to Robertson, these pepper fruits likely belong to the C. annuum species, based on the photographic evidence. Crosby Decl. ¶ 10. However, Dr. Crosby cannot reasonably conclude by viewing photos of the chile peppers, whether both peppers were derived from the same varietal or cultivar. He considered a "pepper" a broad category that requires more than mere visual identification. *Id.* ¶ 11. Thus, two peppers may share similar physical characteristics yet be derived from distinct cultivars. This is because of the extensive genetic diversity among cultivated pepper species and the tendency of distinct species to develop similar traits as they evolve. *Id*.

Thus, contrary to Robertson's testimony that the chile peppers were rare to the area and unique to Mexico, defense counsel armed with the Sample Memorandum could have offered testimony that it is impossible to determine the "uniqueness" of the peppers. Humans have dispersed chile pepper fruits and seeds worldwide, and it is common for Texas gardeners to cultivate many varieties of chile peppers in their backyards. Crosby Decl. ¶ 15. If the State provided defense counsel the Sample memo at trial, they reasonably could have retained an expert like Dr. Crosby to challenge the State's theory surrounding the peppers' "uniqueness."

The suppressed evidence would have cast much more doubt on the credibility of the investigation and the reliability of the lead detective. *See Kyles*,

514 U.S. at 449.[38] Ultimately, it would have allowed the defense to argue that the State was uninterested in seeking the truth, only in presenting unreliable or false information to confirm its belief that Michael Gonzales, an innocent man, had committed the murder.

Had this evidence been available to Gonzales' counsel in 1994, it is reasonably probable that the disclosures would have produced a different result.

2. Materiality at 2009 resentencing.

Had the State disclosed the suppressed evidence related to the personnel files and false chile pepper evidence, there would have been a fundamental shift in defense counsel's trial strategy at Gonzales' 2009 resentencing trial. The suppressed evidence would have altered defense counsel's theory of the case, the witnesses called, the physical evidence presented, the questions asked of the State's witnesses, and the legal arguments made at the close of evidence.

The prosecution presented considerable evidence of Gonzales' guilt in the resentencing trial. *See, e.g.,* 27 RR-R 61-83 (Martha Reyes testifying she saw Gonzales with a knife, bloody clothes, and the stolen VCR on the night of the murders); 27 RR-R 149-200 (Robertson testifying as he did in 1995). In response,

[38] As the Court of Criminal Appeals observed in the Clarence Brandley case, "the cumulative effect of the investigative procedure, judged by the totality of the circumstances" can "result[] in a deprivation of applicant's right to due process of law by suppressing evidence favorable to the accused, and by creating false testimony and inherently unreliable testimony." *Ex parte Brandley*, 781 S.W.2d 886, 894 (Tex. Crim. App. 1989).

trial counsel could have presented evidence related to Robertson's history of false testimony, slipshod investigation, and fabrication of evidence, and then convincingly argued for a non-death sentence based on residual doubt. While Gonzales may not have been entitled to a jury instruction allowing the jurors to consider any residual doubt as a mitigating circumstance when considering the mitigation special issue, *see United States v. Jackson*, 549 F.3d 963, 981 (5th Cir. 2008), defense counsel certainly could present "residual doubt" evidence to the jury and make the related arguments in closing. *See Blue v. State*, 125 S.W.3d 491, 502–03 (Tex. Crim. App. 2003).

The suppression of the personnel files and court records limited trial counsel's determination of what evidence the jury could consider in mitigation. The ability to advance a viable alternative theory of the crime bolstered by the evidence drawn from Robertson's personnel records would have constituted a seismic shift in strategy. Just as at the trial on guilt or innocence, Gonzales could have presented several residual doubt witnesses to introduce information about alternate suspects. The information, taken together, would have allowed the jury to discredit the investigation of the Aguirre murders. The presentation of Robertson's personnel files and defense counsel's impeachment of Robertson through the materials contained within them, along with the suppressed evidence of Robertson's false reports and testimony, "could reasonably be taken to put the

whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

E. Gonzales' due process claim regarding suppressed exculpatory evidence satisfies the requirements under section 5 to be considered on the merits.

The State's suppression of exculpatory evidence meets the standards for authorization under Section 5(a)(1) and 5(a)(2) for the reasons set forth in Claim III.F, *infra* (authorization argument for previously unavailable evidence), and Claim IV.A, *infra* (innocence as a gateway to the merits of claims).

III. The State Knowingly Elicited Multiple Instances of False Testimony in Violation of Gonzales' Due Process Rights.

It "is incompatible with 'rudimentary demands of justice'" for the State to engage in "deliberate deception of a court and jurors by the presentation of known false evidence." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (citation omitted). In Michael Gonzales' trial, the State repeatedly knowingly sponsored false testimony about physical evidence to shore up its weak case for capital murder. These multiple abuses of the trial's truth-seeking function contributed significantly to Gonzales' wrongful conviction and require the remedy of a new trial.

A. Due process standards for false and misleading testimony.

A conviction procured through the use of false or misleading testimony is a denial of the due process guaranteed by the Federal Constitution. *Mooney v.*

Holohan, 294 U.S. 103, 112–13 (1935); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011); *Ex parte Chabot*, 300 S.W.3d 768, 770–71 (Tex. Crim. App. 2009). It does not matter that the falsehood goes to an issue of credibility. *Duggan v. State*, 778 S.W.2d 465, 469 (Tex. Crim. App. 1989) (citing *Napue*, 360 U.S. at 270). When false testimony is knowingly presented by the State, the *State* must "'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Ghahremani*, 332 S.W.3d at 478. When, on the other hand, false testimony is unknowingly presented by the State, the *applicant* has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment. *Ghahremani*, 332 S.W.3d at 482; *Chabot*, 300 S.W.3d at 771.

To assess falsity, the "proper question" is whether the particular testimony, "taken as a whole, gives the jury a false impression." *Ex parte Weinstein*, 421 S.W.3d 565, 666 (Tex. Crim. App. 2104).

Though the prosecutor may not be obligated to correct each instance of misleading or inaccurate testimony, it is the cumulative effect of a prosecutor's failure to correct false testimony that "is the crucial inquiry for due process purposes." *Smith v Phillips*, 455 U.S. 209, 220 n.10 (1982).

B. The State knowingly elicited false testimony from Detective Robertson about the chile peppers' rarity and uniqueness.

At Gonzales' 1995 trial, the State knowingly presented false testimony from lead investigator Snow Robertson that the coincidence of chile peppers found in and around the Gonzales home and at the crime scene into incriminating evidence. This testimony violated Gonzales' right to due process.

