NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

ELOY HERACLIO ALCALA,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent,

On Petition for Writ of Certiorari to the
Thirteenth Court of Appeals of Texas

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE THIRTEENTH COURT OF APPEALS OF TEXAS

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Counsel for Petitioner

To the Honorable Samuel A. Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for Texas.

Petitioner Eloy Heraclio Alcala, by undersigned counsel, prays for a 60 day extension of time, to and including Monday November 4, 2024, in which to file a petition for a writ of certiorari.

In support of this request, counsel states as follows:

1. On August 28, 2023, the Thirteenth Court of Appeals for the State of Texas affirmed the trial courts judgement and conviction regarding the sufficiency to support his conviction, the denial of Mr. Alcala's motion to suppress, the trial court impeding Mr. Alcala's ability to cross-examine witnesses, and the trial court denying his request for an exclusionary rule instruction under Article 38.23(a) of the Texas Code of Criminal Procedure. (Attachment A) Alcala was convicted of capital murder.

2. After obtaining extensions of time to file a motion for rehearing in the Thirteenth Court of Appeals, said motion was denied on January 9, 2024. (Attachment B)

3. Next, after obtaining extensions of time to file a Petition for Discretionary Review in the Texas Court of Criminal Appeals, said Petition was denied on June 5, 2024. (Attachment C)

4. Petitioner has 90 days from June 5, 2024 to file a petition for writ of certiorari. See Sup. Ct. R. 13.1. The petition is, therefore, due on September 3, 2024.

5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

6. Undersigned counsel believes an extension of time will be needed to

adequately prepare Mr. Alcala's petition for writ of certiorari. Of most significance, undersigned counsel was recently appointed, on August 9, 2024 to file a petition for writ of certiorari. (Attachment D) Former appellate counsel was allowed to withdraw and undersigned counsel is entirely new to this cause which appellate record consists of contested pretrial hearings and a 17 day trial. Briefing on the matter is also extensive.

7. Additionally, undersigned counsel is a solo practitioner with pending state and federal matters. Undersigned counsel has either current or upcoming appellate briefing due in causes styled: Victor Godinez v. The State of Texas (AP-77,122)(a case in which the death penalty was assessed); Miles Flores Pena v. The State of Texas (13-24-00286-CR); Victor Manuel Gonzalez v. The State of Texas (13-23-00119-CR); Juan Jose Deluna v. The State of Texas (13-24-00005-CR); David Davila Sandoval v. The State of Texas (13-23-00467-CR); Miguel Angel Ortiz v. The State of Texas (PD-0551-24); Raul Lopez v. The State of Texas (13-22-00230-CR); USA v. Zuniga (24-40410); and USA v. Reyes-Roiz (24-40462).

8. Aside from appellate matters, undersigned counsel has a variety of pending trial level state and federal matters.

9. The State of Texas, through Assistant Hidalgo County District Attorney Roxana Salinas is unopposed to this application.

WHEREFORE, Petitioner Alcala respectfully requests that an order be entered extending his time in which to petition for certiorari by sixty day, to and including November 4, 2024.

Respectfully submitted,

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ATTACHMENT A

NUMBER 13-18-00614-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ELOY HERACLIO ALCALA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 332nd District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Longoria, Hinojosa,[1] and Silva
Memorandum Opinion by Justice Silva

Appellant Eloy Heraclio Alcala appeals his conviction of capital murder involving a double homicide, a first-degree felony. *See* TEX. PENAL CODE ANN. § 19.03(a)(7). The trial

[1] The Honorable Leticia Hinojosa, former Justice of this Court, did not participate in this decision because her term of office expired on December 31, 2022.

court assessed a life sentence. By eleven issues, which we have reorganized, renumbered, and consolidated into four issues, appellant argues: (1) the evidence is insufficient to support his conviction; (2) the trial court abused its discretion in denying appellant's motion to suppress; (3) the trial court impeded his ability to cross-examine witnesses; and (4) the trial court erred in denying his request for an exclusionary rule instruction under Article 38.23(a) of the Texas Code of Criminal Procedure.[2] We affirm.

I. BACKGROUND[3]

At approximately 1:30 a.m. on October 8, 2010, Pharr Police Department (PPD) Investigator Enrique Ontiveros contacted dispatch to report hearing "three loud noises that appeared to be gunshots." Within minutes, Investigator Ontiveros was directed to respond to reports of "shots fired with two men down" in the 900 block of East Santa Monica. Investigator Ontiveros arrived on scene near the intersection of East Santa Monica and South Sabino Avenue and observed a brown van with its lights on and engine running. Two men, later identified as cousins David Garcia and Victor De La Cruz, were lying motionless on the ground by the van, blood pooling around their heads. Investigator Ontiveros was soon joined by PPD Investigator Juan Manuel Quilantan Jr., Interim Police

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[2] After the case was submitted on oral argument, appellant filed a third amended brief containing three additional issues absent the Court's permission. We do not address these issues. *See* TEX. R. APP. P. 38.7 (providing that a brief may be amended or supplemented with the court's permission); *Garrett v. State*, 220 S.W.3d 926, 929 (Tex. Crim. App. 2007) (holding that a reviewing court may decline to address an issue raised for the first time in post-submission brief).

[3] This is appellant's second appeal before this Court. Appellant was previously tried and convicted of capital murder and sought review, in relevant part, of the trial court's denial of his motion to suppress evidence of his statements to police. *Alcala v. State*, No. 13-12-00259-CR, 2014 WL 3731733, at *19 (Tex. App.—Corpus Christi–Edinburg July 24, 2014, pet. ref'd) (mem. op., not designated for publication). Finding error and harm in the inclusion of this evidence at trial, we reversed the judgment of the trial court and remanded the case for a new trial. *Id.*

Chief Jose Alejandro Luengo, Investigator Michael Perez, Officer Eric Galaviz, Sergeant David Castillo, and Sergeant Daniel Leal.

Less than two hours later, appellant and his son, Eloy Jiovanni Perez Alcala (Jiovanni), had been identified as suspects in the double homicide and arrested. Appellant was later indicted on capital murder charges and pleaded not guilty. In a trial spanning over four weeks, twenty-three witnesses testified and well over three hundred exhibits were admitted. We summarize the relevant evidence below.

A. Lay Witnesses

1. The Garcias

David's mother and sister, both named Maricela Garcia,[4] testified that David arrived home after midnight on October 8, 2010, severely beaten up and covered in blood. David told his mother and sister that he had gotten into a fight. Shortly thereafter, a white car, described by Maricela as a "beige or white" Cadillac, pulled up in front of their home. David went outside, and a physical altercation ensued inside the white car between David and the driver of the white car, an individual Mrs. Garcia recognized as a former classmate of David's and Maricela recognized by name—Jiovanni. A neighbor intervened and separated David and Jiovanni. Mrs. Garcia testified that Jiovanni drove away only to return and attempt to "veer[] the car into" David, who sought shelter behind a mailbox. Maricela corroborated Mrs. Garcia's testimony, stating that Jiovanni "steered the car towards" David, but David "jumped to the side of the mailbox." Jiovanni then left, and David began walking on foot towards Victor's house, located several blocks away.

[4] We refer to David's mother as Mrs. Garcia and his sister as Maricela.

At some unspecified point, Jiovanni returned but this time as a passenger in a white truck driven by another man. They were looking for David. After a brief exchange with Mrs. Garcia, the two men left the home. Maricela described the two men as "angry," and in an affidavit admitted at trial, Maricela stated that Jiovanni apologized before leaving. After the white truck departed, Maricela saw Victor's van pass by their house. "[M]aybe four minutes" later, Maricela heard gunshots. Mrs. Garcia later identified the driver of the white car as Jiovanni and the man who had accompanied Jiovanni to her home that same night in a white truck as appellant.

2. De La Cruzes

Luis Alberto De La Cruz and Robert Mena De La Cruz, Victor's brothers, testified that earlier that evening, they had been drinking with David, Victor, and some friends. According to Luis, David arrived around 7:00 p.m., but after four or five hours, David wanted a ride to buy drugs. Luis and Robert testified that David ultimately left the home by himself. When David returned, he "was bloodied up" with a gash on his face. David claimed to have been attacked by Jiovanni. Victor insisted that he and David confront Jiovanni. Victor and David departed in Victor's van. Luis estimated that five or six minutes elapsed, and he went inside the house. Then, Luis and Robert heard gunshots and eventually made their way to the crime scene, where Luis and Robert saw Victor's van.

