No. _________

(CAPITAL CASE)

IN THE

Supreme Court of the United States

CHARLES DON FLORES,
Petitioner,

vs.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

APPENDIX

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INDEX OF APPENDICES

Appendix A	Decision of the Texas Court of Criminal Appeals, denying habeas relief, May 6, 2020	AppA001-003
Appendix B	State District Court's Findings of Fact and Conclusions of Law, recommending that habeas relief be denied, Oct. 3, 2018	AppB001-073
Appendix C	Applicant Charles Don Flores's Objections to, and Motion for Withdrawal of, Trial Court's Findings of Fact and Conclusions of Law and Recommendation That Relief Be Denied, Oct. 15, 2018	AppC001-171
Appendix D	Texas Code of Criminal Procedure, articles 11.071 and 11.073 (statutory procedure for habeas proceedings in Texas death-penalty cases)	AppD001-015
Appendix E	Photographic lineups	AppE001-003

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-64,654-02

EX PARTE CHARLES DON FLORES, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. F98-02133 IN THE 195TH JUDICIAL DISTRICT COURT DALLAS COUNTY

***Per curiam*.**

ORDER

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5.

In April 1999, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Flores v. State*, No. AP-73,463 (Tex. Crim. App. Nov. 7, 2001)(not designated for publication). Applicant

filed his initial application for a writ of habeas corpus in the convicting court in September 2000, and he timely filed supplements to the application in December 2000. This Court subsequently denied relief on all of his claims. *Ex parte Flores*, No. WR-64,654-01 (Tex. Crim. App. Sept. 20, 2006)(not designated for publication).

On May 19, 2016, applicant filed in the trial court the instant first subsequent application for a writ of habeas corpus. Applicant presented four claims, one of which satisfied the requirements of Texas Code of Criminal Procedure Article 11.071, § 5:

Claim I — Applicant is entitled to relief because new scientific knowledge discredits the testimony of the only eyewitness to the crime.

We remanded this claim to the trial court for consideration. *Ex parte Flores*, No. WR-64,654-02 (Tex. Crim. App. May 27, 2016)(not designated for publication).

On remand, the trial court held an evidentiary hearing. The trial court adopted the State's proposed findings of fact and conclusions of law recommending that the relief sought be denied.

This Court has reviewed the record with respect to the allegation made by applicant that he is entitled to relief under Article 11.073 because new scientific knowledge on hypnosis and its effects on memory recall were not previously available to him. Article 11.073 §(b) provides (1) that applicant must show that (A) the relevant scientific evidence was not previously available, and (B) the evidence would be admissible at trial, and (2) had the evidence been presented at trial, on the preponderance

of the evidence the person would not have been convicted. We agree with the trial judge's findings and conclusions that applicant fails to meet the dictates of Article 11.073 §(b). Therefore, based upon the trial court's findings and conclusions and our own review, we deny relief on applicant's first claim.

Applicant's remaining claims are procedurally barred. We dismiss claims 2, 3, and 4 as an abuse of the writ under Article 11.071 §5(a)(1) without reviewing the merits of the claims raised.

IT IS SO ORDERED THIS THE 6th DAY OF MAY, 2020.

Do not publish

W98-02133-N(B)

195TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY

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EX PARTE
CHARLES DON FLORES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

TABLE OF CONTENTS

HISTORY OF THE CASE 3

FACTUAL SUMMARY 7

APPLICANT'S ISSUE 13

GENERAL FINDINGS OF FACT 15

SPECIFIC FINDINGS OF FACT 15

Admissibility of Hypnotically Refreshed Testimony in Texas 15

History of Applicant's Challenges to Barganier's In-Court Identification .. 19

Procedural Bar 30

Merits of the Claim 32

Additional Findings 65

Conclusion 68

ORDER 69

The Court, having considered Charles Don Flores's ("Applicant") subsequent application for writ of habeas corpus, the State's answer, all motions and exhibits filed by the parties, the testimony and documentary evidence offered at the subsequent writ hearing conducted on October 10, 11, and 16, 2017, official court documents and records, and the Court's personal experience and knowledge, makes the following findings of fact and conclusions of law:

I. HISTORY OF THE CASE

Applicant is confined pursuant to the judgment and sentence of the 195th Judicial District Court of Dallas County, Texas, in cause number F98-02133-N, in which Applicant was convicted by a jury of capital murder for the shooting death of Elizabeth Black committed in the course of a home invasion robbery on January 29, 1998. On April 1, 1999, the jury answered the special issues in a manner requiring the imposition of the death sentence. Applicant appealed his conviction and sentence to the Court of Criminal Appeals. On November 7, 2001, the Court of Criminal Appeals affirmed his conviction and sentence. *Flores v. State*, No. AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (not designated for publication).

On September 13, 2000, in accordance with Article 11.071 of the Code of Criminal Procedure, Applicant filed an application for writ of habeas corpus. The application, filed by state habeas counsel, raised twelve grounds for relief. On December 14, 2000, Applicant filed a *pro se* amendment to his application, raising nineteen additional grounds for relief. This Court issued findings of fact and conclusions of law recommending that relief be denied on all thirty-one grounds on April 12, 2006, and the Court of Criminal Appeals expressly adopted the trial court's findings and denied relief on September 20, 2006. *Ex parte Flores*, No. WR-64,654-01, 2006 Tex. Crim. App. Unpub. LEXIS 744 (Tex. Crim. App. Sept. 20, 2006) (not designated for publication).

Applicant filed his initial federal petition for habeas relief on September 18, 2007, raising forty-five potential claims. Applicant filed an amended petition on March 24, 2008, raising only four claims. The United Stated Magistrate Judge recommended that relief be denied on March 3, 2011. *Flores v. Thaler*, No. 3-07-CV-0413-M-BD, 2011 U.S. Dist. LEXIS 158338 (N.D. Tex. Mar. 3, 2011). Subsequently, Applicant filed a motion to withhold a determination pending the United States Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Following the Supreme Court's opinions in these cases and

supplemental briefing by the parties, the federal district court denied relief and declined to grant Applicant a certificate of appealablility on July 17, 2014. *Flores v. Stephens*, No. 3:07-CV-0413-M, 2014 U.S. Dist. LEXIS 97028 (N.D. Tex. July 17, 2014). The Fifth Circuit Court of Appeals refused to grant Applicant a certificate of appealability on July 21, 2015. *Flores v. Stephens*, 794 F.3d 494 (5th Cir. 2015).

On October 20, 2015, the State filed a motion to set an execution date, with March 15, 2016 as the proposed execution date. *See* Tex. Code Crim. Proc. Ann. art. 43.141 (West 2015). Applicant filed a response opposing the setting of an execution date prior to the United States Supreme Court's resolution of his petition for writ of certiorari, which Applicant filed on October 19, 2015. In a hearing held on December 3, 2015, this Court set Applicant's execution for June 2, 2016, six months from the date of the hearing.

On January 25, 2016, the United States Supreme Court denied certiorari review of the Fifth Circuit's decision. *Flores v. Stephens*, 136 S. Ct. 981 (2016).