1. Detective Robertson's testimony about the chile peppers was false.

The facts of Robertson's false testimony are recounted above in Claim II, part C and incorporated by this express reference here. Robertson testified he found "the same type of peppers" in three places: "right next to [Gonzales'] back door," "crushed" in a bowl in Gonzales' house, and "next to Mrs. Aguirre's body" at the crime scene. 15 RR-T 115, 116. Robertson testified that the peppers "were somewhat unique." *Id*. at 121. He tried "numerous locations" to find similar peppers and talked to people "in those establishments [to] help me to locate peppers like that," but could not "locate them." *Id*. Robertson testified that he consulted with a pepper expert named Dr. Ben Villalon, at Texas A&M about the peppers. *Id*. at 140-41. According to Robertson, Dr. Villalon told him the peppers are "very, very rare for this area" and are grown primarily in Mexico. *Id*. at 140. Robertson said he was "mainly" "basing my testimony on what Dr. Ben Villalon from Texas A&M Research Center in Weslaco, Texas, advised me of." *Id.* at 141.

Detective Robertson's pepper testimony was false and misleading. An internal memo from a staff member at the Ector County District Attorney's office described a call with Dr. Ben Villalon. Dr. Villalon told the employee of the prosecutor's office he had told Robertson that the peppers only "looked alike to him" and that "all he could say" is that "the peppers appeared to be the same to him." Robertson asked Villalon to conduct DNA analysis to confirm the peppers were the same, but Villalon said he was not qualified to do so. As a result, Villalon "didn't see how he would be useful in this case when he can only say that the peppers seem to be the same." Villalon said nothing about the peppers being rare to the Odessa area or somehow unique. Sample Memorandum (Ex 50).

2. The State knowingly presented this false or misleading testimony.

At the time of Gonzales' 1995 trial, the prosecutor knew the chile peppers were not "unique." Dr. Villalon said nothing to Ms. Sample about whether the peppers were rare in the Odessa area. He could talk "only" about the apparent similarity between the peppers—that was "all he could say." That is why "he didn't see how he would be useful in this case." *Id*.

The State thus knew the limitations of what Villalon told Robertson. And the State was aware that Robertson's testimony far exceeded Villalon's statement about the superficial similarity of the peppers. A handwritten note at the bottom of this memo states, "Snow [Robertson] said" that Villalon told him the peppers

"were very rare for this area." That is not what Villalon told Ms. Sample he told Robertson.

The State provided neither this memo nor the information in it to Gonzales' counsel. This adds to the view that the State had knowledge that the information was false and unhelpful to the State's case. So, there is robust evidence that the State's presentation and failure to correct Robertson's false or misleading testimony was knowing.

C. The State knowingly elicited false forensic testimony from Detective Robertson about the "blood transfer stain" on a camper between the Aguirre and Gonzales homes.

At Michael Gonzales' trial, the State knowingly elicited yet more false testimony from Detective Snow Robertson in violation of Gonzales' right to due process.

1. Robertson gave false testimony about "blood transfer stains" connecting Gonzales to the crime.

Robertson testified there were "blood transfer stains" on a camper parked in the alley between the Gonzales and Aguirre homes. 15 RR-T 155. The State offered these stains as yet another circumstantial link between Gonzales and the Aguirre murder, on the tenuous theory that a bloody Gonzales walked through the alley to return to the rear entrance to 218 Schell. Robertson stated that he made the "determination from a photograph that was taken," and he was unaware if the

stains were ever analyzed. *Id*. Robertson was not asked to explain why or how these stains were supposed to have been deposited.

Robertson falsely testified that the evidence was blood and that he was unaware of any testing. According to Paulette Sutton, an eminent expert in forensic serology and bloodstain pattern analysis, "There is no evidence to support that these stains are, in fact, blood." Ex. 33 at 10 (1st Sutton Aff., Jan., 31, 2022). Sutton casts doubt on the very idea that these stains could be blood: "These stains are lighter in coloration than whole blood and are not visually consistent with blood." *Id.* Ms. Sutton explains that "[i]n the absence of testing, it is impossible to determine that these stains are, in fact, blood." *Id*. Even though "[s]ampling of the stains and further testing is imperative in this situation," *id*., "[n]o samples of the stains on the camper were collected or analyzed even though 128 other samples were collected at the scene." *Id*. at 11.[39]

Moreover, Robertson and the prosecution were aware what evidence was analyzed as part of their investigation. And so, Robertson and the prosecution were well aware that this evidence had not been collected, let alone analyzed for the presence of blood. Robertson had access to the complete list of evidence collected

[39] As noted by Ms. Sutton, "Sampling of the stains and further testing is imperative in this situation." *Id*. at 10. That is no longer possible, however, because the camper is no longer on the property where the Gonzales' house stood, and to the extent records are available, it appears that the camper has been destroyed.

by OPD. Robertson had himself driven all the evidence submitted to the DPS crime lab in Austin. *See* Ex. 28. He had received the January 13, 1995 report of the DPS lab describing the evidence tested, Ex. 15, and communicated with DPS analysts about further testing. It was thus not only false to declare the evidence "blood"; Robertson testified falsely about whether he knew testing on the camper had been conducted.

2. The State knew of the falsity of Robertson's testimony.

The State knew that Robertson's testimony regarding supposed "blood" was false and misleading. The State was aware that no evidence from the camper had been collected or submitted for analysis. The State maintained a property invoice to track all evidence collected. Yet nothing on the camper was among that evidence.

A further indication of the State's knowledge is that the State elected not to have its qualified forensic expert discuss the evidence. The State offered the testimony of a qualified bloodstain pattern analyst, Sgt. Rick Pippins. Yet the State did not ask Sgt. Pippins about this apparently incriminating "blood" evidence. The reasonable inference is that the State was attempting to direct yet another piece of false testimony through Detective Snow Robertson, whose checkered history reflected a willingness to break protocols and lie.

D. The State knowingly elicited false or misleading opinion testimony from Sergeant Rick Pippins about bloodstain pattern analysis.

Yet more false evidence entered the trial through the testimony of bloodstain pattern analyst Sergeant Rick Pippins. Pippins opined on how the murders were committed in sequence, leaving the prosecution and jurors with the false impression that the murder must have been committed by a single perpetrator.