3. David Garza

David Garza testified that on October 8, 2010, he resided in the 700 block of East Santa Monica. In the early morning hours, Garza was awoken by a phone call. Already awake, Garza heard commotion coming from outside his home. Garza looked out his

window and saw Jiovanni pacing back and forth, yelling, and threatening to "kill the damn dog." Believing Jiovanni was expressing an intention to kill Garza's dog, Garza prepared to go outside to speak with Jiovanni. By the time he got outside, however, Jiovanni was getting into appellant's white Dodge truck. Appellant and Jiovanni drove off, and Garza retreated inside his home.

Shortly thereafter, Garza heard three gunshots. Garza ran to the window and saw appellant's white Dodge truck traveling down Santa Monica with his headlights off. According to Garza, the truck parked along the side of the street and Jiovanni got out of the passenger side of the truck. Before going inside the home, Jiovanni went to his own vehicle—a Cadillac parked in the driveway of the home—and opened and shut the hood. Meanwhile, appellant did not immediately exit the truck. It was only after an officer drove by that appellant moved his white Dodge truck into the driveway within the fenced-off perimeter of his home.

As appellant was closing the fence gate, Garza used the opportunity to approach appellant. Garza told appellant he had heard gunshots and asked appellant if he knew what had happened. Appellant claimed he had not heard anything and excused himself. Garza testified that appellant's statement and general disinterest struck him as unusual because appellant was the head of the neighborhood watch group, and he ordinarily expressed interest in neighborhood incidents.

Garza remained outside his home and after seeing officers talking to a neighbor, he approached officers and notified them that the only vehicle he had seen traveling after the shooting had been driven by his neighbor—appellant, and appellant had just pulled

the white Dodge truck into his yard.

B. Law Enforcement Testimony

1. Investigator Enrique Ontiveros

Investigator Ontiveros testified that he was the first to arrive on scene and upon seeing the two men down, he immediately called for backup and notified dispatch that he had received information that a gray truck was witnessed leaving the scene.[5] Two minutes later, Investigator Ontiveros informed officers he had received subsequent information from an eyewitness describing the involved vehicle as a white Dodge truck.

An SUV pulled up behind Investigator Ontiveros while he was attempting to secure the crime scene. Mrs. Garcia and Maricela exited the vehicle, distraught. Mrs. Garcia told officers her son David "had just gotten into a fight" with an unknown male. Although Mrs. Garcia could not identify the male subject by name, she informed officers he drove a white truck and indicated he lived near Santa Monica and Laurel Avenue—three blocks west of the shooting.

2. Interim Chief Jose Alejandro Luengo

Chief Luengo was a patrol officer on duty on October 8, 2010, when he responded to a dispatch call regarding two men down. On his way to the crime scene, Chief Luengo initiated a traffic stop of a vehicle traveling from the direction of the alleged shooting. Upon receiving a description of the suspect vehicle, he ended the stop and began canvasing the 900 block of East Santa Monica for the vehicle matching the description provided by

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[5] 9-1-1 calls were admitted as exhibits. While one of the callers advised that the vehicle leaving the scene was a grey truck, another caller advised that it was a white truck.

witnesses: a white Dodge truck. While walking westbound, Chief Luengo spotted a white Dodge truck parked at 7002 South Laurel, at the intersection of Laurel and Santa Monica. Officers spoke with the residents of 7002 South Laurel and ruled the truck out as the suspect vehicle.

Chief Luengo then spoke with witnesses who directed him to 708 Santa Monica, a residence located in the intersection of La Mora and Santa Monica, one block over. Chief Luengo set a perimeter up around 708 Santa Monica. A white Dodge truck and white Cadillac were both located within the fenced area of the home. Chief Luengo recounted having received information concerning a physical altercation involving one of the deceased and the driver of a white Cadillac just prior to the shooting.

Chief Luengo testified that he accompanied Sergeant Castillo to search the white Dodge truck on the property, where Sergeant Castillo found bullets. Chief Luengo also reported seeing blood in plain view inside the Cadillac after passing through the fence line.

3. Investigator Juan Manuel Quilantan Jr.

Investigator Quilantan testified that he helped secure and block off the crime scene to preserve any potential evidence. Investigator Quilantan then joined other officers in looking for the suspect vehicle and ruled out the involvement of two other white Dodge trucks within the neighborhood before locating a third white Dodge truck at 708 Santa Monica.

While surveying the property at 708 Santa Monica, a neighbor told Investigator Quilantan that the driver of the white Dodge truck returned to the home without its

headlights on shortly after the shooting.[6] Investigator Quilantan then noticed somebody peeking through the windows from the home and the sound of a door locking followed. Investigator Quilantan determined that exigent circumstances dictated that he enter the property to feel the hood of the truck to determine if it was warm from recently being driven. Investigator Quilantan confirmed the hood felt hot and noticed two live rounds of ammunition in the cab of the white Dodge truck.

Also parked at the home was a white Cadillac. Investigator Quilantan and Sergeant Castillo were standing a few feet behind the white Cadillac when Sergeant Castillo shined his light into the back window of the white Cadillac and both officers noted blood inside the vehicle.[7] Investigator Quilantan, accompanied by additional officers, initiated contact with the residents of 708 Santa Monica. Appellant answered the door, after which the officers explained that they were with PPD and investigating a double homicide. According to Investigator Quilantan, appellant signed a consent to search form, which was admitted as an exhibit. Investigator Quilantan denied making any threats to appellant or telling him that they had obtained a search warrant.

4. Officer Eric Galaviz

Edinburg Independent School District Officer Eric Galaviz testified that he was a patrol officer with PPD on October 8, 2010. Officer Galaviz assisted in canvassing the

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[6] Investigator Ontiveros's dash camera was admitted into evidence at trial. While en route to the 900 block of East Santa Monica, Investigator Ontiveros's vehicle can be seen passing a white Dodge truck parked along the street outside a home on 708 Santa Monica. Investigator Ontiveros noted that when he returned to 708 Santa Monica, the same white Dodge truck was now parked inside a chain-link fence on the property. The white Dodge truck parked on the street at 708 Santa Monica was also captured on Chief Luengo's dash camera.

[7] The trial court admitted two photographs of the backseat of the white Cadillac, which depicted a significant amount of blood on the head rests of both front seats and throughout the back seat.

area for the white Dodge truck, moving west down Santa Monica with Investigator Quilantan and Chief Luengo. Officer Galaviz advised that the officers originally identified a white Dodge truck in a cul-de-sac at the intersection of Laurel and Santa Monica, where they spoke to the residents. While the officers were speaking with the residents, a vehicle approached Officer Galaviz and provided further information on the suspect vehicle, leading them to 708 Santa Monica. Officer Galaviz recalled that the white Dodge truck was "parked underneath a tree," with "no lighting."

Officer Galaviz testified that after Sergeant Castillo saw blood in the white Cadillac in the driveway, the officers decided to approach the residents of the home and ask the homeowner, later identified as appellant, for consent to enter the home. Appellant provided oral and written consent to search the home, the white Dodge truck, and the white Cadillac. Officer Galaviz described the residents as cooperative and denied using any force or threats while inside the home.

5. Lieutenant Daniel Leal

Lieutenant Leal testified that on October 8, 2010, he was a patrol sergeant and joined the investigation at 708 Santa Monica. Lieutenant Leal testified that he asked for and received verbal and written consent to search the property from appellant. A copy of the written consent to search was admitted into evidence, which provided PPD with permission to search 708 Santa Monica, the white Dodge truck, and the white Cadillac.

Lieutenant Leal denied being involved in the actual search of the home but accompanied Sergeant Castillo during the search of both vehicles. According to Lieutenant Leal, appellant accompanied the officers to the white Dodge truck while

conducting the search and pointed out a backpack underneath the rear seat. The backpack contained boxes of .40 caliber ammunition and some magazines. Appellant then led Lieutenant Leal and Lieutenant William Ryan to a walk-in closet in one of the bedrooms of his home where he turned over a .40 caliber rifle to officers.

6. Lieutenant William Ryan

Lieutenant Ryan testified that he went to 708 Santa Monica to assist officers in collecting evidence and arrived after the consent to search had already been obtained. Lieutenant Ryan received Jiovanni's clothing from Investigator Quilantan and placed the clothes into a brown paper bag, all of which were admitted as exhibits. Lieutenant Ryan also assisted Lieutenant Leal in recovering a rifle that appellant turned over. According to Lieutenant Ryan, the rifle was loaded with a round in the chamber. The rifle, chambered round, and loaded magazine were admitted as exhibits. Lieutenant Ryan testified that the ammunition loaded in the magazine was .40 caliber hollow point rounds.

At some point after appellant and Jiovanni's arrest, Lieutenant Ryan learned that the walk-in closet where the firearm had been retrieved contained a gun safe. Lieutenant Ryan opined that a thorough search had not been done in the home that night.