On May 19, 2016, Applicant filed the instant subsequent state application for writ of habeas corpus and a motion for stay of execution.[1]

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[1] Applicant's federal habeas counsel, Bruce Anton and Mary Margaret Penrose filed the motion for stay of execution and the instant subsequent application for writ of habeas

Applicant raised four grounds for relief, alleging: (1) new scientific knowledge discredits the testimony of [Jill Barganier] the only eyewitness to the crime; (2) Applicant was denied the effective assistance of trial counsel when trial counsel failed to investigate or produce any mitigating evidence on Applicant's behalf during the sentencing proceedings; (3) Dallas County continues to evidence racial bias in its prosecution and punishment in capital cases and Texas's capital-punishment statutes are unconstitutional as applied to Applicant, a Hispanic, because they arbitrarily allowed the white male principal to be released on parole even before the less culpable Hispanic accomplice is scheduled to be executed; and, (4) as applied to Applicant, the "law of parties" is unconstitutional because it allowed an unjustifiable disparity between the more-culpable principal and less-culpable accomplice. (*See* Subsequent Writ Application at pp. 34, 63, 119, 124).

The State filed a motion to dismiss the subsequent application on May 25, 2016.

On May 27, 2016, the Court of Criminal Appeals stayed the Applicant's execution, held that the Applicant's first allegation satisfied the requirements

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corpus. Subsequently, counsel moved to withdraw from the case and the Office of Capital and Forensic Writs was appointed to represent Applicant in the subsequent writ proceedings.

of Article 11.071, § 5, and remanded the allegation to this Court for consideration on the merits. *See Ex parte Flores*, No. WR-64,654-02, at *2 (Tex. Crim. App. May 27, 2016).

The State filed a timely response to Applicant's subsequent application on September 26, 2016. Tex. Code Crim. Proc. Ann. art. 11.071, §§ 6(b), 7(a) (West Supp. 2016).

The Court appointed the Office of Capital and Forensic Writs ("OCFW") to represent Applicant "on the single ground of his subsequent writ application that the Court of Criminal Appeals has remanded to this Court to resolve." (*See* Order Granting Motion to Withdraw and Appointing New Counsel, Dated Aug. 11, 2016).

A live evidentiary hearing was held on October 10, 11, and 16, 2017. Applicant presented the following witnesses at the hearing: (1) Jill Barganier, (2) Alfredo Serna, (3) Jerry Baker, (4) Dr. Margaret Kovera, Ph.D., and (5) Dr. Steven Lynn, Ph.D. The State called Dr. George Mount, Ph.D. and Dr. David Spiegel, M.D.

II. FACTUAL SUMMARY

In its opinion on direct appeal, the Court of Criminal Appeals summarized the facts of the offense and investigation as follows:[2]

> Elizabeth Black, the deceased, resided with her husband in Farmers Branch. At approximately 6:30 a.m. on January 29, 1998, Mr. Black left for work. He returned home three hours later to discover Mrs. Black's body beneath the den table. Mr. Black immediately called the police, who arrived at the scene within a few minutes. An autopsy established that Mrs. Black had died as the result of a single gunshot.
>
> Nearby, officers discovered the Blacks' Doberman pinscher, Santana, shot through the back. The size of the wound suggested a large-bore weapon, such as a .44 caliber. Fragments of potato littered the floor, table, walls, and ceiling in the vicinity of the victim. On the floor near Mrs. Black's body, police officers found a .380 caliber bullet. Officers located a shell casing of the same caliber and a piece of potato on the floor inside the garage. The spent cartridge's presence suggested that a semiautomatic pistol, rather than a revolver, had fired the shot that killed Mrs. Black. A police detective testified that a second round struck the dog. Although officers did not find another bullet or shell casing, they did find a hole in the carpet, and the size of the wound and patterns of blood and potato spatter tended to corroborate this hypothesis.
>
> While searching the rest of the house, police discovered a hole in the wall above the toilet in the hall bathroom. In the master bathroom, someone had punched a hole in the wall near the laundry hamper, opened the commode top, and tore the sink and medicine cabinet from the wall. Police found a large potato inside the sink. A ladder extending to the attic access-door stood in a rear room. There were no signs of forced entry or struggle.

[2] Footnotes 5 and 6 have been added to include additional facts with citations to the record.

Officers discovered $39,000 in cash hidden inside the master bedroom closet. Mr. Black stated that the Blacks' incarcerated son, Gary, had left this money with his parents before going to prison for selling drugs. Gary's common-law wife, Jackie Roberts, had been receiving $500 of this money from the Blacks each month.

Neighbors reported that a purple, pink, and yellow Volkswagen had been parked in the Blacks' driveway around 7:35 on the morning of the murder. The garage door was open a few feet, which was unusual. The Volkswagen driver got out, rolled underneath the garage door, and raised the door to admit the Volkswagen's passenger. A neighbor identified [Applicant], dressed in dark-colored clothing, as the passenger, but other witnesses could not identify the passenger. After entering the garage, the two men shut the door. One neighbor heard a thud, but stopped investigating the matter upon observing the multi-colored Volkswagen, which he had previously seen at the home of Jackie Roberts.

Jackie Roberts (Jackie), who was on probation for possessing methamphetamine, lived with her mother and three children on Emeline Street, a short distance from the Blacks' home. She had become romantically involved with Ricky Childs about three weeks before the murder. Childs, a drug dealer, habitually carried a .380 semiautomatic pistol in the back of his waistband.

Childs, [Applicant], and several acquaintances spent the early morning hours of the day of the murder inside [Applicant's] trailer using methamphetamine and marijuana. Childs and [Applicant] left the trailer together in Childs' multi-colored Volkswagen at approximately 3:00 a.m., arriving at Jackie's home at some time later that morning. Jackie had arranged for an acquaintance, Terry Plunk, to sell Childs and [Applicant] a quarter-pound of methamphetamine. She had not expected [Applicant], dressed in a long black duster, to accompany her and Childs to purchase the methamphetamine, but [Applicant] refused to hand over his money without attending the drug transaction

for fear of being "ripped off." The trio rode in Jackie's El Camino to an apartment near Love Field Airport, where they met Plunk. During the transaction, [Applicant] weighed the drugs on a portable digital scale and declared that the quantity delivered by Plunk was a quarter-ounce short.[3] Plunk made up the alleged shortage to avoid a confrontation. Jackie, Childs, and [Applicant] then drove to [Applicant's] home with the drugs. [Applicant] weighed the methamphetamine again and again accused Plunk of shortchanging him, insisting that the deal had been for a half-pound instead of a quarter-pound. [Applicant] then pointed a gun at Jackie and asked what her "connection" would pay for her head. While Childs attempted to calm [Applicant] down, Jackie telephoned Plunk to see if he would cover the claimed shortage. Plunk refused. Childs, [Applicant], and Jackie then drove to a nearby house, where Childs and [Applicant] acquired three firearms. [Applicant] was armed with a "long, blue gun" and a handgun. Childs carried a larger handgun. When Jackie asked the men why they had armed themselves, they told her that it was none of her business.

To make up the alleged shortage, she agreed to pay [Applicant] $3,900 from the cash that Gary Black had hidden at his parents' home. Childs confirmed the existence of this money, and the two men dropped Jackie off at home sometime between 6:35 and 7:15 a.m. Childs' former girlfriend, Vanessa Stovall, testified that Childs and [Applicant] arrived at Childs' grandmother's home on High Meadow around 6:30 that morning. [Applicant] and Stovall smoked some methamphetamine before they left in the Volkswagen between 6:45 and 7:00 a.m.