1. Sergeant Pippins' provided misleading testimony about the order and number of perpetrators.

Detective Snow Robertson asked Sgt. Rick Pippins to assist in the Aguirre homicide investigation by conducting a bloodstain pattern analysis of the crime scene. 15 RR-T 97-98. He prepared a report detailing his conclusions and was called to testify by the State. *See* Ex. 9 (Pippins Report).

Pippins testified that he believed Mr. Aguirre was "attacked first" because it appeared that Mr. Aguirre "was overcome quite … quickly," while Mrs. Aguirre "put up a greater struggle." 15 RR-T 200-01. This testimony left jurors with a false impression that a single attacker committed the murders in sequence. In closing argument, the prosecution exploited that misimpression and made it explicit.

Thus, the prosecutor argued:

> Mrs. Aguirre was obviously somewhere else in the house, in the kitchen, in one of the back rooms. I would say that probably she heard a commotion. Mr. Aguirre had to have at least made some sound. She responded to that sound and she was very brutally murdered. And she fought. You can tell, you can listen to the testimony. She fought.

> Mr. Pippins, he comes out, he is the blood spatter expert, and he tells you basically just exactly that, that that is what happened, that it was a very swift and very sudden attack and that it was probably by one person.

17 RR-T 362-63.

Bloodstain pattern analyst Paulette Sutton rejects these conclusions as unsupportable. Pippins' observations regarding the location and condition of the victims did not "indicate any useful information about the number of attackers or the order of attacks." Sutton, Jan. 31 Affidavit at 13. Since Mr. Aguirre was very weak after heart surgery, "[i]t is [just as] plausible that the attacker or attackers would view Mrs. Aguirre as the greater threat and attacked her first because the more robust and greater threat would need to be eliminated first." *Id.*

Ms. Sutton then turns to the theory advanced by the prosecutor in closing argument that a single person committed both murders. She begins, "Nothing about the evidence eliminates the possibility that two or more attackers assaulted Mr. and Mrs. Aguirre." *Id.* She then lays out plausible scenarios:

> These attacks could have occurred roughly simultaneously. One attacker could be apt to carry out a frenzied attack such as the attack on Mrs. Aguirre and one might be more able to control the weakened Mr. Aguirre. Or perhaps more than one attacker assaulted Mr. Aguirre first making the assumption that the man will be harder to take out.

Id. Because "Sgt. Pippins' report and testimony do not entertain these hypotheses or test them against the available evidence," *id*., the testimony of Pippins provides no "useful information about the number of attackers or the order of attacks." *Id*.

Ms. Sutton further finds that Pippins' written report (not in evidence at trial) contains several additional unsupportable conclusions. Pippins reported there was a single, right-handed attacker skilled with a knife who assaulted Mrs. Aguirre second and assaulted her exclusively in the place where her body was discovered. *See* Pippins Report at 17-18 (discussing skill and handedness of attacker); 23 ("I believe that the perpetrator first attacked Mr. Aguirre, and then turned his attention to Mrs. Aguirre."). There is no factual or scientific basis for these views. *See* Sutton Jan. 31 Affidavit at 13-15; 17-18. Even though Pippins did not testify to these views, his inclusion of them in his report reveals his willingness to provide misleading information to satisfy the prosecution's theory of the case.

2. The State knew or should have known that the testimony was misleading.

The State knew or should have known that testimony was false or misleading. The State had Sgt. Pippins' written report in which he had offered a single-perpetrator theory he believed was consistent with the crime scene evidence. Nevertheless, there were other plausible scenarios for how more than one perpetrator could have carried out the murders. *See* Sutton. Jan. 31 Affidavit at 13 ("Nothing about the evidence eliminates the possibility that two or more attackers assaulted Mr. and Mrs. Aguirre.") Without bothering to ask Pippins about other scenarios, the prosecution elicited testimony about the order of attacks and then deliberately argued that this must have meant that there was only one attacker. This

deliberate strategy demonstrates that Pippins' testimony was presented to mislead the jury to believe in a single attacker theory.

E. There is a reasonable likelihood these instances of false or misleading testimony affected the judgment of the jury.

There was a "reasonable likelihood" these three pieces of false and misleading testimony affected the judgment of the jury. *See Ghahremani*, 332 S.W.3d at 478. As with *Brady*, when there are multiple instances of false testimony, a court must assess the cumulative impact of the testimony. *See, e.g.*, *Kyles*, 514 U.S. at 421; *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009) (quoting *Kyles*, 514 U.S. at 436-37 n.10).

Detective Snow Robertson's chile pepper testimony provided the most direct link from the Gonzales home to the crime scene. *See Ghahremani*, 332 S.W.3d at 478. To be sure, the pepper evidence was only circumstantial proof of a connection between Gonzales and the crime scene—and a weak one at that. But the State sought to improperly bolster the credibility of their false evidence with an expert's supposed stamp of approval. *See* 15 RR-T 141. This would have caused jurors to set aside their common sense doubts about the value of the pepper evidence and defer to what Detective Robertson said about "rarity" and "uniqueness" and the peppers being of "the same type." Eliminating this false testimony could well have affected the verdict.

The evidence of "blood" on the camper also may have had a crucial role for the jury. It was the *only* blood evidence the prosecution attempted to use to connect Gonzales to the crime. The prosecution knew its case rested on the jury's inferences from circumstantial physical evidence like the so-called blood transfer stain. 17 RR-T 365.

Pippins' misleading testimony about the order of the attacks against the Aguirres, which was unsupportable under the standards of his discipline and the crime scene evidence, was dramatically exploited by the State to opine on the order of attacks *as committed by a single offender*. This filled what otherwise would have been a crucial void in the State's case.

This false or misleading impression was sure to have an impact on the jury's decision. The jury was instructed to consider only a single-perpetrator theory of capital murder—that Gonzales had committed the murder of both Aguirres. The jury was not instructed to consider any other theory or to consider Gonzales guilty as a "party" to the offense. While the jury was told by the prosecutor and Robertson that more than one perpetrator might have been involved, the prosecutor insisted that Gonzales alone committed both murders. Even so, the jury was troubled about this pivotal aspect of the case. They sent the trial judge a note during deliberation about the effect of another attacker committing one of the murders.

