The State of Texas Cannot Execute The Mentally Retarded, But That May Not Prevent A Dallas Cop Killer From Being Put To Death.

By Andrea Grimes
published: July 01, 2010

A billboard suggested to passersby that Officer Brian Jackson's service to Dallas would not be forgotten—nor would his killer, the man who, prosecutors argued, broke the "thin blue line" between law-abiding citizens and chaos.

A portrait of Officer Jackson hangs in DPD's Central Patrol Division on Hall Street, where Jackson had been assigned.
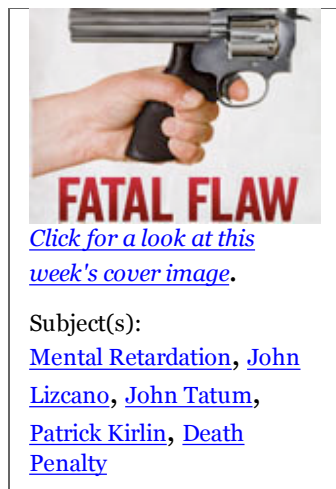
Details:

Cops approach domestic disturbance calls with an abundance of caution, knowing that these situations are highly unpredictable and can escalate quickly, turning dangerous, even deadly. When an officer pulls up to a residence, they don't know who's armed. Who's on drugs. Who's been drinking. And who's so pissed off they won't hesitate to use a weapon on anyone who gets in their way—including the police.

But it was the thrill of public service—the high speed and flashing lights—that drew Dallas Police Officer Brian Jackson to the job, according to his father. Every moment on the clock counted. Every call could mean the opportunity to counsel a gang member or calm the nerves of a frightened child or take a bad guy off the streets. Impressed by the Dallas Police Department, Jackson knew he wanted to become a Texan in 2000, when he and his girlfriend packed up their life in Newport, Rhode Island, so that Brian could wear a DPD uniform.

Brian, at 23, had passed up a job with the New York City Police Department to join the Dallas force. And it was no surprise to his father, retired Navy Captain John Jackson, to see how easily his son, an Eagle Scout, made the transition to Texas, wearing cowboy boots and hats. "They called him a New England Yankee that could wear his boots with the best of them," his father remembers.

Five years later, Jackson married his Rhode Island sweetheart, JoAnn. He seemed to make every tick-tock of his time, on duty and off, count—he'd go to visit his wife on dinner breaks but stretch out every minute of service to the city and his fellow officers. On November 13, 2005, he had 20 minutes left on his shift. He decided to answer one last call before heading home. It was a domestic disturbance.

Just as no one questions Jackson's dedication to public service, no one questions that in the early hours of that mid-November morning, an illegal

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Subject(s):
Mental Retardation, John Lizcano, John Tatum, Patrick Kirlin, Death Penalty

Mexican immigrant named Juan Lizcano shot and killed Officer Jackson. He was 28.

Drunk and angry, Lizcano had been out all night, as he was most every weekend, pounding beers at a dance club with his friends. Convinced that his ex-girlfriend, Marta Cruz, was sleeping with other men, Lizcano, a yard man, made angry cell phone calls to her before showing up at her house in the Knox-Henderson area. It was 2 a.m. He had a gun. She let him inside, where he fired a shot into the ceiling before pointing the gun at her. "Next time," he told Cruz, "it will be you."

Terrified for her life, Cruz called the police as Lizcano sped away in his truck. Forty-five minutes later, the police were still near Cruz's house when Lizcano returned, still drunk, still armed. When he saw the cops, he sprinted down an alley behind the house, firing shots at police in pursuit. Slipping through a side yard in the darkness, Lizcano rounded a corner to find Officer Jackson with his gun drawn. Lizcano then pulled the trigger. The bullet bypassed the officer's outstretched right hand, flew through the armhole of his bulletproof vest and hit him in the heart. A million-to-one shot, it fatally wounded him.

Lizcano then threw down his gun and laid face-down on the ground. Jackson was taken to Baylor Hospital, where doctors pronounced him dead.

Five years later, Juan Lizcano remains embroiled in the prolonged, complicated appeals process that comes with a capital conviction and a death sentence. Now the question is not whether he is a cop killer, which a jury had little trouble deciding in November 2007, but whether evidence, presented at trial and newly discovered, proves he is mentally retarded and therefore ineligible for execution.