In her living room, Jackie spoke briefly with Doug Roberts (Doug), who had arrived to take their son to school. Later that morning, Jackie left to visit Plunk. A short time after Jackie's departure, her mother told Doug about the murder of Mrs. Black. That evening, Doug went to the home of the victim's daughter,

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[3] Jackie testified that Plunk had not shortchanged them and that [Applicant] was trying to rip off Plunk.

Sheila Black, and learned that neighbors had observed a pink and purple Volkswagen outside the house. Doug drove to Plunk's house to inform Jackie not only about the murder but also that neighbors had seen the multi-colored Volkswagen at the scene. He tried to convince Jackie to go with him to the police immediately, but Jackie feared possible retaliation or prosecution. Consequently, Doug drove her from Plunk's house to a hotel.

On his way to the police station, Doug disposed of a map, discovered by Plunk, that Jackie had drawn showing the area of her own home and the Blacks' house.[4] He reported Childs' possible involvement to the police that night and submitted to another police interview the next day. Law enforcement officers apprehended Jackie at Doug's apartment four days after the murder. By then, the police had arrested Childs.

When he was arrested, Childs possessed amphetamine and a partial box of the same brand of .380 ammunition found at the murder scene. A police search of his grandmother's residence uncovered a .44 Magnum revolver and shells, two boxes of .357 bullets, and a pair of gloves. Polarized-light microscopy of granular material found inside the Magnum barrel identified starch grains consistent with those from a potato.

A day after the offense, [Applicant] admitted to a friend, Homero Garcia, that he had shot the dog, but blamed Childs for killing the "old lady." [Applicant] made a similar statement to his father-in-law [Jonathan Wait, Sr.].[5]

Two days after the murder, [Applicant] and two others[6] towed Childs' Volkswagen to the parking lot behind the Grand

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[4] At trial, Jackie denied drawing the map for Childs and [Applicant], stating that she drew it four days before the murder to guide her ex-husband's girlfriend to the Blacks' home to babysit. She initially told police she drew it for Childs.

[5] Applicant told Wait that he had gotten himself into a little trouble and needed to get out of the country. Wait showed Applicant a newspaper article about Mrs. Black's murder and said, "You call this a little bit of trouble, killing a 64-year-old woman," to which Applicant responded, "I only shot the dog." (RR37: 82–86).

[6] Myra Wait and her brother, Jonathan. (RR36: 261–68).

Prairie roofing business owned by [Applicant's] father. There, between 6:00 and 7:00 p.m., [Applicant] sprayed the Volkswagen with black spray paint. At some point, the license plates were removed. The group then towed the vehicle up an I-30 freeway entrance ramp and onto the shoulder of the road. [Applicant] doused the Volkswagen with gasoline and set the interior on fire. When a passing motorist stopped to offer assistance, [Applicant] got into the tow car and drove away. Jonathan Wait, who was in the tow car with [Applicant], testified that the other motorist followed, but [Applicant] eluded the other vehicle after an extended high-speed chase during which [Applicant] fired several shots at the other car.

On April 18, 1998, at 7:00 p.m., Kyle police officers Slaughter and Oaks stopped a blue Volvo traveling north on I-35. [Applicant], the vehicle's sole occupant, could not produce a driver's license, but identified himself as Juan Jojola, [Applicant's] brother, and presented a social security card bearing that name. Because of the alias, the officers did not discover that [Applicant] had an outstanding federal warrant for his arrest. An angry motorist stopped at the scene to complain that the Volvo had almost run his automobile off the road.

After [Applicant] failed a series of field sobriety tests, Officer Slaughter initiated an arrest for driving while intoxicated. As the policeman started to cuff the suspect's hands behind his back, [Applicant] turned quickly and struck Officer Slaughter's head with his elbow. A struggle ensued, during which [Applicant] tried to push both police officers in front of oncoming traffic on the freeway. [Applicant] called the arrest "bullshit" and insisted that it was not going to happen. Finally, Officer Slaughter managed to push the group from the roadway into a nearby ditch. By chance, Deputy Mike Davenport of the Hays County Sheriff's Department arrived on the scene and assisted the police officers in handcuffing [Applicant]. The officers transported [Applicant] to the Hays County jail, where they charged him with driving while intoxicated and two counts of assault on a peace officer. Officer Slaughter suffered a swollen eye, and Officer Oaks had a

bite on her arm and an injury to a bone in her right hand. [Applicant] was released from jail on bond before authorities learned his true identity.

Following his arrest for the instant offense, [Applicant] was taken to Parkland Hospital for treatment of a knee injury, accompanied by Officer Bobby Sherman. Because of the nature of [Applicant's] injury and because he rode in a wheelchair, [Applicant] was virtually unrestrained. As Sherman and [Applicant] passed through an infirmary door, [Applicant] reached around with both hands and grabbed the grip of Sherman's pistol. Sherman grabbed [Applicant] by the neck, and they fell against the wall, then to the ground. Sherman felt the pistol coming out of its holster, but pushed the gun to the ground, forcing it from [Applicant's] hands. [Applicant] struggled for it again, threatened to kill Sherman, then bit him just above the elbow. As Sherman yelled, "Grab the gun," he again forced the gun from [Applicant's] hand, and a doctor grabbed it. Sherman remained on top of [Applicant] trying to hold him down, although [Applicant] continued to struggle violently. Sherman then tried to spray [Applicant] with Mace, but [Applicant] grabbed the can from him and began spraying it into Sherman's eyes and on hospital staff members. Sherman continued to try to restrain [Applicant] with the help of two or three hospital staff members. At some point, someone grabbed Sherman's handcuffs and handcuffed [Applicant].

Flores, No. 73,463, slip op. at *2–8.

III. APPLICANT'S ISSUE

(1) Applicant's single remanded claim, alleged as his first ground for relief in his subsequent habeas application, is stated in Applicant's application as follows:

> Flores is entitled to relief because new scientific knowledge discredits the testimony of the only eyewitness to the crime and (A) Article 11.073 requires a new trial because, without

> the State's use of [Jill Barganier's] flawed hypnotically induced testimony, Flores would not have been convicted; and (B) the State's reliance on now-debunked science violates Flores' constitutional rights to be free from cruel-and-unusual punishment, equal protection under state laws, and due process.

(*See* Subsequent Writ Application at pp. 34–63).

(2) Applicant bases his first ground for relief on the opinion of Dr. Steven Lynn, Ph.D., a professor of psychology at the State University of New York at Binghamton. (*See id.*; AWX: 5).

(3) Dr. Lynn provided an affidavit in this case, which Applicant attached to his subsequent application as Exhibit 1. (*See id.*, Ex. 1; AWX: 5). Applicant asserts that the "affidavit confirms that Barganier's testimony has since been conclusively determined as scientifically unsound," and would not have been admissible today. (*See* Subsequent Writ Application at p. 35, 40, 55).