7. Investigator Michael Perez

Hidalgo County District Attorney's Office Investigator Michael Perez testified that that he was an investigator with PPD on October 8, 2010. Investigator Perez spoke with a witness who confirmed he saw a white Dodge truck drive southbound, away from the crime scene immediately after the shooting. Additionally, Investigator Perez spoke with Mrs. Garcia and Maricela, who recounted David's fight with Jiovanni and appellant and

Jiovanni driving to their home in a white Dodge truck. Maricela also advised Investigator Perez that appellant and Jiovanni lived westward from the crime scene, in the same neighborhood. Accordingly, Investigator Perez instructed officers Quilantan, Luengo, and Galaviz to look for a white Dodge truck in that direction while he remained on scene.

Investigator Perez testified that once he was at 708 Santa Monica, he received consent to collect DNA cheek swab samples from Jiovanni and appellant and gunshot residue samples from their hands. Appellant told Investigator Perez that he had shot a firearm around 5:00 pm that day but threw any empty casings in a ditch full of water.

Investigator Perez further obtained search warrants for the white Dodge truck and white Cadillac and performed a search of each vehicle. Investigator Perez opined that the search of 708 Santa Monica could have been more thorough, and the officers should not have allowed appellant to collect the suspect firearm and hand it to them.

8. Janie Arellano

Janie Arellano, evidence technician supervisor for the PPD Crime Scene Unit, testified that she photographed and marked evidence at the crime scene, noting two bullet casings and a pink receipt issued by Matt's Building Supply found around a van near the decedents. The casings were .40 caliber Winchester, and the receipt was dated October 2, 2010.

After processing the crime scene, Arellano proceeded to 708 Santa Monica to process any evidence found there. Evidence collected included a bullet in the cupholder in the front seat of the white Dodge truck and seven pink receipts from Matt's Building Supply found in the back seat of the white Dodge truck. Ammunition and magazines found

in the backseat of the white Dodge truck were identified as "Glock 40 caliber magazine[s]" loaded with full metal jacket and hollow point rounds. Boxes of ammunition included Federal and Winchester hollow point .40 caliber rounds. Meanwhile, the recovered receipts contained date stamps ranging from September 22, 2010, to October 2, 2010.

In addition, Arellano inspected the clothing recovered from 708 Santa Monica. One of the shoes belonging to Jiovanni had blood on it as well as on the sole. Arellano noted the similarities between the sole of Jiovanni's shoe and a bloody footprint located on the passenger side doorstep of the white Dodge truck. Arellano submitted several of the blood swabs taken from both the white Dodge truck and the white Cadillac, clothing recovered from 708 Santa Monica, and clothing worn by appellant for DNA and gunshot residue testing.

C. Forensic Testimony

1. Doctor Norma Jean Farley

Doctor Norma Jean Farley, a forensic pathologist for Hidalgo County, performed the autopsies for David and Victor and generated reports for each autopsy; both reports were admitted as exhibits.

David's cause of a death was a single gunshot wound to the face. Dr. Farley testified that the gunshot wound had "powder tattooing," meaning the muzzle of the gun was "fairly close to the face," causing powder and hot gas from the firearm to leave slight abrasions to the skin around the wound. Dr. Farley recovered bullet fragments from David's injury, which she believed to be hollow point bullets.

Victor's cause of death, meanwhile, was the result of two gunshot wounds: one to

the left side of the chest and another to the head. Dr. Farley indicated that both wounds contained powder tattooing. Bullet fragments were removed from Victor's head wound, while larger in-tact pieces were recovered from his chest wound. Dr. Farley opined that both bullets were hollow point rounds.

2. Carlos Vela

Carlos Vela, a Texas Department of Public Safety (DPS) latent print expert, testified that he inspected the .40 caliber rifle that was recovered from appellant's home and .40 caliber casing recovered from the crime scene. Vela was unable to retrieve a suitable fingerprint from either item recovered. Vela explained that the absence of latent prints was not unusual.

3. Bradford Means

Bradford Means, a DPS crime lab forensic scientist in the firearms and toolmarks division, tested the.40 caliber rifle that was recovered from appellant's home, the casing recovered from the initial crime scene, and the bullet fragments recovered from the autopsies. According to Means, the casings recovered from the initial crime scene could not be confirmed or eliminated as having been fired from the .40 caliber rifle recovered. Moreover, the DPS crime lab determined that three of the four bullet jacket fragments were not fired from the rifle recovered but could neither confirm nor rule out that the fourth jacket fragment was fired from the .40 caliber rifle.

3. Vanessa Nelson

Vanessa Nelson, Ph.D. testified that she is the Biology Program Coordinator for the DPS crime lab in McAllen. Dr. Nelson was provided control DNA samples from David,

Victor, Jiovanni, and appellant for comparison with other samples collected. According to Dr. Nelson, the samples taken from the driver side seatbelt, side mirror, passenger side doorstep of the white Dodge truck did contain "apparent blood." Dr. Nelson, however, did not compare the blood sample from the driver's side with any of the control samples for DNA analysis.

Dr. Nelson additionally tested various other items collected for the presence of blood, including appellant's jeans worn the night of October 8, 2010, and a jacket recovered from appellant's truck. Appellant's jeans and jacket both had "apparent blood" on them. The DNA profile for the blood on appellant's jeans and jacket matched appellant's DNA profile. Dr. Nelson testified that the blood recovered from the doorstep on the white Dodge truck and Jiovanni's shoe was consistent with the DNA profile for David. Blood from Jiovanni's jeans was consistent with the DNA profile for Victor.

4. Krystina Vachon

Krystina Vachon, a Bexar County Criminal Investigation Laboratory forensic scientist, examined the swabs collected from Joivanni's and appellant's hands, as well as the clothing items taken from Joivanni's room and clothing items worn by appellant for the presence of gunshot residue. Vachon concluded that appellant's left hand contained trace particles consistent with gunshot residue, but his right hand did not. The shirt and jeans recovered from Jiovanni contained trace particles consistent with gunshot residue. The clothing worn by appellant also contained trace particles consistent with gunshot residue, as well as the jacket recovered from appellant's truck. Finally, no trace particles for gunshot residue were detected on Jiovanni's hands.

Vachon explained that the absence of gunshot residue on Jiovanni's hands did not rule out that he fired a gun because gunshot residue will come off with time or "can be easily washed away with soap and water." Whereas gunshot residue does not come off clothing as readily because it can get caught between fibers.

Vachon testified that the acceptable window for gunshot residue collection is within four to six hours after contact because beyond that the residue is typically not found. Accordingly, if appellant fired a gun around 5:00 pm the preceding day, Vachon would not expect any gunshot residue to be present. However, Vachon could not be certain that appellant fired a gun, as handling a gun that had been fired may transfer gunshot residue to his hands or he may have been near a fired gun.

D. Jury Charge and Verdict

At the close of evidence, the jury was provided its charge of the court. The charge instructed the jury on the elements of murder and capital murder, including the law of parties. The jury ultimately found appellant guilty of capital murder, and appellant was sentenced to life in prison. This appeal followed.

II. Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence supporting his conviction.[8]

A. Standard of Review

We review the sufficiency of the evidence by considering "all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and

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[8] Appellant puts forth two sufficiency challenges: legal sufficiency and factual sufficiency. However, the court of criminal appeals held that there is no distinction between legal and factual sufficiency. *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). Accordingly, we conduct a singular sufficiency review. *See id.*

reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt." *Hammack v. State*, 622 S.W.3d 910, 914 (Tex. Crim. App. 2021); *see Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). The jury is the sole judge of witnesses' credibility and weight to be given the evidence presented, and we defer to those conclusions. *Hammack*, 622 S.W.3d at 914 (citing *Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012)). We look to the "events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Id.* at 914–15. Not every fact or piece of evidence needs to point directly to appellant's guilt, so long as the cumulative force of all the evidence supports the convictions. *Id.* at 914. "Juries are permitted to draw reasonable inferences from the evidence presented at trial 'as long as each inference is supported by the evidence presented at trial.'" *Carter v. State*, 620 S.W.3d 147, 150 (Tex. Crim. App. 2021) (quoting *Hooper*, 214 S.W.3d at 15).

We measure the sufficiency by the elements of an offense as defined by a hypothetically correct jury charge. *Hammack*, 622 S.W.3d at 914. "Such a charge [is] one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.* (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).