Prosecutorial misconduct is especially prejudicial when used during the State's closing, because those comments are presented to the jury moments before it begins deliberations. *See York v. State*, No. PD-1753-06, 2008 WL 2677368, at *4 (Tex. Crim. App. 2008) (citing *Norris v. State*, 902 S.W.2d 428, 443 (Tex. Crim. App. 1995) ("We have also noted the impact of improper closing jury arguments because they are the last thing the jury hears before deliberations and that an instruction to disregard may be insufficient to remove the prejudice of some such arguments.")); *see also United States v. Johnston*, 127 F.3d 380, 399 (5th Cir. 1997) (observing elevated prejudice from unlawful argument during closing).

The combined effect of these three pieces of false testimony cannot be overstated. Where the State asked the jury to rely especially on the "physical evidence," much of that "physical evidence" was false. The State's case would have been fundamentally weaker and the jury far likelier to acquit had such evidence not been presented. *See, e.g., Kyles*, 514 U.S. at 421; *Smith*, 572 F.3d at 1333 (quoting *Kyles*, 514 U.S. at 436-37 n.10).

Moreover, the impact of this false evidence on the jury is inextricably linked with the *Brady* material presented above (Claim II.B *supra*). Detective Robertson was the conduit for two of these pieces of false testimony. The strong impeachment of Robertson's truthfulness and professionalism and related questions about the reliability of the homicide investigation are closely tied to the

claim that the State sponsored false opinions about the physical evidence through Robertson's testimony.

This constitutional violation rendered Gonzales' trial fundamentally unfair.

F. Gonzales' due process claims for suppressed evidence and false testimony (Claims II and III) satisfy the requirements of section 5.

Gonzales' Claim II is based on suppressed evidence that Gonzales could not previously obtain through the exercise of reasonable diligence. Claim III is based on the State's knowing presentation of false testimony. These claims qualify for authorization under Article 11.071, § 5(a)(1) and § 5(a)(2).

1. Gonzales' claims satisfy the requirements of Article 11.071, Section 5(a)(1).

Texas law requires that further proceedings be authorized when a claim "ha[s] not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article … because the factual or legal basis for the claim was unavailable the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). The factual basis of a claim is unavailable if "the factual basis was not ascertainable through the exercise of reasonable diligence on or before" the date the previous application was filed. Tex. Code Crim. Proc. art. 11.071, § 5(e). The claims that grew out of the State's withholding of material evidence and

presentation of false testimony—*Brady* and *Napue*—lie in the heartland of claims that the Court of Criminal Appeals typically authorizes for subsequent litigation.

These claims were not and could not have been "presented previously" in a prior application because the State had suppressed their factual predicates, and so the claims were unavailable to reasonably diligent counsel.

The fact that the State was concealing the factual predicate makes the application of article 11.071, § 5 straightforward. Defense and post-conviction counsel reasonably relied on representations made by the State that it had turned over all evidence it was obligated to disclose. *See, e.g., Banks*, 540 U.S. at 696 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process. 'Ordinarily, we presume that public officials have properly discharged their official duties.'"); *Strickler*, 527 U.S. at 283-84 ("If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable.").

The principles articulated in *Banks* and *Strickler* are grounded in the Constitution's protection of due process and the guarantee of the benefit of habeas

corpus. The "same bedrock due process principles" discussed in *Banks* should be considered when construing the meaning of "reasonable diligence" for purposes of making the determination whether applicant's present arguments were "available" when prior application was filed. *Ex parte Storey*, 584 S.W.3d 437, 444 (Tex. Crim. App. 2019) (Yeary, Slaughter, JJ., dissenting).

Beginning in August 1994, the trial court placed the State under a continuing obligation to disclose exculpatory evidence to the defense. 1 CR-T 4-9 (Order for Discovery and Inspection of Evidence). During the pre-trial proceedings, the State adopted an "open file policy" and gave "the entire file to the defense counsel." 20 RR-T 81 (testimony of prosecutor Preston Stevens in hearing on motion for new trial). Under the standards of *Strickler* and *Banks*, Gonzales' counsel reasonably relied on these representations about the completeness of the file.

At no time during the proceedings in state and federal court that took place between the 1995 trial and 2020 did the State revealed any exculpatory evidence. Only in 2020 did the district attorney *pro tem* reveal the Sample Memorandum about her conversation with Dr. Villalon that showed Robertson's chile pepper testimony was false.

Undersigned counsel learned of the suppression of Robertson's personnel record and its relation to his false testimony and manipulation of the evidence by happenstance. In 2020, Gonzales' investigator performed routine record requests

for key witnesses in Gonzales' trial pursuant to the Public Information Act. Upon receipt of these materials, the investigator learned of the civilian abuse and dishonesty allegations contained within Robertson's records. These allegations were the basis for further investigation into Robertson's prior conduct including researching other cases with fact patterns similar to those in Gonzales' case.

Thus, because the state misconduct at issue precluded Gonzales from learning of the factual basis of the claim and raising it in an earlier application, he has satisfied § 5(a)(1). In numerous cases, the Court of Criminal Appeals has recognized that such claims satisfy § 5(a)(1) [40]

[40] *See, e.g., Ex parte Landor*, No. WR-81,579-02, 2020 WL 469979, (Tex. Crim. App. Jan. 29, 2020) (unpublished) (authorizing successive proceedings on claim that State withheld *Brady* evidence); *Ex parte Reed*, No. WR-50,961-10, 2019 WL 6114891, (Tex. Crim. App. Nov. 15, 2019) (unpublished) (authorizing successive proceedings on *Brady*, false testimony, and actual innocence claims); *Ex parte Chaney*, 563 S.W.3d 239, 277 (Tex. Crim. App. 2018) (granting applicant relief in Art. 11.073 proceedings on basis of newly-discovered *Brady* evidence); *Ex parte Castillo*, No. WR-70,510-04, 2017 WL 5783355 (Tex. Crim. App. Nov. 28, 2017) (unpublished) (staying applicant's execution and authorizing successive proceedings on *Chabot* claim); *Ex parte Young*, No. WR-65,137-04, 2017 WL 4684770 (Tex. Crim. App. Oct. 18, 2017) (unpublished) (staying applicant's execution and authorizing successive proceedings on *Chabot* claim); *Ex parte Temple*, No. WR-78,545-02, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016) (unpublished) (granting relief on basis that State's failure to timely disclose police reports to defendant constituted *Brady* violation); *Ex parte Roberson*, No. WR-63,081-03, 2016 WL 3543332 (Tex. Crim. App. June 16, 2016) (unpublished) (staying applicant's execution and authorizing successive proceedings on *Chabot* claim); *Ex parte Murphy*, No. WR-38,198-04, 2015 WL 5936938 (Tex. Crim. App. Oct. 12, 2015) (unpublished) (staying applicant's execution to consider authorization of successive proceedings on *Brady* claim that State failed to disclose threats of prosecution and promises of leniency to its two main witnesses and on claim that State unknowingly presented false testimony through one witness); *Ex parte Tercero*, No. WR-62,592-04, 2015 WL 5157211 (Tex. Crim. App. Aug. 25, 2015) (unpublished) (authorizing successive proceedings on claim that State presented false testimony); *Ex parte Espada*, No. WR-78,108-01, 2015 WL 4040778, (Tex. Crim. App. July 1, 2015) (unpublished) (granting relief on applicant's *Chabot* claim that the State presented false evidence about the employment background history of a law enforcement witness); *Ex parte Carty*, No. WR-61,055-02, 2015 WL 831586 (Tex.