(4) Applicant asserts that since his trial, the scientific community's knowledge has changed in four ways:

1) New studies have discredited the scientific community's understanding that hypnosis does not elicit false memories;
2) New studies have demonstrated the plasticity of hypnotically induced memories;
3) New studies show that hypnosis, even without leading questions, can create false memories; and
4) New studies show hypnosis creates memories about highly emotional events that change over time.

(*See* Subsequent Writ Application at p. 48 (citing Ex. 1 at pp. 20–21).

(5) Applicant argues that, based on this new scientific knowledge, the trial court's findings at the *Zani* hearing were erroneous and merit a new trial. (*See id.* at p. 39).

(6) Applicant asserts that "the State relied on scientific evidence regarding hypnosis and memory that has since been discredited," and that "[s]cientific knowledge now confirms that the scientific principles on which the State relied at trial actually increase the likelihood of critical error and wrongful convictions, casting a large shadow of doubt on Barganier's identification of Flores." (*See id.* at p. 42).

(7) Applicant further claims that the State "relied on accepted scientific understanding in 1999 that hypnosis could be used to recover memories without procedural safeguards aside from not suggesting facts." (*See id.* at p. 43).

(8) Applicant argues that "scientific studies since the trial have changed the state of scientific knowledge about hypnosis and recovered memories," and that the "new state of scientific knowledge firmly understands that 'hypnosis is an unreliable memory recovery technique.'" (*See id.* at pp. 39–40 (citing Exhibit 1 at pp. 20–21)).

(9) Applicant argues that the State did not present any physical evidence placing Applicant at the crime scene and rested its case on the "words of undesirables—drug dealers and drug users," and that the only "seemingly untainted evidence the State presented to place Flores on the scene was Barganier's hypnotically altered testimony." (*See* Subsequent Writ Application at pp. 35–36).

(10) Applicant argues that absent Barganier's identification he would not have been convicted. (*See id.* at p. 40).

IV. GENERAL FINDINGS OF FACT

(1) The Court takes judicial notice of the entire contents of the Court's file in Cause Number F98-02133-N.

(2) The Court takes judicial notice of all volumes of the reporter's record of the trial in Cause Number F98-02133-N. Citations to this record will be "RR_."

(3) The Court takes judicial notice of the entire contents of the Court's file in Cause Numbers W98-02133-N(A) and (B).

(4) The Court takes judicial notice of the reporter's record of the October 10, 11, and 16, 2017, subsequent writ hearing conducted on the instant habeas applications. Citations to the record will be "WRR__." Citations to Applicant's exhibits from the hearing will be "AWX__," and citations to the State's exhibits with be "SWX__."

(5) The Court had ample opportunity to observe all witnesses who testified at the subsequent writ hearing.

V. SPECIFIC FINDINGS OF FACT

ADMISSIBILITY OF HYPNOTICALLY REFRESHED TESTIMONY IN TEXAS

(6) Hypnotically refreshed testimony is admissible in Texas courts where the proponent of such testimony "demonstrate[s] to the satisfaction of the trial court, outside the jury's presence, by clear and convincing evidence, that such testimony is trustworthy." *Zani v. State*, 758 S.W.2d 233, 243 (Tex. Crim. App. 1988); *see also State v. Medrano*, 127 S.W.3d 781, 783 (Tex. Crim. App. 2004) (en banc.).

(7) The leading Texas case on the issue of hypnotically refreshed testimony is *Zani v. State*, in which the Court of Criminal Appeals explained the process the trial court should use to determine whether the testimony is trustworthy. *Zani*, 758 S.W.2d at 243.

(8) In assessing the trustworthiness of the testimony, the trial court should be alert to the four-prong dangers of hypnosis: hypersuggestibility, loss of critical judgment, confabulation, and memory cementing. *Zani*, 758 S.W.2d at 244 (internal quotations omitted).

(9) Hypersuggestibility can occur because the hypnotized person is in a state of increased suggestibility in which her disassociated attention is constantly sensitive to and responsive to cues from the hypnotist. *Zani v. State* ("*Zani II*"), 767 S.W.2d 825, 825 (Tex. App.—Texarkana 1989, pet. ref'd) (opinion on remand).

(10) Loss of critical judgement occurs when the hypnotized person loses the ability to make a mental evaluation of her ideas, images, and feelings. *Zani II*, 767 S.W.2d at 837.

(11) Confabulation occurs when the hypnotized person creates memory perceptions in an unconscious effort to please the hypnotist and believes the fabricated memories are real. *Zani II*, 767 S.W.2d at 836.

(12) Memory cementing happens when the more the hypnotized person goes over the memory in her mind, the more she becomes convinced it is an accurate remembrance. *Zani II*, 767 S.W.2d at 837.

(13) The *Zani* court adopted a non-exclusive list of ten factors for trial courts to consider when deciding whether hypnotically refreshed testimony is trustworthy in a given case. *Zani*, 758 S.W.2d at 243–44.

(14) The factors the trial court should consider, known as the "*Zani* factors" are:

1) The level of training in the clinical uses and forensic applications of hypnosis by the person performing the hypnosis;
2) the hypnotist's independence from law enforcement investigators, prosecution, and defense;
3) the existence of a record of any information given or known by the hypnotist concerning the case prior to the hypnosis session;
4) the existence of a written or recorded account of the facts as the hypnosis subject remembers them prior to undergoing hypnosis;
5) the creation of recordings of all contacts between the hypnotist and the subject;
6) the presence of persons other than the hypnotist and the subject during any phase of the hypnosis session, as well as the location of the session;
7) the appropriateness of the induction and memory retrieval techniques used;
8) the appropriateness of using hypnosis for the kind of memory loss involved;

9) the existence of any evidence to corroborate the hypnotically-enhanced testimony; and

10) the presence or absence of overt or subtle cuing or suggestion of answers during the hypnotic session.

Zani, 758 S.W.2d at 24–44; *see also Medrano,* 127 S.W.3d at 783.

(15) The Court of Criminal Appeals instructed that these factors are to be evaluated based on the totality of the circumstances. *Zani,* 758 S.W.2d at 244. This followed the approach made in *People v. Romero,* 745 P.2d 1003 (Colo. 1987) and *State v. Iwakiri,* 682 P.2d 571 (Idaho 1984) rather than the strict procedural guidelines method that was adopted in *State v. Hurd,* 432 A.2d 86, 95–97 (N.J. 1981).

(16) Under *Hurd,* hypnotically refreshed testimony was admissible only if the State demonstrated by clear and convincing evidence compliance with the following six procedural guidelines:

1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis.

2) The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator or the defense.

3) Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined.

4) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness's description of the events.

5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is

available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.

> 6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.

Hurd, 432 A.2d at 95–97.

(17) However, in rejecting this approach and instead adopting the totality of the circumstances review, courts recognized that there could be "circumstances where, even when the safeguards are not strictly or entirely followed, a trial court could nevertheless conclude that the testimony would still be sufficiently reliable for its admission." *Iwakiri*, 682 P.2d at 577. By way of example, the court noted that one of the safeguards is that only the hypnotist and the subject should be present during any phase of the hypnotic session, and this would prevent a criminal defendant from having his attorney present or prevent a person from requesting that his or her own psychiatrist be present to observe the session. *Id.* The court opined that the presence of a third person, such as an attorney or personal doctor would protect the rights of a subject, but at the same time would not necessarily render the entire testimony unreliable. Thus, merely because one of the safeguards was not followed should not result in the automatic exclusion of the entire testimony. *Iwakiri*, 682 P.2d at 577–78.