B. Applicable Law

A person commits murder if he intentionally or knowingly causes the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(a). As relevant here, a person commits capital murder if he murders more than one person during the same criminal transaction. *Id.* § 19.03(a)(7)(A). "A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." *Id.* § 7.01(a). "A person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id.* § 7.02(a)(2). "However, mere presence of a person at the scene of a crime, or even flight from the scene, without more, is insufficient to support a conviction as a party to the offense." *Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012).

C. Analysis

Appellant contends the evidence is insufficient to support his conviction for capital murder because there is no direct evidence that he committed the murder, and the circumstantial evidence has "no bearing on whether [he] is guilty" and is a product of "mere coincidence." We review the relevant evidence supporting the conviction to determine whether a rational juror could have found each of the elements beyond a reasonable doubt. *See Hammack*, 622 S.W.3d at 914.

Mrs. Garcia, Maricela, Luis, and Robert testified that Jiovanni and David fought shortly before David's death. Mrs. Garcia and Maricela witnessed Jiovanni attempt to run

David over in his white Cadillac. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) ("Although motive and opportunity are not elements of murder and are not sufficient to prove identity, they are circumstances indicative of guilt."). Following the physical altercation between David and Jiovanni in front of Mrs. Garcia's residence, Jiovanni returned with appellant in appellant's white Dodge truck, looking for David. Minutes later, Mrs. Garcia and Maricela both reportedly heard gunshots. *See Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996) (finding sufficient evidence to support conviction where the evidence showed, in part, that "appellant lived in the same neighborhood[] and . . . was seen within a few blocks of the crime scene shortly before and shortly after the murder"). Residents nearby the shooting told officers they witnessed a white Dodge truck driving away immediately after hearing gunshots. *See id.*; *see also Hammack*, 622 S.W.3d at 914. Garza, appellant's neighbor, testified that appellant and Jiovanni returned home shortly after gunshots had rung out, and appellant drove with the Dodge truck's headlights "blacked out" so as not to be seen. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (attempts to conceal evidence are probative of wrongful conduct and are circumstances of guilt). Moreover, Garza witnessed appellant wait until after an officer had driven past appellant's home to move his truck from along the street to an area behind a tree within his property's fence line, as if to hide it. *See id.* Garza's testimony is further corroborated by officer dash camera footage, which depicted appellant's white Dodge truck parked on the street minutes before the same officers returned to appellant's residence and observed the same truck now parked within the gated property. Coupled with the bloody footprint officers observed on the passenger-

side doorstep of appellant's vehicle, there was sufficient evidence to support the inference that it was appellant and his white Dodge truck at the scene of the murder.

Further, Garza's testimony that Jiovanni was yelling that he was going to "kill the dog" shortly before he and appellant went to search for David could support a conclusion that Jiovanni set out with the intent to commit an offense. *See Ross v. State*, 133 S.W.3d 618, 621 (Tex. Crim. App. 2004) (finding sufficient evidence to support a conviction where defendant threatened the decedent with violence not long before the murder). Moreover, Garza testified that he asked appellant about the gunshots, but appellant denied hearing any whereas Luis and Robert testified they heard the gunshots from several blocks away. Garza explained that appellant disregarding the gunshots was inconsistent with his prior behavior as the head of the neighborhood watch group and would normally have investigated the cause.

Officers recovered Winchester .40 caliber hollow point ammunition from appellant's white Dodge truck—the same brand of casings found at the crime scene and type of bullets used to shoot David and Victor. *See Hammack*, 622 S.W.3d at 914–15; *see also Marquez v. State*, No. 04-09-00018-CR, 2009 WL 3645670 (Tex. App.—San Antonio Nov. 4, 2009, pet. ref'd) (mem. op., not designated for publication) (considering empty shell casings found at the crime scene matched the ammunition with the weapon connected to the appellant when reviewing the sufficiency of the evidence).

Further, the forensic evidence tying Jiovanni and appellant to the murder supports the conviction. Appellant's hand and both Jiovanni's and appellant's clothing had gunshot residue present. *See Ledford v. State*, 649 S.W.3d 731 (Tex. App.—Houston [1st Dist.]

2022, no pet.) (considering the presence of gunshot residue on gloves worn by appellant when affirming conviction for murder); *see also Firo v. State*, No. 13-03-122-CR, 2004 WL 305977 (Tex. App.—Corpus Christi–Edinburg Feb. 19, 2004, no pet.) (mem. op., not designated for publication) (considering the presence of gunshot residue on appellant's clothing when affirming conviction for murder). The jury was free to disbelieve evidence that appellant fired a weapon earlier in the day and accept Vachon's explanation that she would not expect to find gunshot residue on appellant's hand if he had fired a weapon only when he claimed to have—approximately eleven hours before officers collected the sample from appellant's hand. *See Hammack*, 622 S.W.3d at 914.

Importantly, the DNA taken from the blood samples connect Jiovanni to the murders. Although the presence of David's blood could be explained by the fight between David and Jiovanni, no other evidence was presented to explain the presence of Victor's blood on Jiovanni's clothing. Furthermore, the bloody footprint on the doorstep—and absence of bloody footprint in the white Cadillac—combined with what appeared to be a bloody footprint at the crime scene permits the jury to make the inference that Jiovanni or appellant shot David, Jiovanni stepped in David's blood, then got into the truck and went home. *See Carter*, 620 S.W.3d at 150. Although not all the forensic evidence supports a conviction, the jury has the sole authority to determine the weight to be given to the evidence. *See Hammack*, 622 S.W.3d at 914.

Finally, appellant's actions before and after the shooting support the conclusion that, even if he were not the shooter, he was more than merely present at the crime scene. *See id.*; *Gross*, 380 S.W.3d at 188. Considering the entire record, we conclude there was

sufficient evidence that a rational jury found each element of the offense beyond a reasonable doubt either as a principal actor or under the law of parties. *See* TEX. PENAL CODE ANN. §§ 7.01(a), 7.02(a)(2), 19.02(b)(a); *Hammack*, 622 S.W.3d at 914. Appellant's first issue is overruled.

III. MOTION TO SUPPRESS

By what we construe as appellant's second issue, appellant argues the officers committed criminal trespass in entering his property, and any consent obtained was involuntary and in violation of his constitutional rights under the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution and under Article 1, §§ 9 and 19 of the Texas Constitution.

A. Standard of Review

We review a trial court's ruling on a motion to suppress evidence using a bifurcated standard of review. *Wexler v. State*, 625 S.W.3d 162, 167 (Tex. Crim. App. 2021), *cert. denied*, 142 S. Ct. 821 (2022); *Pecina v. State*, 361 S.W.3d 68, 78–79 (Tex. Crim. App. 2012). "We afford almost total deference to the trial court's rulings on questions of historical fact and on application of law to fact questions that turn upon credibility and demeanor . . . ." *Pecina*, 361 S.W.3d at 79. When, as here, the trial court does not make explicit findings of fact, we view the evidence in the light most favorable to the trial court's ruling and presume that the court made implicit findings of fact supported by the record. *Lerma v. State*, 543 S.W.3d 184, 189–90 (Tex. Crim. App. 2018). A trial court's ruling should not be reversed unless it is arbitrary, unreasonable, or outside the zone of reasonable disagreement. *State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018).

"[W]e review de novo the trial court's rulings on application of law to fact questions that do not turn upon credibility and demeanor." *Pecina*, 361 S.W.3d at 79. We will affirm the trial court's ruling on a motion to suppress if it is supported by the record and "correct under any applicable theory of law." *Wells v. State*, 611 S.W.3d 396, 406 (Tex. Crim. App. 2020) (quoting *Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016)).

B. Applicable Law

The text of the Fourth Amendment "expressly imposes two requirements[:] [f]irst, all searches and seizures must be reasonable[;] [s]econd, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky v. King*, 563 U.S. 452, 459 (2011) (citing U.S. CONST. amend. IV); *Martin v. State*, 620 S.W.3d 749, 759 (Tex. Crim. App. 2021). Such special protections attach to the home. *Martin*, 620 S.W.3d at 759. "At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). "To give full practical effect to that right, the Court considers curtilage—the area immediately surrounding and associated with the home—to be part of the home itself for Fourth Amendment purposes." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (quoting *Jardines*, 569 U.S. at 6) (cleaned up). "[T]he extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *United States v. Dunn*, 480 U.S. 294, 300 (1987).

"When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred." *Collins*, 138 S. Ct. at 1670. A warrantless search of a curtilage is presumptively unreasonable. *Igboji v. State*, 666 S.W.3d 607, 613 (Tex. Crim. App. 2023). Where a defendant establishes that a warrantless search occurred, "the State has the burden of showing that probable cause existed at the time the search was made and that exigent circumstances requiring immediate entry made obtaining a warrant impracticable." *Turrubiate v. State*, 399 S.W.3d 147, 151 (Tex. Crim. App. 2013). "If either probable cause or exigent circumstances are not established, a warrantless entry will not pass muster under the Fourth Amendment." *Parker v. State*, 206 S.W.3d 593, 597 (Tex. Crim. App. 2006).