Crim. App. Feb. 25, 2015) (unpublished) (authorizing successive proceedings on claim that State coerced witnesses into providing false testimony and that State did not disclose deal with co-defendant); *Ex parte Brown*, No. WR-68,876-01, 2014 WL 5745499 (Tex. Crim. App. Nov. 5, 2014) (unpublished) (vacating applicant's conviction and sentence on basis that the State withheld *Brady* evidence); *Ex Parte Tiede*, 448 S.W.3d 456 (Mem.) (Tex. Crim. App. 2014) (granting applicant relief on basis of the State's use of false evidence); *Ex parte Lave*, Nos. WR-44564-03, WR 44564-04, 2013 WL 1449749 (Tex. Crim. App. April 10, 2013) (unpublished) (authorizing successive proceedings on claim that State presented false expert testimony); *Ex parte Bower*, No. WR-21005-02, 2012 WL 2133701 (Tex. Crim. App. June 13, 2012) (unpublished) (authorizing subsequent habeas application following forensic testing on *Brady* claim); *Ex parte Wyatt*, No. AP-76797, 2012 WL 1647004 (Tex. Crim. App. May 9, 2012) (unpublished) (authorizing successive petition and granting relief on four items of exculpatory evidence suppressed by the State that would have supported the defense's theory of misidentification); *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012) (authorizing subsequent petition and granting relief on *Brady* claim that State failed to produce police reports which identified other potential suspects); *Ex parte Settle*, No. AP-76591, 2011 WL 2586406 (Tex. Crim. App. June 29, 2011) (unpublished) (authorizing successive petition and granting relief on *Brady* claim); *Ex parte Newton*, No. WR-54,073-02, 2009 WL 2184357 (Tex. Crim. App. July 22, 2009) (unpublished) (authorizing successive proceedings on previously undisclosed *Brady* claim and ultimately granting relief on *Brady* claim in *Ex parte Newton*, No. AP-76456, 2010 WL 4679950 (Tex. Crim. App. Nov. 17, 2010) (unpublished)); *Ex parte Nealy*, No. WR-50,361-03 (Tex. Crim. App. Nov. 13, 2006) (unpublished) (authorizing successive proceedings on claim that prosecution failed to disclose impeachment evidence relating to witness at trial); *Ex parte Toney*, No. WR-51,047-03, 2006 WL 2706782 (Tex. Crim. App. Sept. 20, 2006) (unpublished) (authorizing successive proceedings on *Brady* and *Napue* claims and granting relief on *Brady* claim in *Ex parte Toney*, No. AP-76056, 2008 WL 5245324 (Tex. Crim. App. Dec. 17, 2007)); *Ex parte Reed*, No. WR-50,961-03, 2005 WL 2659440 (Tex. Crim. App. Oct. 19, 2005) (unpublished) (authorizing successive proceedings on *Brady* claims relating to information from law enforcement investigation of offense); *Ex parte Rousseau*, No. WR-43,534-02 (Tex. Crim. App. Sept 11, 2002) (unpublished) (authorizing successive proceedings on *Brady* claim based on evidence that subsequent habeas counsel uncovered through request to review district attorney's file); *Ex parte Blair*, No. WR-40,719-03 (Tex. Crim. App. May 30, 2001) (unpublished) (authorizing successive proceedings on a claim that the prosecution suppressed evidence); *Ex parte Murphy*, No. WR-30,035- 02 (Tex. Crim. App. Sept. 13, 2000) (unpublished) (authorizing successive proceedings on a claim that prosecutors relied on perjured testimony); *Ex parte Faulder*, No. WR- 10,395-03 (Tex. Crim. App. June 9, 1997) (unpublished) (authorizing successive proceedings on claims that prosecutors allowed witnesses to testify falsely and withheld exculpatory evidence); *Ex parte Nichols*, No. WR-21,253-02 (Tex. Crim. App. April 16, 1997) (unpublished) (authorizing successive proceedings on a claim that prosecutors withheld the correct name and address of a witness with exculpatory information).

2. Gonzales' claims also satisfy Section 5(a)(2).

As described in full in Claim IV *infra*, Gonzales meets the high bar for a claim of actual innocence based on the new evidence presented in this application. Even if this Court concludes that Gonzales does not meet the burden for a claim of actual innocence, he can satisfy the lower burden of showing at this stage a prima facie case that a jury would more likely than not convict him had it been presented with the compelling evidence now available. *See* Claim IV.A.

IV. Gonzales Is Actually Innocent and Satisfies Both *Elizondo* and Article 11.071, Section 5(a)(2).

A. Article 11.071 § 5(a)(2)—actual innocence "gateway"/*Schlup*.

Article 11.071 § 5(a)(2) adopts the United States Supreme Court's "gateway" actual innocence standard, as set forth in *Schlup v. Delo*, 513 U.S. 298 (1995). *See Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008). Under *Schlup*, a petitioner's showing of actual innocence can overcome a procedural default in state court, allowing the petitioner to revive otherwise-defaulted claims. 513 U.S. at 321.[41] In evaluating the *Schlup* actual innocence gateway, "the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of

[41] Gonzales submits that § 5(a)(2) authorizes review of even claims previously rejected on the merits. *See Schlup*, 513 U.S. at 320 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (Powell, J.)) (discussing "interests of the prisoner in relitigating constitutional claims *held meritless on a prior petition*").

admissibility that would govern at trial." *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks and citation omitted).