(18) The Court finds that while *Zani* was decided in 1988, the Court of Criminal Appeals reaffirmed the decision in 2004 in *State v. Medrano*. In *Medrano*, the court explained:

> With *Zani*, the Court created a standard for the trial courts to apply in determining the admissibility of hypnotically enhanced testimony—evidence based on a soft science. The Court recognized in *Zani* that the reliability of hypnotically enhanced testimony is especially in question due to the undetected amplification of

> disabilities in perception, memory and articulation in a witness's testimony. Although this standard was created in 1988, predating both *Kelly* and *Nenno,* the objective of reliability remains constant in all three opinions. In *Kelly* and *Nenno,* frameworks were developed to ensure the reliability of novel scientific evidence in the broad categories of hard and soft sciences, respectively. *Zani,* on the other hand, is a standard that applies in a soft science situation where a narrowly tailored framework was created to ensure the reliability of a particular scientific technique.

Medrano, 127 S.W.3d at 786–87.

HISTORY OF APPLICANT'S CHALLENGES TO BARGANIER'S IN-COURT IDENTIFICATION

(19) Jill Barganier and her husband Robert were the Blacks' next-door neighbors at the time of the offense, residing at 2959 Bergen Lane with their daughter and two sons. (RR35: 163–64RR36: 88).

(20) Jill Barganier testified as a witness for the State at Applicant's trial.

(21) Barganier entered the courtroom at Applicant's trial for the first time on March 23, 1999, the second day of the guilt-innocence phase of the trial. (RR35: 153–56; RR36: 91–92).

(22) Outside the presence of the jury, Barganier was questioned briefly by the State and the Court concerning the identifications she had made in Applicant's case and the hypnosis session she had undergone on February 4, 1998. (RR153–56).

(23) Barganier testified that she went to the police department on January 29, 1998, the morning of Mrs. Black's murder, and gave an account of what she saw that morning. (RR35: 154). Barganier testified that she gave descriptions of the two men she had seen getting out of the Volkswagen and identified the driver, Richard Childs, from a photo lineup prior to undergoing hypnosis. (RR35: 154–55).

(24) When asked by the Court whether she had been placed under hypnosis, and whether she had "actually go[ne] under," Barganier testified that she did not "know enough about it. I felt like I was." Barganier further stated that she had "never studied it or been under before." (RR35: 155).

(25) Barganier also testified that she did not make any additional identifications after the hypnosis session. (RR35: 155–56).

(26) Barganier was then excused from the courtroom. (RR35: 154–56).

(27) At that time, the defense objected to Barganier's testimony, arguing that the State had not demonstrated the trustworthiness of her hypnotically refreshed testimony as required by *Zani v. State*. (RR35: 157–61).

(28) In response, the State offered to have a "*Zani* hearing" the following morning and postponed calling Barganier as a witness pending the resolution of the hearing. (RR35: 157–61).

(29) After exiting the courtroom, Barganier asked to speak to one of the prosecutors, Greg Davis, and informed him that the Applicant was the man she had seen outside the Blacks' residence the day of the offense—that he was the passenger of the Volkswagen. (RR36: 13–15, 85–86; 92–93).

(30) The State informed the defense and the Court. (RR36: 15–16). Defense counsel informed the court that they objected to Barganier making an in-court identification of the Applicant, arguing that it was tainted by the hypnosis. (RR36: 16).

(31) The *Zani* hearing was conducted the following morning on March 23, 1999. (RR36: 12–118).

(32) Jill Barganier, Farmers Branch Police Detective Jerry Baker, Farmers Branch Police Officer and certified Forensic Hypnotist Afredo "Roen" Serna, and Dr. George R. Mount, Ph.D. testified at the hearing. (RR36: 18–109).

(33) Testimony at the hearing revealed that Barganier, not the police or the prosecution, requested the hypnosis. (RR36: 31, 89, 100).

(34) Barganier testified that she had assisted the police in creating a composite drawing of the driver of the Volkswagen and was able to positively identify him in two photo lineups as Richard Childs. (RR36: 88–90).

(35) Barganier testified that she was later asked to assist in a composite drawing of the passenger. (RR36: 90).

(36) Barganier testified that she thought hypnosis might help her to relax and be more precise. (RR36: 90).

(37) Barganier testified that she was nervous and afraid because the passenger had scared her. (RR36: 89). Barganier testified: "[The passenger] looked at me when I was looking through the window. I thought we had made eye contact. I was just real nervous." (RR36: 89).

(38) Barganier also found composite drawing difficult and noted that it was computerized, which was different from what she had expected. (RR36: 90).

(39) The hypnosis session was held at the Farmers Branch Police Station on February 4, 1998.

(40) The session was conducted by Officer Alfredo Serna, a certified investigative hypnotist, and witnessed by Investigator Jerry Baker, who operated the camera but otherwise said nothing. (RR36: 18–19, 34).

(41) Investigator Baker and Officer Serna both testified that they were unaware that Applicant had become a potential suspect in the murder at the time of the hypnosis session. (RR36: 20, 30–31, 38, 57).

(42) The State stipulated that another Farmers Branch police officer had spoken with the police in Irving and knew that they were looking for someone who went by the name "Fat Charlie." (RR36: 28).

(43) Investigator Baker testified, however, that neither he nor Officer Serna knew any of the details until after the hypnosis session. (RR36: 30–31). Officer Serna also testified that had no knowledge of the Applicant as a suspect prior to the hypnosis session and had not seen any pictures of Applicant. (RR36: 37).

(44) Officer Serna, who was also a crime scene technician, testified that he had been to the Blacks' residence to collect and document evidence at the crime scene, but had not spoken to any witnesses at the crime scene. (RR36: 37). Officer Serna also testified that aside from the hypnosis session with Barganier, he had not spoken to any witnesses in this case. (RR36: 37–38).

(45) Officer Serna also testified that he did not know that Barganier had already identified the driver of the Volkswagen, Richard Childs, prior to the hypnosis session. (RR36: 43–44).

(46) Officer Serna testified that he was aware of the four possible dangers of hypnosis and explained the dangers to the court. (RR36: 35–42).

(47) Officer Serna testified that Barganier appeared to be in good physical and mental condition and was not fatigued, depressed, intoxicated or on drugs and was a suitable subject for hypnosis. (RR36: 48).

(48) Officer Serna testified that he used the movie theater technique because Barganier expressed some tension or trauma associated with the event and "the fact that she felt the suspects had seen her or that their eyes had crossed" and that she may have been concerned about retaliation. (RR36: 39, 46, 55–56).

(49) During the course of the hypnosis session, Officer Serna suggested nothing to Barganier, provided no feedback, and avoided reinforcing any aspect of her recollection. (RR36: 37, 40, 41, 49).

(50) Officer Serna also testified that he believed Barganier would have been able to identify Applicant if she had not had the hypnosis session. (RR36: 59).

(51) The State called Dr. George Mount, a psychologist with extensive experience in forensic hypnosis, as an expert witness at the *Zani* hearing. (RR36: 60; SX: 86).