"Probable cause exists when reasonably trustworthy circumstances within the knowledge of the police officer on the scene would lead him to reasonably believe that evidence of a crime will be found." *Turrubiate*, 399 S.W.3d at 151. Exigent circumstances justifying a warrantless entry include "(1) providing aid to persons whom law enforcement reasonably believes are in need of it; (2) protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous; or (3) preventing the destruction of evidence or contraband." *Ratliff v. State*, 663 S.W.3d 106, 116 (Tex. Crim. App. 2022) (quoting *Turrubiate*, 399 S.W.3d at 151); *see Lange v. California*, 141 S. Ct. 2011, 2017–18 (2021) (reviewing well-recognized exceptions for warrantless entry onto private property).

Pertinent to this appeal, voluntary consent to search is a recognized exception to the warrant requirement that exists separate from any exigency exception. *McGee v.*

State, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). However, officers which seek consent-based encounters must first be "lawfully present in the place where the consensual encounter occurs." *King*, 563 U.S. at 463. "[T]o constitute a valid waiver of Fourth Amendment rights through consent, a suspect's consent to search must be freely and voluntarily given." *State v. Villarreal*, 475 S.W.3d 784, 799 (Tex. Crim. App. 2014). "An additional necessary element of valid consent is the ability to limit or revoke it." *Id.* Consent may be given orally or by action, or shown by circumstantial evidence. *Valtierra v. State*, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010). The validity of an alleged consent to search is a question of fact to be determined from the totality of the circumstances. *State v. Weaver*, 349 S.W.3d 521, 526 (Tex. Crim. App. 2011). The "standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* Because issues of consent are necessarily fact-intensive, a trial court's finding of voluntariness must be accepted on appeal unless it is clearly erroneous. *See Meekins v. State*, 340 S.W.3d 454, 460 (Tex. Crim. App. 2011).

C. Analysis

1. Relevant Background

Several officers testified at a hearing on appellant's motion to suppress. We summarize the relevant testimony below as it closely resembles testimony provided at trial.

At approximately 1:35 a.m. on October 8, 2010, Investigator Quilantan received

notice from dispatch that two shots had been fired and two men were down in the 900 block of Santa Monica. Investigator Quilantan was the first to arrive on scene, and initial eyewitnesses reported seeing a gray pickup. By 1:38 a.m., Investigator Quilantan had received additional information from residents—the vehicle involved was a white Dodge truck. Investigator Perez testified that a neighbor claimed to have seen a white Dodge truck traveling southbound, fleeing the shooting. According to offense reports admitted as exhibits at the hearing, officers were also informed by the deceased's family member that one of the deceased had been in an argument earlier that same day with a male subject who resides at the corner of Laurel and Santa Monica.

Officers began canvasing the neighborhood for vehicles matching the new description, and at 2:03 a.m., officers arrived at a residence located between the intersection of Laurel and Santa Monica with a white Dodge truck in the driveway. After speaking with the owners of the vehicle, officers ruled out their involvement in the shooting and continued their search for the suspect vehicle.

Investigator Quilantan testified that at some unspecified point, another officer was informed that a white truck had driven up to the front of a home at 708 Santa Monica with the truck's headlights off. Investigator Quilantan testified that although other officers had passed 708 Santa Monica and noted the white Dodge truck, the vehicle was not observed to be on the street as described by the witness. Rather, the vehicle was situated "five, six feet" behind a chain linked fence. Upon returning to 708 Santa Monica at 2:16 a.m., Investigator Quilantan used his flashlight to shine a light on the property. Shortly thereafter, Investigator Quilantan saw an individual peek through window blinds and

heard a door lock. Sergeant Castillo, meanwhile, spotted a large amount of blood inside a white Cadillac parked in the driveway of the same home.

At approximately 2:24 a.m., less than one hour after receiving calls of shots fired, officers entered the property of 708 Santa Monica. PPD Officer Jesus Garza testified that they entered the property to confirm there was no on-going danger. "We didn't know if anyone was in [the vehicle]," said Officer Garza. "[I]t could have been either a suspect, or another victim, or we didn't know. So we have to pretty much make sure that it's clear from . . . from any other, I guess, threats to the public or ourselves." Investigator Quilantan testified he walked to the white Dodge truck and touched the hood, which he described as "pretty hot." Using his flashlight, Investigator Quilantan also observed a round inside the truck resembling a round found next to the deceased. The officers then exited the property.

At 2:56 a.m., four officers proceeded to the front door to initiate contact with the home's occupants and were greeted by appellant. Investigator Quilantan testified that no weapons were displayed or drawn. According to Investigator Quilantan, although they were invited in, out of an abundance of caution, Sergeant Leal sought written consent to search from appellant. The consent to search form was signed by appellant and contained a written-in time of 3:00 a.m. Sergeant Leal testified that he never got the impression that appellant did not understand what he was signing. Sergeant Leal further stated no weapons were drawn and he denied using any intimidation tactics, describing appellant as "welcoming and helpful." Officer Galaviz testified in concurrence.

Although appellant did not testify, he asked that the trial court take judicial notice

of his sworn affidavit, wherein appellant stated at approximately 2:45 a.m., he heard a knock on his front door and opened it to see "about [five] officers" at the door and "many other officers around [his] property." Appellant stated, "Almost all of the officers had their weapons drawn. I was intimidated and fearful for my family because there were so many officers around my home with weapons." Appellant maintained that it was only after officers had begun searching the interior of his home and vehicles—that officers asked appellant for consent to search. Appellant avers that he was not given an opportunity to read the consent form before signing it; he was not informed that he had a right to refuse the search; and he felt "had no choice." Appellant further stated, "I did not want the officers on my property, but I was intimidated and fearful for my family. They had invaded my home and I was powerless to stop them."

2. Probable Cause

Assuming, without deciding, that the officers' entry onto the property past the gated fence line and touch of the truck was an unlawful entry and search, for reasons expounded below, we conclude probable cause and exigent circumstances existed, rendering entry and search permissible. *See Martin*, 620 S.W.3d at 759; *Parker*, 206 S.W.3d at 597; *see also King*, 563 U.S. at 463.

The following information available to officers at the time of their entry onto appellant's curtilage established probable cause: a double homicide had transpired less than one hour before, and multiple witnesses reported the involvement of a white Dodge truck; a white Dodge truck was parked at appellant's home at 708 Santa Monica; the decedents' family told officers that David had been in a physical altercation with an

individual who resided at the home where the white Dodge truck was parked; appellant's neighbor reported seeing the white Dodge truck returning to the home with its headlights off shortly after the shooting, an unusual activity considering the time of evening; in response to the officers presence on the street, a resident of 708 Santa Monica was seen peeking through blinds before locking the door; and while still outside the fence line, an officer observed what he believed to be blood inside another vehicle parked in the driveway. These facts and circumstances were sufficient to warrant a reasonable man in believing that (1) a crime had been committed; (2) the white Dodge truck was utilized in the commission of the crime; and (3) an individual or individuals residing at 708 Santa Monica had committed the crime. *See Turrubiate*, 399 S.W.3d at 151.

3. Exigent Circumstances

We now turn to the question of whether the evidence of exigent circumstances in this case was sufficient to support a warrantless search of the curtilage. Investigator Quilantan testified he believed exigent circumstances warranted entry: "[A] double homicide had just occurred. People were telling us that that's the suspect vehicle. And I didn't know if anybody was in there. I didn't know if we were going to have an active shooter. I didn't know if the suspect was still inside the vehicle at that time." Additionally, Investigator Quilantan testified regarding his concern about the potential loss of evidence, namely, the dissipation of heat leaving the vehicle believed to be involved in the shooting. This—coupled with the officers' observance that there was blood splattered inside another vehicle in the driveway and that a resident inside the home locked the door in response to police presence—satisfied the exigent circumstance exception. *See Missouri*

v. McNeely, 569 U.S. 141, 145 (2013) (observing that consistent with general Fourth Amendment principles, exigency is a matter which "must be determined case by case based on the totality of the circumstances"); *Barocio v. State*, 158 S.W.3d 498, 500 (Tex. Crim. App. 2005) ("[P]olice may properly enter to look for other perpetrators or victims.") (internal citations omitted). Further, we defer to the trial court's evaluation of the officers' credibility and demeanor during their testimony as to the circumstances on the night in question. *See Estrada v. State*, 154 S.W.3d 604, 610 (Tex. Crim. App. 2005); *see, e.g.*, *Pache v. State*, 413 S.W.3d 509, 513 (Tex. App.—Beaumont 2013, no pet.) (concluding there was probable cause to enter a home without a warrant where officers reported that appellant opened the door, saw officers, and fled). Thus, we conclude that the trial court did not abuse its discretion in finding that exigent circumstances were present. We overrule this issue in part.