In 2002, the U.S. Supreme Court prohibited the execution of the mentally retarded in *Atkins v. Virginia,* banning such executions as a violation of the Eighth Amendment, which prohibits cruel and unusual punishment. The court found that there was a national consensus against executing the mentally retarded. At the time, 17 states (not Texas) had laws on their books banning the practice, as did Congress. The court felt that executing the mentally retarded—who have a propensity toward impulsive behavior and the intellectual capacity of young children—serves no valid death penalty objective—neither retribution nor deterrence. Additionally the court stated that the chance of wrongful convictions in capital cases was greater with mentally retarded defendants, whose faulty memories might be of little assistance in their defense and whose tendency to be followers might result in false confessions to the police.

To define mental retardation, the *Atkins* court relied on the generally accepted clinical diagnosis, which characterizes mental retardation as "significantly sub-average intellectual functioning"—an IQ of about 70 or below—accompanied by significant limitations in adaptive functioning such as communication, self-care and social skills. These intellectual and adaptive deficits must manifest themselves before the age of 18.

But the Supreme Court left to states "the task of developing an appropriate way" to enforce its ban. Even before the *Atkins* ruling, in 2001, Texas legislators passed a bill prohibiting the execution of the mentally retarded, but Governor Rick Perry vetoed the legislation. Since Texas was left with no statute, it fell upon the Texas Court of Criminal Appeals in a case called *Ex parte Briseno*, to come up with "temporary judicial guidelines" until the legislature could take up the matter, which it still hasn't done.

But the CCA went beyond *Atkins'* clinical definition of mental retardation, and also allows juries to

consider seven "*Briseno* factors," at least one of which focuses on the commission of the crime (in Lizcano's case, an unprovoked cop killing) rather than the mental disability of the defendant (Lizcano's IQ was below 70). Other factors deal with the defendant's rationality, his premeditation and skill at deception. The problem is, says John Tatum, the Dallas attorney who appealed Lizcano's conviction, mentally retarded people are capable of rational thought. They can understand the difference between right and wrong. "People think mentally retarded people sit in the corner drooling, but that's not the case," Tatum says. "They drive cars. Mow lawns." Moreover, Tatum emphasizes, "Mentally retarded people can commit crimes and still be mentally retarded."

Although the prosecution, the jury and a majority of the CCA thought otherwise, Lizcano and his attorneys maintain in a writ of habeas corpus that he is mentally retarded and sentencing him to death violates the Eighth Amendment's ban on cruel and usual punishment. He also claims that the state's procedure for determining mental retardation in capital cases is flawed. In Texas, a defendant is only allowed to present evidence of his retardation as mitigation in the punishment phase of the trial, after the jury has found him guilty of a capital crime. There is no pre-trial procedure to take the death penalty off the table altogether. And with a "death-qualified" jury, whose members are chosen for their willingness to dole out the death penalty, focusing on the nature of the crime instead of the intellectual disability of the defendant can result in egregious constitutional violations, Tatum argues—such as the execution of the mentally retarded.

"That's a really perilous way to set up the procedure," adds Clinical Professor of Law Rob Owen, co-director of the Capital Punishment Clinic at the University of Texas at Austin. Individual trial judges, says Owen, might be more reliable in making determinations of mental retardation, but many choose to pass on the question to juries. There simply is no procedural statute in Texas that provides consistency in mental retardation cases. "The more we use the death penalty," Owen says, the more important it becomes to have a "meaningful vehicle" for resolving retardation claims. Owen estimates that as much as five to six percent of the United States prison population is mentally retarded—and as many as 25 prisoners on death row in Texas, out of 323.

Tatum also feels a Texas statute would add more clarity and direction to an already complicated appeals process. In May 2010, nearly five years after Lizcano's arrest, the CCA denied his direct appeal, holding that although Lizcano was intellectually substandard with an IQ of 70 or less, he did not prove the second prong of the definition of mental retardation—that he had significant deficits in adaptive functioning. Failing this proof, the jury could justifiably find that Lizcano was not mentally retarded.