The Court should consider the preceding Claims II and III, because Gonzales has obtained substantial new evidence that demonstrates his actual innocence pursuant to Article 11.071 § 5(a)(2) and *Schlup*.[42]

B. Actual innocence under *Elizondo*.

Both Texas and federal constitutional law prohibit the conviction or punishment of persons who are innocent. *See Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1997); *see also In re Davis*, 557 U.S. 952, 953-54 (2009) (Stevens, Ginsburg and Breyer, J.J., concurring) ("[I]t 'would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person.") (citations omitted).

Under *Elizondo,* the court reviewing an innocence claim must examine the new evidence in light of the evidence presented at trial. *Ex parte Thompson,* 153 S.W.3d 416, 417 (Tex. Crim. App. 2005). "In order to grant relief, the reviewing court must believe that no rational juror would have convicted the applicant in light

[42] Additionally, whereas § 5(a)(1) is claim-specific—requiring that the applicant show "the factual or legal basis for *the claim* was unavailable on the date the applicant filed the previous application"—§ 5(a)(2) does not limit review to the claim connected to the applicant's showing of innocence. Rather, § 5(a)(2) permits the court to "consider the merits of or grant relief based on the subsequent *application*" *as a whole* whenever "the application contains sufficient specific facts establishing that … 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."

of the newly discovered evidence." *Id.* This must be shown by clear and convincing evidence. *See Elizondo,* 947 S.W.2d at 209. The Court described this weighing of evidence as follows:[43]

> Because, in evaluating a habeas claim that newly discovered or available evidence proves the applicant to be innocent of the crime for which he was convicted, our task is to assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole, we must necessarily weigh such exculpatory evidence against the evidence of guilt adduced at trial.

Id. at 206. In *Elizondo*, the Court was careful to emphasize that this standard was something less than a legal sufficiency review. 947 S.W.2d at 207. No presumptions should be applied to the evidence either in favor of or against the verdict:

> [T]he court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances. The court then should weigh the evidence in favor of the prisoner against the evidence of his guilt. Obviously, the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence must be.

Id. (citation omitted); *see also Ex parte Chaney*, 563 S.W.3d 239, 274-78 (Tex. Crim. App. 2018) (sustaining actual innocence determination under *Elizondo* after detailed reassessment of trial record in light of newly discovered exonerating evidence).

[43] Gonzales does not concede that *Elizondo* correctly sets forth the federal constitutional standard. Instead, Due Process prevents the conviction of persons who are probably innocent. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). However, the evidence presented in this application meets any applicable standard.

C. Gonzales is entitled to habeas relief because he can make a truly persuasive showing that he is innocent.

The State conceded the weakness of its case. It was not "one of those cases that they say it is wrapped up with ribbons and bows on it." There were no "eyeball witnesses." 17 RR 365. There was no "confession." *Id.* There was not "a video camera." *Id.* "[A]ll that stuff, that stuff doesn't exist." *Id.* The State asked the jury to rely on "the physical evidence" and on what Gonzales supposedly told Kenimer in Spanish, as interpreted by Kenimer. *Id.*

Thus, the State's case against Gonzales rested on a single fleeting translated sentence ("Although I did it…") and several pieces of weak circumstantial evidence, recounted in detail in the statement of the case, *supra*, and reflected in the Court of Criminal Appeals' direct appeal opinion. Though this evidence may have been sufficient to convict under the limits of appellate review, each piece of evidence has now been completely undermined by the new evidence available. In place of the false evidentiary picture the jury heard, Gonzales has discovered compelling new evidence that will demonstrate the guilt of other individuals and exonerate him.

D. Newly discovered evidence undercuts the State's weak case for Gonzales' guilt.

As demonstrated in the facts and claims above, Gonzales has refuted each of the bases for his conviction:

- Charles Kenimer's testimony was already called into doubt at trial because his interpretation of Gonzales' purported admission was based on a translation from Spanish, and the true meaning "could have been lost in translation." But what was not heard at trial is that the State also knowingly elicited false testimony regarding the circumstances of Gonzales' purported confession which had the effect of improperly bolstering the credibility of his account.
- The prosecution and police concealed the true opinion of the chile pepper expert whom they had consulted and offered false testimony that the chile peppers were unique to try to make them appear to connect Gonzales to the murders. Claims II and III *supra*.
- The claim that there was a "blood transfer stain" on a camper in the alley between the Aguirre home and the Gonzales home was blatantly false and misleading. *See* Claim III *supra*. Agents for the State knew that police had not preserved any proof of the stains' existence, and nobody had performed any analysis of the evidence to determine whether it was in fact blood.
- The new expert report of Paulette Sutton refutes the misleading testimony of bloodstain pattern analyst Rick Pippins that suggested

there was only one attacker who committed the crimes in order. *See* Claim III *supra*.

- In federal habeas testimony after the first trial, Detective Robertson recanted his false testimony that the two teardrop tattoos amounted to a confession to the murder of the Aguirres. *See* Claim III *supra*.
- The proponent of many of these pieces of false evidence—the camper bloodstain, the peppers, and the tattoos—was a police officer whose undisclosed law-enforcement record revealed a pattern of misconduct and dishonesty. *See* Claim II *supra*.
- The limited, false evidentiary picture also reflected the tunnel vision and incompetence of the lead detective and other police investigators. In an investigation that the prosecution stated was built on "physical evidence," the police investigation was more remarkable for the physical evidence that was not collected, documented, or preserved. *See* Claim II.D.1 *supra* (describing the obvious police work the Odessa Police did not do). The investigation was marred by sloppiness and constricted by Detective Robertson's single-minded drive to convict Gonzales. Combined with the other new evidence, this record of inaction and sloppiness would have undercut any confidence a jury would have had in the investigation.

- Finally, the lone piece of identifying physical evidence—Gonzales' fingerprints on a stolen stereo discovered in possession of another suspect—was far less informative than the State argued. The fingerprint was taken from the back of stolen property that at least two other suspects had custody of, Daniel Lugo and Julian Olivarez. The stereo was recovered over two weeks after the offense, during which time the stereo passed through many hands. Gonzales does not contest that his fingerprint was found on the back of the stolen stereo, but the weight of this evidence is minimal in light of the trial record, because it does not remotely suggest that Gonzales touched the stereo in the Aguirre house. Moreover, this evidence's value to the conviction is even more slight given the vast new trove of fingerprint evidence that Gonzales has just begun to analyze, *see infra*.