(52) Dr. Mount testified that he had evaluated several hundred hypnosis sessions, taught hypnosis for twenty years, and was on the board that developed the exam for the Texas Commission on Law Enforcement Officers Standards and Education ("TCLEOSE") that peace officers are

required to take in order to be certified as an investigative hypnotist. (RR36: 62–63, 72).

(53) Dr. Mount had viewed the videotape of the hypnosis session and was of the expert opinion that the hypnosis session had been conducted in such a way as to guard against the "four possible dangers" of hypnosis and had satisfied the ten factors of *Zani.* (RR36: 60–62, 65–71, 72). He saw no evidence on the videotape of any incorrect procedures. (RR36: 63–65).

(54) Dr. Mount testified that the movie theater technique is a standard information eliciting technique and is commonly used. (RR36: 63–64, 69).

(55) Dr. Mount also testified that "[h]ypnosis is a subjective phenomenon. No one can one hundred percent guarantee they were or were not hypnotized. If they weren't hypnotized, it's just an interview." (RR36: 72).

(56) Dr. Mount testified that no one can tell the difference between a true memory and a pseudomemory and that is why corroborating evidence is useful. (RR36: 81–82).

(57) Dr. Mount also testified that he did not subscribe to the video recorder model of memory, that it "is an erroneous belief about how memory works." (RR36: 82).

(58) Jill Barganier further testified before the Court that while the hypnosis session had made her feel more relaxed, it did not "firm up" an impression of the Volkswagen passenger. (RR36: 101).

(59) Barganier also testified that while she may have seen a photograph of Applicant on the news at the time of his arrest, she had not looked at the newspaper during trial nor had she seen a picture of Applicant during the trial. (RR36: 108).

(60) She testified that she understood the seriousness of the situation and was positive in her identification. (RR36: 108–109).

(61) In closing argument, Jason January, the lead prosecutor at Applicant's trial, summarized the corroborating evidence as follows:

And I believe that the evidence either has shown or will show that her identification has been corroborated by the fact that number one, Jaime Dodge saw the Defendant and Rick Childs in that Volkswagen a few hours before saying that they were going to go to Farmers Branch.

That Jackie Roberts saw the Defendant and Rick Childs in that Volkswagen within hours of the – within an hour of the murder. The Defendant wanted money, that she had discussed being at the victim's house.

That Judy Haney saw the Defendant and Rick Childs a few hours prior to the killing.

That Terry Plunk saw the Defendant and Rick Childs a few hours prior to the killing together.

That Doug Roberts saw the Volkswagen and Rick Childs as the driver at 6:30 in the morning.

That Jill Bargainer [sic], in fact, does pick out Rick Childs as the driver of that vehicle prior to hypnosis.

That Vanessa Stovall sees the Defendant and Rick Childs in that Volkswagen literally minutes prior to going over to the Bergen address that morning.

That Michelle Babler sees two men, and the passenger is consistent with the build and physical description of this Defendant that she pointed out in court.

That Nathan Taylor saw two men with gloves in that Volkswagen, again bolstering the credibility of Jill [Barganier].

We have two witnesses that are going to testify that the Defendant admitted to being present at the scene.

We also have a witness that is going to testify that he sees the Defendant, identifies the Defendant burning the Volkswagen two days after this offense out on I-30.

(RR36: 111–13)

(62) At the conclusion of the hearing, the Court denied Applicant's motion to suppress Barganier's in-court identification of Applicant. (RR36: 117–18).

(63) The Court made specific findings of fact and conclusions of law, which were dictated to the court reporter:

> Well, the Court finds that Officer Alfredo Serna was a qualified forensic hypnotist; that Farmers Branch investigators that were involved in the case and in the hypnotic – or hypnosis session had no photograph of [Applicant] and no description of [Applicant] at that time which they could impart to Ms. [Barganier].
>
> The Court has viewed the video and saw nothing that it believed was subjective, either verbal or nonverbal, nor any cues to Ms. [Barganier] about her identification.
>
> The hypnotist merely inquired whether she could describe the two persons who had gotten out of the Volkswagen, and she had very little. In fact, although it's obvious that there was a hypnosis session, whether you could call her hypnotically refreshed – her testimony hypnotically refreshed is a question.
>
> I noticed no refreshment beyond perhaps the eye color, and I believe she had previously stated that they were dark eyes, and it was compatible even with that.
>
> The real issue here is whether her in-court identification is trustworthy or not. And if it is not trustworthy by reason of the hypnosis, then obviously it could not be admissible.
>
> There is ample corroboration of the fact that the Defendant was the passenger in the Volkswagen, all which was just enumerated by the Prosecutor. The Court finds that under the totality of the circumstances, that there is clear and convincing evidence that the hypnosis undergone by Ms. [Barganier] did not render her eyewitness – in-Court eyewitness identification of the Defendant untrustworthy; therefore, the motion of the Defendant to disallow her testimony is denied.

(RR36: 117–18).

(64) The Court notes that while it was not a requirement, the trial court judge, Judge Nelms, viewed the videotape of the hypnosis session. (RR36: 117–18); *See Zani*, 758 S.W.2d at 240 n.7 758 S.W.2d at 244.

(65) The trial court also granted the defense a "running objection" to Barganier's identification testimony. (RR36: 117–18, 277).

(66) In the presence of the jury, Barganier identified Applicant as the passenger in the Volkswagen that she had seen in the Blacks' driveway the morning of the murder. (RR36: 283–85).

(67) The defense reserved their cross-examination of Barganier, and called her back to the stand during its case-in-chief challenging her ability to adequately see the men due to the fact that sunrise was not until 7:25 a.m. the morning of the murder. (RR38: 12–19). Barganier was adamant that there had been enough light for her to see the men. (RR38: 22).

(68) Defense counsel did not question Barganier about having undergone hypnosis. (RR38: 12–19); *See Zani*, 758 S.W.2d at 240 n.7 ("Once admitted by the trial court, credibility of the hypnotically enhanced testimony may be attacked before the jury.").

(69) The Court, in an abundance of caution, included the following instruction in its charge to the jury:

> During the trial there was testimony that on February 4, 1998, State's witness Jill [Barganier] was hypnotized by Farmers Branch Police Officer Serna in an effort to refresh, restore, or improve her memory regarding a description of the passenger of a multi-colored Volkswagen automobile she told officers she had seen at the residence of Elizabeth Black on the morning of January 29, 1998. If you find and believe from the evidence, or if you have a reasonable doubt, that her in-court identification of the defendant, Charles Don Flores, as such passenger was a false memory or the result of suggestion or any improper influence, whether intentional or unintentional, arising from her

> having been hypnotized, if she was hypnotized, which rendered her in-court identification of the defendant untrustworthy, you will disregard her in-court identification of the defendant and not consider it for any purpose whatsoever. However, if you find and believe from the evidence beyond a reasonable doubt that her in-court identification of the defendant was not a false memory or the result of suggestion or improper influence while she was hypnotized, if she was, you may consider her credibility and the weight to be given her testimony regarding her in-court identification of the defendant as you would the testimony of any other witness.

(CR1: 134–35).

