

# APPENDIX “C”

**08-23-00357-CR**

**APPELLATE DOCKET NO. 08-23-00357-CR**

**IN THE  
COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS**

**FILED IN  
8th COURT OF APPEALS  
EL PASO, TEXAS  
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**FRANKLIN DANUARI CALIX-REYES  
Appellant**

**vs.**

**STATE OF TEXAS  
Appellee**

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**Appeal in Cause No. 20-08-03163-CR  
In the 112th Judicial District Court of  
Crockett County, Texas**

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**MOTION FOR REHEARING**

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**APRIL 10, 2024**

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**APPELLATE DOCKET NO. 08-23-0357-CR**

**IN THE  
COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS**

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**FRANKLIN DANUARI CALIX-REYES  
Appellant**

**vs.**

**STATE OF TEXAS  
Appellee**

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**Appeal in Cause No. 20-08-03163-CR  
In the 112<sup>th</sup> Judicial District Court of  
Crockett County, Texas**

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**TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:**

Comes now FRANKLIN DANUARI CALIX-REYES, hereinafter referred to as Appellant, and submits this Motion for Rehearing pursuant to Rule 49.1 of the Texas Rules of Appellate Procedure.

**PRELIMINARY STATEMENT**

On March 28, 2025, this honorable court entered its Opinion affirming the conviction of Appellant for the offense of Capital Murder alleged to have been committed on or about April 25, 2020.

Appellant's Point of Error Number 1 contends that the actions of Sgt. Luis Lara, the law enforcement officer who obtained Appellant's oral statement, violated Appellant's constitutional and statutory rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Texas Constitution, and under Article 38.23 of the Texas Code of Criminal Procedure.

Appellant's Point of Error Number 2 contends that any statements obtained by Sgt. Luis Lara were obtained in violation of Article 38.22 of the Texas Code of Criminal Procedure and in violation of the Appellant's rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10 and 19 of the Constitution of the State of Texas.

Appellant's Point of Error Number 4 contends that the evidence was factually insufficient to support a conviction for capital murder and was so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust.

## **ISSUES ON REHEARING**

### ***Points of Error 1 and 2***

Article 38.22, Section 2, Code of Criminal Procedure, sets out the warnings that must be provided before custodial interrogation begins, mandates the use of a written or recorded statement and precludes the use of statements that result from

custodial interrogation absent compliance with those additional procedural safeguards.

For a statement that results from custodial interrogation to be admissible under Section 2, Article 38.22 (b), it must be shown to the Court that the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

The State must prove by a preponderance of the evidence that any waiver was knowing, intelligent, and voluntary under *Miranda* and article 38.22. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); *Leza vs. State*, 351 S.W.3d 344, 349 (Tex.Crim.App.2011).

### ***Video Recording of Waiver of Rights***

The knowing waiver of Appellant's constitutional rights is the central point of this request for rehearing.

A reading of the transcript alone does not fully reveal the circumstances as they occurred during Appellant's custodial interrogation. An actual viewing of the recorded custodial interrogation, State's Exhibit 119, is vital to the issue of a "knowing waiver" of Appellant's constitutional rights.

In viewing State's Exhibit 119, the first part of the recorded interrogation shows Sgt. Lara speaking in a clearly audible slow pace as he read Appellant's constitutional rights, one through five, in Spanish from a form that was on a desk.

The recording reveals that Sgt. Lara then turned the form from which he was reading toward himself and started filling in blanks such as the county, his own name and Appellant's name. Sgt. Lara then instructed Appellant to sign his name to specific parts on the form and Appellant signed as instructed.

A view of the recording clearly reveals that Sgt. Lara then turned the form to himself, lowered his voice and began to read at a quicker pace than before. Sgt. Lara read the waiver of Appellant's constitutional rights to himself in such a low voice that what he was reading is inaudible to the Appellant and to the listener on the recording. Not only was Sgt. Lara's voice inaudible as he was reading, but his rapid self-reading and mumbling occurred during the most critical part of those warnings, the waiver of the Appellant's Article 38.22 rights.