The police concealed the full extent of their investigation of latent prints taken from the stereo and other stolen property. Corporal Joe Rexer testified that he identified three of Gonzales' prints on the stereo by latent print comparison—only one of which was made a State's exhibit. But he did not testify about the vast number of other latent prints that could be compared to other suspects from the stereo or other stolen property. This gave the false impression that there were not other prints from other suspects on the stolen property or at the crime scene.

New evidence upends that picture. We now know that the police had discovered dozens of other prints that were suitable for comparison, but the police failed to investigate the significance of these other prints. *See* Affidavit of Heather McNeill (Ex. 69); Feb. 22 Affidavit of Stephanie Bothwell (Ex. 42). The police could not know how many other identifications it could make from the stolen property, because the police apparently did not even try to do so.

And finally, there is almost no sign that police conducted comparisons of the latent print evidence from the crime scene itself—i.e. the evidence that would be most probative about who committed the crime.[44] If Gonzales' fingerprints are compared and not identified on any latent print of value from the crime scene and one or more of the alternate suspects' fingerprints are identified at the crime scene, then that would be strongly exculpatory evidence.

This is consistent with a larger pattern of lapses in the Robertson-led investigation. *See* Claim II.E (describing all the mistakes and omissions in the OPD homicide investigation); Hueske Decl. ¶¶ 11-12; Ex. 33 ¶¶ 15-19 (First Sutton Aff., Jan. 31, 2022).

[44] A few latent print cards note an identification of Merced Aguirre. But there is no record of any other comparison being performed.

E. New exculpatory evidence of Gonzales' innocence

The new evidence Gonzales has discovered demolishes the false evidence that incriminated Gonzales. But it also provides a compelling new picture that affirmatively exonerates Gonzales. Jesse Perkins and Daniel Lugo committed the murders and Julian Olivarez was their accomplice.

As recounted in the Statement of Facts and incorporated here, Jesse Perkins confessed to the killing in the presence of Eduardo Nino. Nino Aff. ¶ 4. Perkins named his co-conspirators: Julian Olivarez and Daniel Lugo. Nino Aff. ¶ 4. Perkins admitted he set Michael Gonzales up. *Id*. Jesse Perkins was seen wearing a cloth over his left hand and wrist and told Nino he got cut in the Aguirres' house. *Id.* ¶ 6. Perkins made the confession at Olivarez's house and Olivarez did not deny his role. *Id.* ¶ 5.

When the investigator for Gonzales' post-conviction counsel went to speak with Perkins in prison, he also admitted to him that he bled at the crime scene. Reyna Aff. ¶ 6 (Ex. 2).

This third-party admission of guilt is consistent with both old and new physical evidence. It could be further confirmed by additional DNA testing if Gonzales is permitted to test the evidence. *See Gonzales v. State*, No. AP-77,104 (Tex. Crim. App.) (Chapter 64 appeal submitted).

Perkins previously admitted his fingerprints would be on the sliding glass door. Ex. 19 ("My prints will be on that door …."). Police knew that the attackers tracked blood across the living room and out that door. Ex. 33 at 9; Ex. 10. Perkins' wounds are also consistent with the police's own report of drip bloodstains at the crime scene, especially on the housecoat Merced Aguirre was wearing and in the utility room. Pippins Report at 14 ¶ 6. Perkins is the only person who was found to have blood of the victims on an item in his possession.

Perkins attempted to pass off the shirt as Gonzales' by claiming that Gonzales had given it to him. Ex. 19 (May 10 statement). Perkins told the same story to Nino. Nino Aff. ¶ 6.

Detective Snow Robertson had Ruby Luna falsely testify that she saw Gonzales with a flannel shirt on. Ruby Luna now rejects that statement that Robertson had her sign. Ruby Luna Decl. (Ex. 40). In fact, Ruby Luna's recollection is consistent with Perkins' initial description of what Gonzales was wearing in Luna's car that night—before he tried to pass off the flannel shirt as Gonzales'. *See* Ex. 18 (May 5 statement of Jesse Perkins) (Michael Gonzales "had a black T-Shirt on."); Ruby Luna Decl. ¶ 10 ("I remember that Michael was wearing a[]t-shirt that night."). Luna recalls, "The only person wearing a flannel shirt that night was Jesse Perkins." *Id*.

New examination of the physical evidence shows stains on the flannel shirt consistent with Perkins wearing the shirt while bleeding from the wounds he told Nino he sustained on the night of the murder, wounds that appeared as scars in photographs of his left arm months later. Previous examination of the flannel shirt did not locate staining on the inside of the shirt.[45] But a forensic DNA analyst, a bloodstain pattern expert, and OPD's own crime scene unit supervisor now see visible staining on the inner lining of the shirt based on new photographs taken by OPD.

These stains were further enhanced by applying an alternate light source tool to the evidence. *See* Bothwell Aff. ¶ 9 (Ex. 42). OPD Crime Scene Unit Supervisor Stephanie Bothwell also confirms that she "observed discolorations on various spots on the inner lining." *See id.* This caused additional potential bodily fluids to

---

[45] Forensic DNA analyst Huma Nasir states:

> There may be more bloodstains present on this flannel shirt because only stains from the outside front of the flannel shirt were tested. Two stains tested positive for blood in 1994. Then 5 additional stains were identified and tested in 2000. Since different stains were identified upon re-examining the shirt, there may be additional stains on the shirt that were not identified.
>
> All of these tested stains were identified on the outside front and outside sleeves of the flannel shirt. No DNA testing was performed on any portion of the inside of the shirt or the back of the shirt. The inside of the shirt is black and any stains on the inside of the shirt may have been difficult to identify with the naked eye. There may be bloodstains present on the inside of the shirt that may provide crucial information about the perpetrator of the crime.

Feb. 25, 2022 Affidavit of Huma Nasir ¶¶ 7-8 (Exhibit 45). *See also* Third Affidavit of Paulette Sutton Feb. 25, 2022 ¶¶ 15, 27, 34 (Exhibit 3).

fluoresce on the surface of the inner lining. Nasir Aff. ¶ 11 ("There are several areas on the inside lining of the shirt including the sleeve that fluoresced under the alternate light source suggesting possible presence of bodily fluids"); Feb. 25 Sutton Aff. ¶ 36.

The stains on Perkins' shirt suggest that Perkins put the shirt on after the murder when he was wounded and that the outside of the shirt then had incidental contact with several surfaces stained with the Aguirres' blood.