To comply with scheduling deadlines, his lawyers brought a habeas corpus writ challenging the legality of Lizcano's confinement, even before the CCA had ruled. The writ was filed in Judge Andy Chatham's 282nd District Court in Dallas, the same judge who presided over Lizcano's original trial. Respected Houston capital defense lawyer David Dow, founder of the Texas Innocence Network, now leads Lizcano's habeas team, which is conducting a top-to-bottom investigation of the case, including Lizcano's troubled upbringing in Nuevo Leon, Mexico, where he was born into abject poverty. (Dow has declined comment for this story citing pending litigation.) Gathering affidavits and testimony, these lawyers are searching for risk factors known to contribute to mental retardation: among them poor nutrition, maternal substance abuse, and limited access to educational resources. In their petition, they allege they have discovered new evidence that will further prove that Lizcano possessed the adaptive deficiencies requisite to finding him mentally retarded.

As a result of the habeas team's efforts, at least one juror has sworn in an affidavit that if she had been presented with certain pieces of evidence—a family history of intellectual disability, alcoholism and Lizcano's inclination to be a follower—she would have been convinced of his retardation and voted to

save him from the death chamber.

Lizcano has fallen into a treacherous gray area in Texas, with defense medical experts diagnosing him as mildly mentally retarded, while he seeks relief from a Court of Criminal Appeals known for its reluctance to grant death row appeals. If Juan Lizcano manages to cheat the executioner, his sentence commuted to life without parole, it will mark a break in the chain of misfortune that troubled his family even before his birth in Mexico.

In 1976, Juan Lizcano's mother, Alejandra, gave birth to him, her eighth child, alone, squatting, as she did with all her 11 children. Estranged from her family and living on a *rancho*, sharing land and limited resources with nine other houses, Alejandra and her children often went hungry. Her husband, Sabino, had suffered a stroke and was too sick to work, so it fell upon Alejandra to feed her family. They all slept together on the dirt floor of a one-room house without running water or electricity in rural Nuevo Leon, east of Monterrey.

In a December 2009 affidavit given by Alejandra in support of her son's habeas application, she states, "Juan wanted to be born at about six months." She saw no doctors during her pregnancy and had no prenatal care. Alejandra took unspecified herbs known as *malvas,* common among women in her culture, to halt his premature birth. Stopping work was not an option, Alejandra said. "I had to be both mother and father to my children."

Alejandra awoke at three every morning to grind corn for tortillas before venturing into the nearby hills to harvest agave plants. She would carry the 20-kilo bag of *lechuguilla* down from the hills on her back and scrape out the fibers to sell.

Juan was her smallest baby, she said, besides her daughter Lucia—and Alejandra sometimes had no milk with which to breastfeed him. She and her children would sometimes eat just one meal a day; she would feed each of them a tortilla before bed. Alejandra said she tried not to cry in front of her children, though she was deeply depressed. "My children suffered very much. And I suffered watching them."

Gossip was rampant on the *rancho*, because Alejandra's children were not all fathered by her husband Sabino. Juan and his sister Lucia were the children of Sabino's first cousin, Alberto. Alejandra tried not to let the gossip affect her family, saying "*Que hablen,"* or "let them talk," when the gossip would make Juan cry.

Her children went to school without meals. When they were very hungry, they would kill mice to eat. At school and at home, Juan struggled to learn basic skills. His elementary school teacher, Aleida Reyes Lucio, said in an affidavit that Juan was "slow." He copied his homework from the other children in class. Lucio finally promoted Lizcano from the sixth grade when he was 15, two years after the elementary school age limit of 13. Juan was simply too old to be in her class.

On the rancho, Juan's older brother Jose tried to teach Juan how to help with their animals, but he was unable to measure medicine for injections or to put a plow on a horse. "Juan would forget how to do it," Jose stated in his affidavit. It was "too complicated" for his brother to learn. Bicycles, the family's main transportation, would go unrepaired because Juan was incapable of fixing them.

Despite their poverty, Alejandra did not want her son to go to the United States to try and earn more money. When she asked him not to leave, she said he told her, "I am going so you won't be hungry."

In 2000, when Lizcano left Nuevo Leon at age 24, he left behind him in Mexico many close and extended family members who showed signs of intellectual disability and developmental disorders.

According to habeas documentation, there was "Juan Loco," a cousin, who would get lost and disappear for days. Family members described another cousin, Petra, as "not all there." Juan's aunt's children are referred to by those on the *rancho* back home as "crazies," and several of his cousins are mute.