4. Involuntary Consent to Search

We next turn to the issue of appellant's consent.[9] We observe that the motion to suppress record contains conflicting evidence, with appellant asserting via affidavit that he was uninformed of his rights to decline the officers' search and that he had only consented under coercion. *See Villarreal*, 475 S.W.3d at 799; *see also Tippin v. State*, No. 13-17-00201-CR, 2018 WL 3675646, at *6 (Tex. App.—Corpus Christi–Edinburg Aug. 2, 2018, pet. ref'd) (mem. op., not designated for publication) ("Warning an individual of their right to refuse consent is not necessary for a voluntary grant of consent.").

[9] Appellant argues the consent to search was involuntary because the officers' entry into his home was illegal, and that the taint in the illegality had not dissipated by the time consent was given. We have rejected his argument that the entry was illegal.

Meanwhile, officers denied behaving in a threatening or coercive manner, described appellant's demeanor as calm and cooperative, and stated appellant provided verbal consent prior to signing the consent to search form. *See Villarreal*, 475 S.W.3d at 799. Additionally, according to officers' testimony, appellant gave no indication that he objected to the search, nor did he withdraw consent as he watched officers execute the search. *See Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012) (providing that a person who consents to law enforcement entry "may specifically limit or revoke his consent"); *Villarreal v. State*, 565 S.W.3d 919, 931 (Tex. App.—Corpus Christi–Edinburg 2018, pet. ref'd) (providing that where appellant "placed no limitations on the scope of his consent and never objected to the search, even as he watched [the officer] explore various parts of the vehicle for over an hour," the trial court appropriately concluded the officer had received consent to search).

Under the circumstances of this case, the validity of appellant's consent to search was a factual determination that ultimately turned on witness credibility. *See Meekins*, 340 S.W.3d at 460; *Hutchins v. State*, 475 S.W.3d 496, 500 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (finding that, where a defendant denies consent was provided in contravention to officer testimony, the trial court's determination turns on witness credibility). In accordance with the established standard of review on a motion to suppress, we afford "almost total deference" to the trial court's factual determination that appellant validly consented to the search, and that determination was supported in the record by Sergeant Leal's unequivocal testimony that appellant gave verbal consent to enter the premises and Sergeant Leal's affirmance that no physical or psychological

tactics had been employed in the process. *See Hutchins*, 475 S.W.3d at 500; *Uriel-Ramirez v. State*, 385 S.W.3d 687, 693 (Tex. App.—El Paso 2012, no pet.) (finding that appellant consented to a search where detectives testified appellant said "Go ahead," and "the trial court was free to disbelieve" appellant's testimony that he did not provide consent); *see also Tippin*, 2018 WL 3675646, at *6 (concluding "[w]arning an individual of their right to refuse consent is not necessary for a voluntary grant of consent" and an appellant's previous law enforcement encounters were indicative of an appellant's awareness she could deny consent to search). The trial court's finding is not "clearly erroneous" when viewed in the light most favorable to the prosecution, and we defer to it on appeal. *See State v. Ruiz*, 581 S.W.3d 782, 785 (Tex. Crim. App. 2019); *Meekins*, 340 S.W.3d at 459 n. 24, 460. We overrule appellant's second issue.

IV. Evidentiary Issues

We construe issues one through six, renumbered as issue three, to be a challenge to appellant's ability to cross-examine Officer Galaviz and Luis.

A. Standard of Review and Applicable Law

The Confrontation Clause of the Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment right to confront witnesses includes the right to cross-examine to attack their general credibility or to show their possible bias, self-interest, or motives in testifying. *Johnson v. State*, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016); *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009) (citing *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). Although broad, the scope

of appropriate cross-examination is not unlimited, and the trial court generally has wide discretion in limiting the scope and extent of cross-examination. *Johnson*, 490 S.W.3d at 909–910; *Hammer*, 296 S.W.3d at 561. For example, a trial court may properly limit the scope of cross-examination to prevent "harassment, prejudice, confusion of the issues," harm to the witness' safety, and "repetitive or only marginally relevant" interrogation. *Johnson*, 490 S.W.3d at 910–11. We review a trial court's decision to limit cross-examination for an abuse of discretion. *See Nguyen v. State*, 506 S.W.3d 69, 85 (Tex. App.—Texarkana 2016, pet. ref'd); *see also Garcia v. State*, No. 13-17-00218-CR, 2019 WL 1388532, at *6 (Tex. App.—Corpus Christi–Edinburg Mar. 28, 2019, pet. ref'd) (mem. op., not designated for publication). In order to preserve error regarding improperly excluded evidence, a party must timely object, obtain a ruling from the trial court (or object to the trial court's refusal to rule), and prove the substance of the excluded evidence through an offer of proof. *See* TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a).

B. Eric Galaviz

Appellant first points to a single exchange wherein appellant alleges his trial counsel was prohibited from properly cross-examining Officer Galaviz to show "the existence of possible criminal conduct on the part of the [officers], as well as their bias, motive[,] and prejudice."

> [DEFENSE:] Okay. Now, with reference to the house, you said you were—you-all had focused your attention towards the truck. Did you even make an effort to go towards knocking and talking while—
>
> [STATE:] Your Honor, objection. This is again talking—he's—it's argumentative. He is trying to imply that there is some kind of trespass that occurred[,] and this Court has

already ruled that it was not a trespass.

[DEFENSE:] Your Honor, we're going to—

[STATE:] And he has ruled on this issue.

[DEFENSE:] Your Honor, we would object. If she has a specific objection, she needs to state that—

[STATE:] Argumentative.

[DEFENSE:] —and not make an argumentative objection, Your Honor.

THE COURT: I am going to sustain the objection.

Here, after the State objected to appellant's cross-examination of Officer Galaviz, appellant replied that the State's objection lacked specificity. Appellant did not argue nor did he cite to any rules of evidence, cases, or constitutional provisions regarding his perceived limitation on his right to confrontation. Moreover, appellant did not provide an offer of proof to show the substance of the excluded evidence.[10] *See* TEX. R. EVID. 103(a)(2). Accordingly, appellant's sub-issue has been waived. *See Golliday v. State*, 560 S.W.3d 664, 670–71 (Tex. Crim. App. 2018) ("[A] defendant must state the grounds for the ruling that he seeks with sufficient specificity."); *Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005) (providing that objection that evidence should have been admitted for "credibility" did not preserve complaint based on the Confrontation Clause); *see also Hameed v. State*, No. 13-19-00145-CR, 2020 WL 1857842, at *3–4 (Tex. App.—Corpus

[10] By one sentence, appellant cites to another colloquy in the record, arguing: "This Court need not pass on the strength or merits of [appellant's] defense in order to find that the trial court's 'argumentative' ruling, 34R42–44, is arbitrary and served no legitimate purpose." The colloquy, however, accumulated with an off the record discussion followed by a decision by the trial court that was favorable to appellant. In this instance, the trial court overruled the State's objection and gave appellant "a little bit of leeway to continue his examination." It is unclear what appellant is challenging here.

Christi–Edinburg Apr. 9, 2020, no pet.) (mem. op., not designated for publication) (concluding that appellant did not preserve his complaint where he did not object to the trial court's ruling on the appealed of basis and did not provide an offer of proof to show the substance of the excluded evidence). We overrule this sub-issue.

C. Luis De La Cruz

Appellant next argues the trial court abused its discretion in excluding impeachment evidence concerning Luis's criminal history, [11] namely, a pending misdemeanor assault charge.

We review the trial court's admission or exclusion of impeachment evidence under the same abuse-of-discretion standard set forth above. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018). Generally, however, a witness's credibility may not be impeached with specific instances of conduct except through certain criminal convictions. *See* TEX. R. EVID. 608(b), 609; *see also Crambell v. State*, No. 01-17-00331-CR, 2018 WL 3150693, at *11 (Tex. App.—Houston [1st Dist.] June 28, 2018, pet. ref'd) (mem. op., not designated for publication) ("Moreover, because [the witness] did not have a criminal conviction for filing a false report, use of the prior charge would violate Rule 608(b)'s prohibition against using specific instances of a witness's conduct to attack the witness's character for truthfulness."). Certain credibility evidence may be also admissible where a witness "opens the door" by placing his or her credibility at issue. *Allen v. State*, 473 S.W.3d 426, 454 (Tex. App.—Houston [14th Dist.] 2015, pet. dism'd); *see Daggett v.*

[11] Appellant was permitted to cross-examine Luis on his prior felony conviction of aggravated assault with a deadly weapon and alleged gang involvement.