(70) Following his conviction, Applicant filed a direct appeal to the Court of Criminal Appeals, challenging the admission of Barganier's in-court identification on the basis that that the trial court erred by admitting Barganier's identification testimony because the State had failed to prove by clear and convincing evidence that hypnosis had not tainted her memory. *Flores*, No. 73,463, slip op. at 22.

(71) The Court of Criminal Appeals rejected the claim. *Id.* at 23. In so doing, the court explained that the trial court's procedures in admitting the testimony substantially complied with *Zani*, the trial court was aware of the dangers inherent in hypnosis, that it did not abuse its discretion in allowing the testimony, and that the jurors had been free to attach whatever weight they deemed appropriate to Barganier's testimony. *Id.* at 22–23. The court explained:

> As a precautionary measure, the trial court conducted a hearing following the procedures set out in *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1998), and gave the jury instructions to disregard any testimony arising from false memory, suggestion, or improper influence.
>
> When it made the decision to admit [Barganier's] testimony, the trial court in this cause was aware of the

> dangers inherent in hypnosis and the factors that this Court set out in *Zani* to determine the trustworthiness of hypnotically recalled testimony. After hearing all of the testimony and presumably taking the dangers of hypnosis into account, the trial court overruled appellant's motion to exclude [Barganier's] testimony.
>
> We also are aware of the dangers of the effects of hypnosis on memory, but we find that the procedures utilized by the trial court in this cause substantially conformed with those set out in *Zani*, and that it did not abuse its discretion in allowing the testimony.

Id. at 23.

(72) Applicant also challenged Barganier's identification testimony in his initial state application for writ of habeas corpus. Applicant alleged that Barganier's identification was unconstitutionally tainted because the State used improper hypnotically enhanced identification procedures which denied him due process under the Texas and United States constitutions. (*See* Applicant's Initial Application for writ of habeas corpus, Tr. Ct.'s Findings of Fact and Conclusions of Law, at p. 47).

(73) This Court found that Applicant's claim was procedurally barred because it was raised and rejected on direct appeal. (*Id.* at p. 47). This Court also analyzed the merits of the claim in the alternative, reaffirmed its prior findings, found that Applicant had failed to show that Barganier's identification of him was the result of hypnosis or unconstitutionally tainted, and concluded that the testimony was properly admitted and, even if it was not, that any harm was prevented by a curative instruction. (*Id.* at 47–54).

(74) The Court of Criminal Appeals expressly adopted the Court's findings in its order denying relief. *Flores*, WR-64,654-01, 2006 Tex. Crim. App. Unpub. LEXIS 744, 2006 WL 2706773, at *1.

(75) Subsequently, in his federal habeas petition, Applicant claimed that the trial court improperly admitted Barganier's "hypnotically-enhanced identification testimony" in violation of his Fourteenth Amendment right to

due process and his Sixth Amendment right to confrontation. *Flores*, 2011 U.S. Dist. LEXIS 158338, at *2, 20.

(76) In support of his claim, Applicant included the affidavit of Dr. R. Edward Geiselman, an expert in eyewitness psychology. *Id.* at 24. In his affidavit, Geiselman "conclude[d] that 'the forensic interview session might have caused and otherwise affected the in-court identification of Charles Flores by eyewitness Jill Barganier.'" *Id.* "According to Dr. Geiselman, Barganier's identification testimony was untrustworthy and unduly suggestive because the interviewer told her, while under hypnosis, that '[y]ou might find yourself able to recall other things as time goes by.'" *Id.*

(77) The federal magistrate recommended that relief be denied, noting that "[e]ven if the court considers the Geiselman affidavit, which was never presented to the state habeas court, it does not overcome the presumption of correctness attached to the state court findings." *Id.*

(78) The federal district court adopted the magistrate's recommendation. *Flores*, 2014 U.S. Dist. LEXIS 97028, at *27–28.

(79) The district court also rejected Applicant's request to amend his federal petition, in light of the United States Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), to include a claim that trial counsel was ineffective for failing to adequately contest Barganier's testimony. *Id.* at 41. The district court determined that the claim would be procedurally barred and time barred, but also noted:

> Flores has not shown that an objection to this testimony would reasonably have prevailed if it had included the new evidence presented in these proceedings[, i.e., Geiselman's affidavit]. Since trial counsel could not be faulted for failing to take a futile action, *see Clark v. Collins*, 19 F.3d at 966, an ineffective-assistance-of-trial-counsel claim for failing to make this objection would not be substantial as required by *Martinez.*

Id. at 41.

(80) Next, the Fifth Circuit denied Applicant's request for a certificate of appealability to appeal the district court's denial of leave to amend his federal habeas petition to raise three ineffective assistance of counsel claims, including the one described above. *Flores*, 794 F.3d at 502. In specifically addressing Applicant's claim concerning trial counsel's failure to properly challenge Barganier's testimony, the Fifth Circuit explained:

> Reasonable jurists also could not debate the district court's conclusion that amendment would be futile because Flores failed to present a substantial [ineffective assistance of trial counsel] claim based on the failure to properly challenge Barganier's identification testimony, and therefore failed to show cause to excuse the procedural default of that claim. The record reflects that trial counsel vigorously challenged the admission of [Barganier's] testimony. Fearing that [Barganier] might identify Flores in the courtroom, defense counsel requested and obtained a hearing at which the State had the burden of producing clear and convincing evidence that the hypnosis session did not affect [Barganier's] identification of Flores. When the trial court denied their motion to suppress her testimony, defense counsel requested and received a running objection to her testimony. Further, defense counsel cross-examined [Barganier] about her ability to see the passenger in the Volkswagen, in an effort to discredit her identification. **Even assuming that trial counsel performed deficiently by failing to present expert testimony such as that in the affidavit of Dr. Geiselman, and assuming further that the trial court would have excluded Barganier's in-court identification of Flores had such expert testimony been presented, there is not a reasonable probability that the outcome of the trial would have been different, because there was ample other evidence that placed Flores at the scene of the murder, including his own admissions that he was there and shot the dog.**

Id. at 505–06 (emphasis added).

(81) Presently, Applicant is challenging Barganier's testimony pursuant to Article 11.073 of the Texas Code of Criminal Procedure.

PROCEDURAL BAR

(82) Texas law prohibits successive applications for writ of habeas corpus except in specifically defined circumstances. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a) (West Supp. 2016); *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). Those specific circumstances are limited to claims of newly discovered evidence, new rules of law, actual innocence, and actual lack of deathworthiness. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1)-(3) (West Supp. 2016); *Campbell*, 226 S.W.3d at 421. Accordingly, this Court does not have jurisdiction to consider a claim contained in a subsequent application for writ of habeas corpus until the Court of Criminal Appeals has determined the claim meets the requirements of the Article 11.071, § 5 procedural bar.

(83) In this case, section 5(a)(1) prohibits consideration of the merits of a successive habeas corpus application unless the successive application establishes that "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this Article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1) (West Supp. 2016); *Ex parte Woods*, 296 S.W.3d 587, 606 (Tex. Crim. App. 2009).

(84) A legal basis of a claim is unavailable if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(d) (West Supp. 2016).