Viewing the recorded interrogation clearly shows that at the precise moment Sgt. Lara was self-reading and mumbling the waiver of Appellant's rights in a low inaudible voice, Appellant was unaware that Sgt. Lara was reading the waiver of his rights to him so he reached for a soda and began to drink from it.

Understandably, this honorable Court's reading of the following Spanish to English transcript from State's Exhibit 119 does not result in any confusion about what Sgt. Lara read to Appellant. (R.5, p.59)(R.16, p. 32-33):

Lara: No, your signature. And I'm going to put my name and title. Here the witness signs. Uh, during the issuance of this declaration, I have complete knowledge, intelligence, and have renounced the rights set forth in this signing document having renounced full recognition (mumble) will to these rights I surrender this declaration freely and voluntarily. Okay, so give me a moment. Okay, so since I read your rights, uhm, do you want to keep talking to me? Do you want to talk to me?

However, viewing the recording of this part of the interrogation leaves the viewer with a different conclusion. Viewing State's Exhibit 119 makes it readily apparent that Sgt. Lara was no longer reading anything to Appellant. Instead, he was reading the waiver of Appellant's constitutional rights to himself.

This critical issue was not disputed by Sgt. Lara. During his testimony he readily admitted that in that last part of his reading, while he was mumbling the waiver of Appellant's rights, Appellant reached for a soda and was no longer paying attention. (R.5, p. 47-48).

Not only did Sgt. Lara himself confess that he mumbled when he read the waiver of Appellant's constitutional rights, but more importantly, Sgt. Lara further confessed: "I was reading to myself that portion." (sic) (R.5, p. 47-48)

### ***No Knowing, Intelligent and Voluntary Waiver of Rights***

A knowing, intelligent and voluntary waiver of Appellant's rights under Article 38.22 did not occur as evidenced by the recording showing Appellant's reaction of no longer paying attention to Sgt. Lara as he mumbled the waiver of Appellant rights to himself.

Appellant's lack of criminal experience, his limited seven years foreign education, his recent arrival in the U.S., and Sgt. Lara's admission that he was mumbling and self-reading the waiver of Appellant's constitutional rights demonstrate a complete lack of Appellant's realization that by signing the form, Appellant was abandoning his constitutional rights. As a direct consequence of Sgt. Lara's confessed act of mumbling the waiver of Appellant's constitutional rights to himself, he failed to substantially comply with the requirements of Article 38.22.

Sgt. Lara's failure to substantially comply with the waiver of Appellant's constitutional rights under Article 38.22 can be attributed to several factors:

1. Sgt. Lara never studied the reading of Miranda warnings at the academy;
2. Sgt. Lara did not carry Miranda warnings with him;
3. Sgt. Lara had never read Miranda warnings to anyone;
4. Sgt. Lara did not know the meaning of "custodial interrogation;"

5. Sgt. Lara admitted that he was not aware that he was supposed to make sure that a person was giving up his rights and “wants to talk to him:” and

6. Sgt. Lara’s limited understanding of Appellant’s constitution rights that was personified by his obvious verbal and mental struggle while reading the Article 38.22 warnings to Appellant from English to Spanish (R.16, p. 28, 35, 41, 51-54, 56-57, 60, 64, 71)

Viewing State’s Exhibit 119 clearly reveals to the viewer that through Appellant’s body language of reaching for a soda, Appellant’s lack of attention to Sgt. Lara’s incoherent mumbling, and Sgt. Lara’s admission he was reading the waiver Article 38.22 warnings to himself, that Appellant did not “knowingly, intelligently and voluntarily” waive his rights under Article 38.22.

### ***Lack of Full Awareness of Abandoned Rights***

The Texas Court of Criminal Appeals has acknowledged that a defendant is not required to “explicitly” waive the Miranda rights, but must do so knowingly, intelligently, and voluntarily. *Joseph v. State*, 309 S.W.3d 20, 25 (Tex.Crim.App.2010).

In *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986), the Supreme Court held that a waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran at 421*.

Sgt. Lara's inaudible mumbling and self-reading of the waiver of Appellant's rights did not rise to the level of Appellant having a "full awareness of the nature of the right being abandoned" nor to the "consequences of the decision to abandon it."

Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. *Moran at 421*; see also *Coffey v. State*, 435 S.W.3d 834, 842 (Tex.App.—Texarkana 2014, pet. ref'd).

The failure of the State to prove both a willing choice and the requisite level of comprehension results in the Appellant's Article 38.22 and Miranda rights not having been properly waived. *Moran at 421*.

The Court's failure to suppress the custodial interrogation and its admission in evidence rises to the level of constitutional error.

### ***Constitutional Error was Contributing Factor to Verdict***

As in the Court of Criminal Appeals decision in *Scott*, the question here is: "what is the likelihood that the constitutional error of admitting the Appellant's custodial interrogation recording in evidence was a contributing factor in the jury's deliberations in arriving at that verdict?" *Scott v. State*, 227 S.W.3d 670, 690 (Tex.Crim.App.2007).

The answer to this question is clearly evident from the fact that despite the jury having received 179 Exhibits from the State and 8 Exhibits from Appellant during a four-day trial, the only exhibit the jury requested at their deliberation was State's Exhibit 119, the 98-page written transcript of Sgt. Lara's custodial interrogation of Appellant. (R.21, p. 3-7) (R.19, p. 99-100).

***Point of Error 4***

Appellant's fourth point of error maintains that without the use of the custodial interrogation, the evidence presented at trial was factually insufficient to support his conviction.

In this Court's opinion on Appellant's fourth point of error, the Court nevertheless relies on inconsistent statements made by Appellant to Sgt. Lara during the objected to custodial interrogation and then a change of those stories at trial, along with the "defendant's own confession." However, to consider what Appellant said during the custodial interrogation as evidence to support the conviction is to find that Sgt. Lara substantially complied with the requirements of Article 38.22, despite the evidence in the recorded custodial interrogation to the contrary.

Aside from the Appellant's flight from the scene of the crime and his arrest in Arkansas, flight itself does not amount to a presumption of guilt, it is merely a

circumstance from which an inference of guilt may be drawn. *Arivette v. State*, 513 S.W.2d 857, 862 (Tex.Cr.App.1974).

The State produced no live witnesses to the crime, produced no forensic or DNA evidence to connect Appellant with the criminal offense of Capital Murder or Robbery of Romeo Perez, and produced no witnesses that saw Appellant on Romeo Perez' premises on the day of the murder. Instead, the record reveals 25 undisputed facts of factually insufficient evidence to support Appellant's conviction of the Capital Murder. The blood on the Appellant's shoes does not prove the commission of any crime. Without the recorded interview, it only shows that it was the victim's blood.

Given the undisputed facts and nonincriminating evidence, it is evident that the jury's verdict was based solely on the custodial interrogation to the complete exclusion of all other non-incriminating evidence presented by the State. Based on the lack of incriminating live and forensic evidence, it cannot be denied that the jury violated its duty to be guided solely by the evidence. Instead, the jury's verdict was guided by nothing more than the objectionable custodial interrogation transcript that was not supported by the evidence.

In *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), the United States Supreme Court declared that if a reviewing court finds a

defendant's conviction is based upon legally insufficient evidence, then the State is constitutionally prohibited from prosecuting the defendant again. In other words, as a practical matter, the State has but one opportunity to amass and present evidence legally sufficient to convict a defendant.

The record reveals and Appellant's brief summarizes at least 25 independent and distinct grounds showing that the Appellant's conviction is based on insufficient evidence. As such, the proper relief afforded to the Appellant is for this Honorable Court to reconsider its Opinion and to reverse the conviction and render a judgment of acquittal.

### **PRAYER FOR RELIEF**

Based on the foregoing, Appellant respectfully requests that this Court Reconsider its Opinion, sustain Appellants points of error 1, 2 and 4, reverse the conviction, and render a judgment of acquittal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This is to certify that this document contains 2,285 words.

By: /s/ Albert G. Valadez  
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This is to certify that on April 10, 2025, a true and correct copy of the above and foregoing document was served on the 112<sup>th</sup> District Attorney Stephen Dodd, by electronic service through the Electronic Filing Manager, whose email address is [stephen@112da.org](mailto:stephen@112da.org).

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