State, 187 S.W.3d 444, 453 n.24 (Tex. Crim. App. 2005) ("When a witness makes a broad statement of good conduct or character on a collateral issue, the opposing party may cross-examine the witness with specific instances rebutting that false impression, but generally may not offer extrinsic evidence to prove the impeachment acts."). Even if a party "opens the door," the trial court still retains its discretion to exclude the evidence under Rule 403. *Hayden v. State*, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009); *see* TEX. R. EVID. 403. That is, the trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403; *see also* TEX. R. EVID. 401 (providing that evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence). The burden is on the proponent of evidence to tell the trial court why the evidence is admissible following an objection by the opponent of the evidence. *White v. State*, 549 S.W.3d 146, 152 (Tex. Crim. App. 2018) (citing *Reyna*, 168 S.W.3d at 177). "[I]t is not enough to tell the judge that evidence is admissible." *Reyna*, 168 S.W.3d at 177.

Following appellant's question of whether Luis had "currently pending charges," the State objected, arguing that information concerning the witness's pending criminal case is irrelevant and improper impeachment under Rule 609. Appellant countered that Luis's pending charge could "lead to a potential bias or—or influence of testimony," and appellant was "allowed to impeach [Luis's] character under Rule 608 for truthfulness or untruthfulness." We agree with the State.

The transcript of appellant's cross-examination of Luis consists of over forty-five pages in the reporter's record. Appellant had a full and fair opportunity to probe and expose Luis's alleged testimonial infirmities through cross-examination. *See id.* at 847. Immediately preceding appellant's question concerning Luis's pending criminal charge question, appellant was permitted to cross-examine Luis on his prior felony conviction of aggravated assault with a deadly weapon and alleged gang involvement. While the Confrontation Clause of the Sixth Amendment affords appellant the right to be confronted with the witnesses against him, the Confrontation Clause does not permit appellant the right to impeach Luis's general credibility through otherwise prohibited modes of cross-examination. *See id.* at 893.

Moreover, Rule 608(b) provides in relevant part: "Except for a criminal conviction under Rule 609, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness." TEX. R. EVID. 608(b). Accordingly, whether Luis's pending criminal charge was admissible is at least subject to reasonable disagreement. *See Beham*, 559 S.W.3d at 478. Therefore, the trial court did not abuse its discretion by excluding the testimony. We overrule this issue in its entirety.

V. CHARGE ERROR

In his fourth point of error, appellant challenges the legality of his proffered consent leading to the search of his home and property and alleges the trial court erred in denying his request for an exclusionary rule instruction under Article 38.23(a) of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) ("No evidence

obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.").

A. Standard of Review and Applicable Law

Trial courts are obligated to instruct the jury on the law applicable to the case. *Williams v. State*, 662 S.W.3d 452, 460 (Tex. Crim. App. 2021); *see* TEX. CODE CRIM. PROC. ANN. art. 36.14. In evaluating alleged jury charge error, we first determine whether the trial court erred in refusing the requested instruction. *Gonzalez v. State*, 610 S.W.3d 22, 27 (Tex. Crim. App. 2020). If we find error, we then engage in a harm analysis. *Id.* The degree of harm necessary for reversal depends on whether the error was preserved. *Jordan v. State*, 593 S.W.3d 340, 346 (Tex. Crim. App. 2020) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). Where, as here, the defendant preserved the alleged error, should we find error then we must reverse if we find "some harm." *Jordan*, 593 S.W.3d at 347 ("'Some harm' means actual harm and not merely a theoretical complaint."); *Almanza*, 686 S.W.2d at 171.

Article 38.23(a) is a statutory exclusionary rule which exists to prevent illegally obtained evidence from being used at trial. *See Holder v. State*, 639 S.W.3d 704, 707 (Tex. Crim. App. 2022); *Day v. State*, 614 S.W.3d 121, 128 (Tex. Crim. App. 2020) ("The text of Article 38.23 addresses the admissibility of evidence at trial when the law has been violated."). When evidence presented at trial directly pertains to a contested fact issue and raises a concern of whether it was legally obtained, the jury shall be instructed that "if it believes, or has a reasonable doubt, that the evidence was obtained in violation of

the provisions of [Article 38.23], then and in such event, the jury shall disregard any such evidence so obtained." TEX. CODE CRIM. PROC. ANN. art. 38.23(a). In other words, Article 38.23(a) "is fact-based: For example, 'Do you believe that Officer Obie held a gun to the defendant's head to extract his statement? If so, do not consider the defendant's confession.'" *Oursbourn v. State*, 259 S.W.3d 159, 173–74 (Tex. Crim. App. 2008). The "contested fact issue must be material to the lawfulness of the challenged conduct in obtaining the evidence," and the burden is on the defendant to make the showing of materiality. *Chambers v. State*, 663 S.W.3d 1, 4 (Tex. Crim. App. 2022) (first citing TEX. CODE CRIM. PROC. ANN. art. 38.23; and then citing *Madden v. State*, 242 S.W.3d 504, 510–11 (Tex. Crim. App. 2007)). Further, disputed evidence must be brought forth by an appropriate witness. *Oursbourn*, 259 S.W.3d at 177. "The cross-examiner cannot create a factual dispute for purposes of an Article 38.23(a) instruction merely by his questions. It is only the answers that are evidence and may create a dispute." *Madden*, 242 S.W.3d at 514.

B. Analysis

During a charge conference, appellant requested the submission of an Article 38.23(a) jury instruction:

> We are asking for the instruction that as a matter of fact the Court—I mean, this Jury can consider whether the search of the premises was voluntary and given certain facts and circumstances that they were able to hear. And during the course of this case they could make certain determinations with reference to certain evidence that was brought forward and make the determination as a matter of fact that consent was not proper or elicited in a way that would justify its inclusion and to their consideration. So they should be instructed under that basis of law as well, Your Honor.

The State countered that appellant had not shown there was a material fact issue on the voluntariness of appellant's consent because the State's witnesses uniformly testified that consent had been provided voluntarily, knowingly, and intelligentially. The trial court denied appellant's requested Article 38.23(a) jury instruction, and the jury returned a guilty verdict.

As the State correctly notes, appellant elicited no testimony at trial to raise a fact issue suggesting that appellant's consent was *not* freely or voluntarily given. While appellant's trial counsel insinuated through his questioning on cross-examination of various officers that appellant was not given adequate time to review the consent to search form, no evidence was adduced at trial to contradict Sergeant Leal's testimony that appellant's consent was obtained voluntarily, knowingly, and intelligentially. *See Madden*, 242 S.W.3d at 514; *see also Rodriguez v. State*, No. 13-19-00326-CR, 2022 WL 1669069, at *17 (Tex. App.—Corpus Christi–Edinburg May 26, 2022, no pet.) (mem. op., not designated for publication) (concluding appellant's pretrial hearing testimony concerning voluntariness could not be considered in the instruction analysis because some evidence must have been presented to the jury at trial on voluntariness). To the extent that appellant also challenges the officers' conduct preceding the obtained valid written consent, we are once more left with questions and applications of law to undisputed facts and implications by counsel, which do not, by themselves, raise a disputed fact issue. Accordingly, appellant was not entitled to an Article 38.23(a) instruction. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22; *Oursbourn*, 259 S.W.3d at 176; *see also Brooks v. State*, No. 13-20-00085-CR, 2021 WL 2461062, at *11 (Tex. App.—

Corpus Christi–Edinburg June 17, 2021, no pet.) (mem. op., not designated for publication) (noting that Article 38.23 jury instructions predicated on matter of law matters are not appropriate absent the existence of question of fact). We overrule this issue.

VI. CONCLUSION

We affirm the trial court's judgment.

CLARISSA SILVA
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed on the
28th day of August, 2023.

ATTACHMENT B

FILE COPY

Court of Appeals

Thirteenth District of Texas

NUECES COUNTY COURTHOUSE
901 LEOPARD, 10TH FLOOR
CORPUS CHRISTI, TEXAS 78401
361-888-0416 (TEL)
361-888-0794 (FAX)

HIDALGO COUNTY
COURTHOUSE ANNEX III
100 E. CANO, 5TH FLOOR
EDINBURG, TEXAS 78539
956-318-2405 (TEL)
956-318-2403 (FAX)

www.txcourts.gov/13thcoa

January 9, 2024

Hon. Victoria Guerra
Law Office of Victoria Guerra
3219 N. McColl Rd.
McAllen, TX 78501
* DELIVERED VIA E-MAIL *

Re: Cause No. 13-18-00614-CR
Tr.Ct.No. CR-4969-10-F
Style: Eloy Heraclio Alcala v. The State of Texas

Dear Counsel:

Appellant's motion for rehearing in the above cause was this day DENIED by this Court.