But what began as a hard life in Mexico grew more complicated when Lizcano came to the United States. He had no family support, no skills, no coping mechanisms, and seemed child-like and vulnerable to suggestion. In Mexico, he never drank or had a criminal record, but by the time he was 33 and living in Dallas, he was drinking every day, pressured to do so by his uncle and brother with whom he lived. He would work all week long at landscaping jobs and then on the weekends go to nightclubs with friends and drink beers.

In Dallas County, his drinking got him into trouble with the law on several occasions, with arrests on his record for driving while intoxicated and public drunkenness. Once, he showed up at Marta Cruz's house after a drinking binge and started waving around one of her kitchen knives. But when Lizcano wasn't drinking, Cruz swore in an affidavit, he was very quiet and reserved. Alcohol seemed to turn him into a very different, very volatile person. But nothing in his past suggested Lizcano might be a killer—not until he got drunk and angry, and met Officer Brian Jackson in an alley outside his ex-girlfriend's house, taking the officer's life with a single gunshot.

If any defendant was primed to get the death penalty, it was Juan Lizcano. Cop killer, illegal immigrant, fallen hero—loaded words like these don't make for fair and impartial juries. The police, the media, and the community cry out for justice, and by that they mean the full measure of it. Rarely has a cop killer escaped the death penalty in Dallas County, and everything seemed in place to ensure that Lizcano would be no exception, mental retardation or not.

After Officer Jackson's death in 2005, a massive billboard rose above the street across from the Frank Crowley Criminal Courts Building, depicting a photo of Jackson wearing his favorite cowboy hat. Honoring Jackson for his five-year service to the city, the billboard served as a reminder of the "thin blue line" of police officers that prosecutors would argue in trial "stands between the public and chaos."

There was both a public and private outpouring of grief for the officer, with memorial services in Dallas and in Rhode Island. American Airlines chartered a plane and crew, flying 200 of Jackson's fellow officers to Newport to mourn their fallen brother. In Dallas, thousands attended a public funeral for Jackson, who was remembered as quiet, funny, committed to the job. Frequently, he acted as a liaison to DPD's gang units, encouraging teenagers he met on the street to straighten out their lives.

"He would try to settle the kids down a little," his father recalls. "He was just an all-around good guy."

In the wake of the tragic murder, multiple editorials and letters to the editor in *The Dallas Morning News* called for immigration reform. A crackdown on illegal immigration would have prevented Jackson's death, they said, and letter-writers asserted that police should be required to report offenders who are illegal immigrants to immigration officials for deportation whenever they are arrested. Maybe then, Lizcano would have been in jail—or on his way back to Mexico—instead of firing shots at officers.

When the trial began in October 2007, investigator Debbie Nathan, a mitigation expert who assisted Lizcano's lawyers by trying to help "humanize him," says she was stunned by the many police officers who sat through Lizcano's trial alongside the Jackson family. Captain Jackson and his wife made the trip from Rhode Island and stayed for six weeks to watch the trial. "The police presence really

dominated," Nathan said, while Lizcano's side was "nearly empty." A handful of family members were brought up from Mexico to testify, but on the whole, Nathan stated in a habeas affidavit, the police officers "reminded [her] of an army," seated very close to the jury box.

A mannequin dressed in Officer Brian Jackson's bloodied uniform stood before the jury throughout the trial. The guilt or innocence phase was relatively straightforward, as jurors heard testimony from Jackson's tearful widow and fellow officers at the scene the night he was murdered. Though Lizcano's lawyers, Brooke Busbee and Juan Sanchez, did question whether Jackson had adequately identified himself as a police officer before Lizcano shot him, jurors quickly found him guilty of capital murder.

Only after his conviction in the punishment phase of the trial did the court allow testimony of Lizcano's intellectual disabilities. But John Tatum, Lizcano's appellate lawyer, considers it a better practice to let a separate jury hear the mitigation evidence of mental retardation, rather than a "death-qualified jury." "There's six to eight more weeks of psychological priming for giving the death penalty," during capital trials when graphic photographs, bloody clothing and masses of victim supporters might appear before the jury, as they did in Lizcano's trial.

The burden of proving retardation fell on the defendant, whose lawyers called his ex-girlfriend Marta Cruz to the stand. Through her, they attempted to prove that Lizcano had significant limitations in adaptive functioning, the second prong of the Supreme Court's clinical definition. Ten years his senior, Cruz said she acted more like Lizcano's mother than anything else. She testified that she taught him how to clean his ears, noticing that after showering, he'd always have grass in them from his landscaping job. She would find him clothes that fit, since clothing sizes confused him—Lizcano, if left unassisted, would wear oversized shirts and pants that would swallow him up. And after tiring of trying to teach him to read a clock, Cruz finally got him a digital watch so he could just read the numbers.