> The small amount of bloodstaining and the distribution of the bloodstains on the exterior surface of cuffs and front of the flannel shirt is indicative of the shirt being worn during incidental contact with exposed blood belonging to Mr. and Mrs. Aguirre and not during a violent attack. This opinion has been reinforced by the photographs of the flannel shirt (Item 121) taken February 17, 2022 showing the stains on the right cuff were created by a saturation mechanism (accumulation of blood in an absorbent material) and by a transfer mechanism (the result of the cuff coming into contact with a blood-bearing surface).
>
> …
>
> After examining the evidence photographs taken on February 17, 2022, it was noted that there are areas of brownish staining on the interior of the left sleeve and near the interior of the right cuff of the flannel shirt (Item 121). In my experience in the laboratory, I have found that bloodstains deposited on black synthetic material, such as the quilted interior of the flannel shirt, often present as a brownish stain.
>
> In addition to the coloration of these stains on the interior surface of the flannel shirt (Item 121) being consistent with blood, the location of these stains is consistent with their being deposited by a person with an injured arm and/or hand wearing the shirt.

Feb. 25 Paulette Sutton Aff. ¶¶ 33, 35-36.

All of this new evidence has come to light since mid-February this year, less than a month before Gonzales' scheduled execution. New potential biological material on the most incriminating piece of physical evidence that would connect Perkins to the bloodstained garment cries out for additional testing and for a stay of execution until that testing can occur. Forensic DNA analyst Huma Nasir states it is "imperative" that testing be performed "urgently":

> In light of the new information discovered by Mr. Gonzales' counsel, and the confirmation of fluorescent staining indicating possible bodily fluids on the inside lining of the flannel shirt, it is imperative that the flannel shirt (item 121) be tested for additional stains urgently. Newly identified bloodstains can be tested using the more sensitive PCR testing that is now available and has been mentioned in my last affidavits. This more sensitive testing may be able to identify additional contributors on the shirt and could lead to information regarding the perpetrator.

Feb. 25 Nasir Affidavit ¶ 13 (Ex. 45).

This new information also adds urgency to retesting evidence at the crime scene.

> There is now new evidence from Jesse Perkins himself that he was inside the Aguirre home when they were attacked; that he was bleeding; and that he believed that he left traces of blood inside the Aguirre's house. This evidence indicates that Perkins may well be the person who left the bloodstains in the laundry room and on Mrs. Aguirre's housecoat as described by Sgt. Pippins and by Texas Ranger Sanders. DNA testing could answer this question.

Feb. 25 Sutton Affidavit ¶ 41 (Ex. 3).

This new information also reinforces the exculpatory character of the evidence that the State hid from the defense and the jury but revealed during the hearing on Gonzales' motion for a new trial in 1996. Gonzales had luminol testing done to his bare arms and hands and he had no sign of blood there. Luminol can show the presence of washed-off blood. In fact, that is one of its main forensic uses. Given the large amount of blood at the crime scene and the nature of the stabbing, it would have been highly improbable that Gonzales committed the murders and yet had no blood on his arms and hands. *See* 1st Sutton Aff. at 8-9 (Ex. 33)(discussing testimony of officers Lambert and Thomas).

It also makes the exculpatory 2003 DNA testing results more significant. *See* Ex. 32 (2003 DNA Report). Post-conviction DNA results of all the available crime-scene evidence excluded Gonzales as a contributor from every item tested. That in itself was powerfully exculpatory. *See Chaney*, 563 S.W.3d at 275.

In addition, Julian Olivarez's testimony now appears to be a fabrication intended to frame Gonzales. The only testimony regarding Gonzales having stolen property in his house immediately after the murder came from Julian Olivarez and his wife. 16 RR-T 223-26, 233-34. Julian Olivarez conjured a story where the stolen property was pushed on him by Gonzales. Yet police never seriously entertained that Julian Olivarez was a suspect. They did not obtain Olivarez's

blood, take his fingerprints, or immediately investigate his alibi.[46] New evidence further shows that Julian Olivarez threatened Michael Gonzales and others to silence them after the murders. Suniga Aff. (Ex. 48). This no doubt had an impact on Gonzales who was a husband, father of an infant daughter, and an intellectually disabled man.

Finally, Michael Gonzales' significant intellectual impairments cannot be discounted as a factor in his innocence. As the Supreme Court recognized, an individual's intellectual disability makes them uniquely susceptible to wrongful conviction and execution. *Atkins*, 536 U.S. at 320-21. Michael Gonzales poorly coped with his lack of understanding in social settings. *See generally* Claim I *supra*. He became fixated on loyalty in part because of his deficits in communicating and interacting with others. *Id.* He was far more likely to act irrationally when he believed that he had been set up by people he knew and believed were his friends. All this made it far more likely he "took the rap" for others' wrongdoing despite his consistent protestations of innocence. *See* Affidavit of Dr. Jack Fletcher at 16-17; Affidavit of Alice Ramirez ¶ 20 ("Michael was an easy target for people to put the blame on because he wasn't a snitch."); ¶ 21 ("Guys were usually using him.").

[46] Police waited until June to ask his boss whether Olivarez was in that night and received no confirmation. *See* Ex. 49.

F. Gonzales is actually innocent.

The evidentiary record amassed by Gonzales, in light of highly probative newly discovered evidence, leads to but one conclusion: Gonzales would not have been convicted of the murder of Manuel and Merced Aguirre. He has at least made a prima facie showing that, at an evidentiary hearing, he will be able to demonstrate his actual innocence by clear and convincing evidence.

Accordingly, because Gonzales has met the standards under Article 11.071, Section 5(a)(2), in addition to *Elizondo*, the Court should remand the claims in this Application for a hearing on Gonzales' actual innocence.

CONCLUSION AND PRAYER FOR RELIEF

Gonzales asks that the Court:

- Stay his impending execution to allow for further review of his meritorious claims;
- Find that the requirements of Section 5 of Article 11.071 have been satisfied;
- Issue an order remanding the case to the convicting court for an evidentiary hearing for the purposes of examining the merits of these claims; and
- Grant any other relief that law or justice may require.

Respectfully Submitted,

Richard Burr
Texas Bar No. 24001005
Burr and Welch, PC
PO Box 525
Leggett, TX 77350
713-628-3391
dick@burrandwelch.com

Counsel for Michael Dean Gonzales

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following attorneys by electronic service on the 28th day of February, 2022.

Erich Dryden
District Attorney Pro Tem
Ector County, Texas
Erich.Dryden@oag.texas.gov

Richard Burr