Very truly yours,

Kathy S. Mills, Clerk

cc: Hon. Toribio "Terry" Palacios (DELIVERED VIA E-MAIL)
Hon. Roxanna Salinas (DELIVERED VIA E-MAIL)

ATTACHMENT C

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

6/5/2024 **COA Case No. 13-18-00614-CR**
ALCALA, ELOY HERACLIO **Tr. Ct. No. CR-4969-10-F** **PD-0119-24**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

VICTORIA GUERRA
ATTORNEY AT LAW
3219 N. MCCOLL ROAD
MCALLEN, TX 78501
* DELIVERED VIA E-MAIL *

ATTACHMENT D

FILED
AT 4:00 O'CLOCK P M
AUG 09 2024
LAURA HINOJOSA, CLERK
District Courts, Hidalgo County
By _____ Deputy#38

Cause No. CR-4969-10-F

THE STATE OF TEXAS	§	**In the District Courts**
v.	§	**332nd Judicial District**
ELOY HERACLIO ALCALA	§	**Hidalgo County, Texas**

ORDER

The Court considered appointed counsel's MOTION TO WITHDRAW AND SUBSTITUTE APPOINTED COUNSEL TO TIMELY FILE AT THE UNITED STATES SUPREME COURT A PETITION FOR … WRIT OF CERTIORARI and the Response of the State of Texas, took judicial notice and made these findings and orders.

I. Judicial Notice

The Court takes judicial notice of the entire record in this cause, which is available at https://pa.co.hidalgo.tx.us/CaseDetail.aspx?CaseID=1242341 and that:

1.) In this cause, the Defendant was convicted of Capital Murder and sentenced to life without parole.

2.) This court's judgment of conviction and sentence were affirmed by opinion and judgment of the Court of Appeals of Texas in its cause number 13-18-00614-CR on August 28, 2023, after that court filed some of the parties' briefs, which this court viewed at https://search.txcourts.gov/Case.aspx?cn=13-18-00614-CR&coa=coa13

3.) To exhaust Defendant's direct appeal at the state level, appointed counsel Victoria Guerra timely petitioned for Discretionary Review; but the Court of Criminal Appeals of Texas refused review in its cause number PD-0119-24 on June 5, 2024.

4.) The Court of Appeals issued its mandate regarding this cause on July 10, 2024.

5.) Hidalgo County has a public defender's office; and its lawyers handle misdemeanor cases, certain felony cases and neither capital murder defense nor capital murder conviction appeals.

6.) Hidalgo County has an assigned counsel program that lacks a provision for appointment of counsel to prepare and timely petition for writ of certiorari, if a death penalty sentence is not assessed after a capital murder conviction. See https://www.hidalgocounty.us/DocumentCenter/View/65834/Local-Rules_Amended-Oct192023

7.) Under the conditions in Article 1.051(d)(4), Texas Code of Criminal Procedure (C.C.P.) (2023-2024), a court can appoint counsel to represent an indigent defendant beyond the direct appeal's first stage.

8.) "In some cases, a remedy at law may technically exist; however, it may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate." *Smith v. Flack*, 728 S.W.2d 784, 792 (Tex. Crim. App. 1987).

9.) Finding indigence, the court appointed this Defendant counsel for the first and second jury trials and the resulting two direct appeals. *See Alcala v. State*, No. 13-12-00259-CR, 2014 Tex. App. LEXIS 7949, 2014 WL 3731733 (Tex. App.—Corpus Christi July 24, 2014, pet. ref'd) (memo op. not designated for publication) (court reversed the trial court's judgment and remanded for a new trial); *Alcala v. State*, No. 13-18-00614-CR, 2023 Tex. App. LEXIS 6647, 2023 WL 5541572 (Tex. App.—Corpus Christi Aug. 28, 2023, pet. ref'd) (memo op. not designated for publication) (court affirmed the trial court's judgment).

10.) This Defendant "… is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs." Article 26.04(p), C.C.P.

11.) The legislature committed to the trial court's sound judgment and discretion the responsibility to determine when the interests of justice require the appointment of qualified counsel to prepare and timely file a petition for certiorari at the United States Supreme Court. *Compare Ex parte Sandoval*, 508 S.W.3d 284, 284 (Tex. Crim. App. 2016) (orig. mandamus proceeding) (Keller, P.J., concurring opinion in which Keasler and Hervey, JJ., joined).

12.) "A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is

timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." United States Supreme Court Rule 13.

II. Findings

The Court finds that:

1.) This Motion can be determined without a hearing.

2.) No party suggests a material change has occurred in the Defendant's financial circumstances.

3.) This cause's current presiding judge has learned much in his 30+ years serving as a state judge.

4.) Appointed counsel Guerra was notified that this Defendant desires to have counsel appointed to timely file a petition for writ of certiorari at the United States Supreme Court; but attorney Guerra is unable to expend the time necessary to complete and timely file a petition for certiorari regarding any issues raised or judicially addressed by the Court of Appeals.

5.) This Defendant's petition for writ of certiorari is due to be filed on or before the 90th day after the Court of Criminal Appeals refused his petition for discretionary review on June 5, 2024.

6.) This court can appoint "in … any other appellate proceeding if the court concludes that the interests of justice require representation," Article 1.051(d)(4) C.C.P., including timely petitioning for writ of certiorari to a Court of Appeals of Texas,

which had overruled or denied a federal constitutional issue that is worthy of the Supreme Court's certiorari review.

7.) Thus, the legislature has thereby acknowledged judicial discretion to appoint counsel to timely petition for writ of certiorari, where a court of appeals has overruled or denied a "cert. worthy" issue.

8.) Such appointment of counsel would permit the United States Supreme Court to determine whether to grant review of this Defendant's "certiorari worthy" issue(s). See Articles 1.051 & 26.04(j)(2), C.C.P. Cf. Article 26.052(i)-(j), C.C.P., regarding death penalty cases.

9.) In its exercise of judgment and discretion, the court determines that interests of justice require appointment of counsel to represent this Defendant by timely petitioning for writ of certiorari at the United States Supreme Court. See Article 1.051(d)(4), C.C.P.

10.) This indigent Defendant was entitled as a matter of federal constitutional due process to appointed counsel at trial and during the first appeals as of right, *see Cooks v. State*, 240 S.W.3d 906, 910 (Tex. Crim. App. 2007); and given the totality of the circumstances existing in this cause, he is entitled in the interest of justice to counsel appointed to timely file at the United States Supreme Court a petition for writ of certiorari to the Court of Appeals regarding its last judgment and opinion, affirming this court's last judgment in its cause number CR-4969-10-F.

11.) The knowledge and skills that are necessary to adequately proceed at the United States Supreme Court as certiorari counsel petitioning for a writ of certiorari differ from the knowledge and skills required for criminal defense counsel to render on direct appeal at an appeals court in Texas the effective assistance guaranteed by Amendments VI and XIV, U.S. Constitution.

12.) Withdrawing appellate counsel has an ethical duty to promptly provide appointed certiorari counsel with all information and records relevant to the Defendant's latest direct appeal.

13.) The facts contained in Mr. Connors' affidavit filed in this cause in July 2024 are credible and true.

III. Orders

IT IS THEREFORE ADJUDGED, ORDERED AND DECREED that the said pending Motion be and is hereby granted and Honorable Victoria Guerra is released from further representing this Defendant and Honorable Rolando Garza is appointed to represent this Defendant in preparing and timely filing at the United States Supreme Court a petition for writ of certiorari to the Thirteenth Court of Appeals of Texas related to this cause; and the court's clerk shall promptly send a copy of this signed order to:

William Hubbard hubbard43@gmail.com

Victoria Guerra vguerralaw@gmail.com

Rolando Garza crimapp@yahoo.com

Glenn W. Devino appeals@da.co.hidalgo.tx.us

Signed on the 9th August 2024.

Hon. Mario E. Ramirez, Jr.
Judge Presiding

Cc: William Hubbard at hubbard43@gmail.com
Victoria Guerra at vguerralaw@gmail.com
Rolando Garza at crimapp@yahoo.com
Glenn W. Devino at appeals@da.co.hidalgo.tx.us