Mitigation expert Nathan had found Lizcano's former sixth-grade teacher, Aleida Reyes Lucio, who testified that Lizcano was a slow learner who couldn't master an elementary school education, and a Mexican nurse who once treated Lizcano for the flu. She testified that it was common among women of the region to lack prenatal care and that Lizcano's nutrition as a child was "totally deficient." Her account was backed up by Lizcano's mother, Alejandra, who described the poverty-stricken conditions of his childhood and his trip to the United States, from where he would send home money every 15 days to help support the family he left behind.

Because Lizcano could not count change as a 10-year-old at the *cooperativa* store on the *rancho,* his older brother Reyes Lizcano Ruiz told him he could no longer work there. And while Lizcano could be trusted to work and send money home to his family, a cousin testified that Lizcano often didn't understand jokes and laughed inappropriately.

In addition to testimony from family and friends, two medical experts testified to Lizcano's deficits in intellectual functioning, the first prong in the *Atkins* definition. According to these defense experts, Lizcano functions at the intellectual level of an 8- to 10-year-old. Various tests reported his IQ at 62, 60 and 48, though prosecutors argued in cross-examination that the scores might be adjusted upward due to cultural and language issues.

Prosecutors were confident that the jury would see, as they did, that Lizcano was functional enough in his everyday life to disprove any mitigating claims of retardation. After all, he could hold a job, drive a car, and had friends and girlfriends. Because of this, says assistant district attorney Patrick Kirlin, the lead prosecutor in the case, they had no qualms about asking the jury to return a death sentence.

"The philosophy of this office is that typically the death penalty is merited when a person kills a police

officer in the line of duty," Kirlin says in a phone interview. "The bad guys have to know that if you murder a peace officer, that the ultimate punishment must be sought."

"Ladies and gentlemen," Kirlin says he told the jury, "[the defense wants] you to believe he was mentally retarded, but think of what he did that night." Kirlin argued that Lizcano's actions were not those of a mentally retarded man. His threats to Cruz showed premeditation and planning. He was able to elude officers who had Cruz's home surrounded. Kirlin says that "clearly, his actions that night negate the whole mental retardation issue."

Getting the jury to focus on the facts of a crime, how deliberate they were, how premeditated rather than on just the clinical definition of mental retardation is permissible under the *Briseno* which is why the case is bad law, UT law professor Owen argues. "The Court of Criminal Appeals is confusing retardation with mental illness." Irrationality, Owen says, is "one of the hallmarks of certain kinds of mental illness," but not of retardation. Whereas an "unbiased professional observer" might say that certain behaviors are attributable to adaptive dysfunction, adds Owen, the jury may see them as "willful misbehavior, anti-social conduct."

Certainly Lizcano's jury saw his behavior that way. On November 1, 2007, after a lengthy trial, it only took jurors three hours to sentence him to death.

"They had every opportunity to give him life," Kirlin says. "They reviewed and heard all the evidence." But Lizcano's habeas appeal argues otherwise, claiming that a deeper investigation into Lizcano's background would have revealed more details that, if teased out during the trial, could have made a difference between life and death.

When they were dating, Marta Cruz would count out Lizcano's car payments in cash for him. Every Friday, she would lay out six $20 bills and tell him, "That's $120." Lizcano rolled up the bills and stuck them deep in his wallet, reminding himself not to touch this money because it was for his car.

Habeas attorney David Dow and his investigators are sussing out little stories like these from Lizcano's trial witnesses, family and friends in hopes of convincing Judge Chatham that Lizcano had the kinds of significant limitations on his adaptive functioning to render him retarded and ineligible for execution. They maintain his death sentence is unconstitutional, even when taking into account *Briseno* factors. Most of all, they argue that Lizcano categorically fits the clinical definition of mental retardation set out in *Atkins* by the Supreme Court.

Combining affidavits from trial witnesses and others that reflect new evidence not presented at trial, the habeas appeal presents a picture of a man who began life in the worst possible conditions and, to this day, only possesses a childlike grasp of what is happening to him.

In his habeas affidavit, Mexican Vice Consul Luis Lara Benjamin Escobedo, who assists Mexican nationals accused of crimes in the United States, says that other Hispanics on death row are protective of Lizcano, often saying, "*Este chavo esta bien bruto. Pobrecito, no entiende nada*"—"This guy is really slow. Poor guy, he doesn't understand anything."

Escobedo stated that Lizcano asked repeatedly why his mother couldn't come to visit him, not understanding the lengthy visa process required by the U.S. government. When Escobedo took Lizcano a fourth-grade Mexican history book to read, Lizcano seemed ashamed to read it in front of him, asking for more time to read it later.

In her affidavit, mitigation investigator Nathan said she witnessed Lizcano struggle with the basic concepts of his trial. After a long day in court, he could not recall much of what happened nor

remember "anything his attorneys had said." But her affidavit may be more useful in pointing out evidence she had developed that his trial lawyers didn't use. (Both attorneys declined to comment, citing the ongoing litigation).

Nathan had traveled to Mexico on more than one occasion, and found a long history of alcoholism in Lizcano's family. But his attorneys, she said, seemed uninterested in her findings that most of his male relatives would binge drink for days on end, until they ran out of liquor. Nathan says she discussed "a wealth of information" with Lizcano's former sixth-grade teacher about his extreme poverty and malnutrition that was not sufficiently brought out in trial. On the stand for only 20 minutes, Aleida Reyes Lucio was not given time to "explain the nuances" of these "important" facts, Nathan said in her affidavit.

Citing already-established indicators of mental retardation—IQ tests and adaptive deficits—Lizcano's habeas application also paints a picture of an upbringing riddled with retardation risk factors, from maternal substance abuse to an extensive family history of mental retardation on his father's side.

If juror Nikki Dawn Mitchell had been presented with more testimony about his poverty-stricken past, his family history of mental retardation and alcoholism, and evidence that Lizcano was a follower and taken advantage of by others, she would have found him mentally retarded, according to her affidavit filed in the habeas proceeding. Such testimony, she said, "would have been very persuasive" during the trial.

Kathryn Kase, a senior staff attorney for the Texas Defender Service in Houston, whose colleagues have worked on Lizcano's case, says that presenting compelling evidence in cases where Mexican nationals are on trial in the United States is costly, time-consuming and particularly difficult in mental retardation cases because of cultural differences. Investigators and lawyers must travel across the border to find persons from a defendant's past who might be able to shed light on certain behaviors.

Kase did just that while defending a Mexican national named Daniel Plata, whose death sentence was recently reduced to life after an extensive investigation into his past and the de-credentialing of an oft-used medical expert, Mark Denkowski, who was found to have inflated IQ scores in the prosecution's favor.

The problem is, Kase says, ideas about mental retardation just don't translate, especially in rural Mexico. "In their communities, they accommodate people with retardation, but the label is not important to them." Getting solid information translatable into the American legal system is a challenge from people living in areas where "knowing the IQ of your baby is not as important" as simply making sure they have enough to eat.

Even Captain Jackson acknowledges that Lizcano's IQ tests were so "borderline, [the issue of mental retardation] could have gone either way." But until the lengthy habeas process concludes or the Texas legislature decides to step up and pass a statutory scheme to deal with the issue, the legal question of whether Lizcano suffers from low intelligence or mental retardation will remain unanswered.

Nevertheless, "the incident," as Jackson refers to the murder, has left its scars on both the Jackson and the Lizcano families. "Not a day goes by that you don't think more about what it would have been like had [Brian] been here," says his father, who dreams about the grandchildren he might have had, and the impact of Brian's loss on his family's tradition of public service. His daughter wanted to make a career out of the military like her father, but she changed her plans because she was fearful that if something happened to her, she would leave her parents childless. Jackson also worries that if the habeas petition should result in a new trial, he might have to relive his son's death again, and yet he takes comfort in the fact that no matter what, Lizcano will always be off the streets. "Whether it's

execution or life in prison without parole," he says, "we think that he's being held accountable for his actions."

Lizcano's mother Alejandra, too sick to travel these days from her home in Nuevo Leon, gets dizzy spells and has trouble sleeping at night despite taking medication to alleviate her depression. When she can't fall asleep, she listens to the radio that Lizcano sent her when he was working in the States, and she cries. Like the Jacksons, but for different reasons, Alejandra will never see her son again.