(85) In this case, the Court of Criminal Appeals stayed Applicant's execution on May 27, 2016, held that only Applicant's first allegation, of the four allegations raised, satisfied the requirements of the Article 11.071, § 5

procedural bar, and remanded that allegation to this Court for consideration. *Ex parte Flores*, No. WR-64,654-02, at *2 (Tex. Crim. App. May 27, 2016) (unpublished order).

(86) The Court finds that the remanded claim is an Article 11.073 claim involving new science.

(87) Article 11.073 took effect on September 1, 2013. *See* Tex. Code Crim. Proc. Ann. Art. 11.073 (West Supp. 2016).

(88) The Court finds that Applicant filed his initial application for writ of habeas corpus on December 11, 2001. Applicant filed a subsequent application for writ of habeas corpus pursuant to Article 11.071 on May 19, 2016. Accordingly, Article 11.073 provided a legal basis for a claim that was unavailable at the time Applicant filed his initial habeas application.

MERITS OF THE CLAIM

(89) The Court finds that Applicant's claim is meritless.

(90) Article 11.073 of the Texas Code of Criminal Procedure applies to relevant scientific evidence that was not available to be offered by a convicted person at the convicted person's trial, or contradicts scientific evidence relied on by the State at trial. Tex. Code Crim. Proc. Ann. art. 11.073(a)(1),(2) (West Supp. 2016).

(91) In order to prevail on his Article 11.073 claim, Applicant must establish that relevant scientific evidence is currently available and was not available at the time of his trial because the evidence was not ascertainable through the exercise of reasonable diligence by Applicant before the date of or during the trial. *See* Tex. Code Crim. Proc. Ann. art. 11.073 (b)(1)(A) (West Supp. 2016).

(92) Applicant must also show that had the relevant scientific evidence been presented at Applicant's trial, on the preponderance of the evidence, he would not have been convicted. *See* Tex. Code Crim. Proc. Ann. art. 11.073 (b)(2) (West Supp. 2016).

(93) In a habeas proceeding, the applicant must plead facts which entitle him to relief and must prove his claims by a preponderance of the evidence. *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016); *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997).

(94) Applicant has not shown that there is relevant scientific evidence that is presently available that was not available to be offered by Applicant at the time of his trial.

(95) Specifically, the Court finds that the scientific evidence on hypnosis and memory that Applicant has presented in this proceeding, specifically the opinion of Dr. Steven Lynn, was readily ascertainable through the exercise of reasonable diligence at the time of Applicant's trial.

(96) The Court finds that even if Applicant had presented the testimony of Dr. Lynn or a similar expert at the *Zani* hearing at Applicant's trial, the result of the proceeding would not have been different.

(97) The Court further finds that Applicant has also failed to prove, by a preponderance of the evidence, that he would not have been convicted if Jill Barganier's identification testimony had been excluded.

(98) Accordingly, the Court finds Applicant fails to prove, by a preponderance of the evidence, facts entitling him to relief. Consequently, the Court finds Applicant fails to sustain his burden of proof.

(99) The Court finds that Applicant has failed to meet the requirements of Article 11.073.

Availability of the Scientific Evidence

(100) Applicant offered the opinion of Dr. Steven Lynn, Ph.D. in support of his claim.

(101) Dr. Lynn prepared an affidavit in this case that was included as an attachment to Applicant's subsequent writ application. (AWX: 5). Dr. Lynn also testified at the subsequent writ hearing on October 16, 2017. (WRR6: 7–150).

(102) Dr. Lynn became involved in this case when he was contacted in April 2016 by Gregory Gardner, one of Applicant's former attorneys. (WRR6: 21–22; AWX: 5 at p. 1).

(103) Dr. Lynn received his undergraduate degree in psychology from the University of Michigan in 1967 and his Ph.D. in clinical psychology from Indiana University in 1976. (SWX: 5).

(104) Dr. Lynn has been practicing psychology since 1976 and is currently licensed to practice in New York. (WRR6: 119; SWX: 5).

(105) Dr. Lynn reviewed the following materials in order to prepare his affidavit in this case:

(1) the transcript of Jill Barganier's [sic] testimony before the jury in Volumes 35, 36, and 38 of the reporter's record from Applicant's trial;

(2) a video recording of the hypnosis session of Barganier conducted by Officer Alfredo Roen Serna;

(3) a transcript of the video recording of the hypnosis session;

(4) the Farmers Branch Police Department Hypnosis Data Sheet dated February 4, 1998; and

(5) the transcript of the *Zani* hearing from Applicant's trial.

(*See* AWX: 5 at p. 1; WRR6: 25–26).

(106) In addition to these materials, Dr. Lynn testified that he also reviewed a document titled: "Time Line Barganier" prior to testifying at the subsequent writ hearing on October 16, 2017. (WRR6: 25–26). Dr. Lynn did not bring a copy of the document with him to the hearing and did not know who had prepared the document. (WRR6: 25–26).

(107) Dr. Lynn also did not know who had prepared the transcript of the video of the hypnosis session. (WRR6: 130).

(108) In his affidavit, Dr. Lynn offered the opinion that hypnosis is not a reliable means of refreshing memory, and in this case specifically, Dr. Lynn opined that "the use of hypnosis and the testimony rendered in the Flores matter were so fundamentally flawed that they raise a specter of doubt not only regarding the admission of the testimony of [Barganier], but also regarding the in-court eyewitness identification of [Applicant]." (AWX: 5 at p. 1).

(109) Dr. Lynn further opined that "[t]he way the hypnosis session was conducted and the testimony of the hypnotist, police officer, Mr. Alfredo Serna [sic], and the expert, Dr. George Mount, were riddled with problems," "[]t]he most egregious" of which "was the memory enhancement technique used." (AWX: 5 at p. 15).

(110) Additionally, Dr. Lynn opined that a "significant development in the study of psychology over the last two decades or so has been the decline and fall of the idea that memory is a vast, permanent and potentially accessible storehouse of information," that "'[h]uman memory works like a tape recorder or video camera, and accurately records the events we've experienced.'" (AWX: 5 at p. 2 (internal citations omitted)).

(111) Dr. Lynn offered the opinion that developments in the scientific knowledge concerning hypnosis and memory that "have occurred in the past two decades, around the time of and after the [Applicant's] trial" have "reinforced and expanded concerns about the risks of hypnosis for memory retrieval and supplement and firm concerns about the admission of hypnotically elicited testimony in judicial proceedings." (AWX: 5 at p. 2).

(112) Dr. Lynn offered the opinion that hypnosis increases the risk of false or inaccurate memories; increases the risk of enhanced or unwarranted confidence in the information recalled as a result of hypnosis; causes memories to become resistant to change and be highly malleable; and that pre-hypnotic warnings about the possible risks of hypnosis are only occasionally effective. (AWX: 5 at pp. 9–12).

(113) At the evidentiary hearing, Dr. Lynn testified that the debate over the reliability of hypnotically refreshed testimony is not a new debate, and existed prior to Applicant's trial, which is one of the reasons the *Zani* hearing was held in this case. (WRR6: 144).

(114) Dr. Lynn testified that when he began his career in 1976, he was a "true believer" in hypnosis and thought hypnosis could improve people's memories, but his opinion concerning hypnosis had changed by the 1980s and, by the time of Applicant's trial, he no longer was of the opinion that hypnosis could be reliably used to refresh memories. (WRR6: 30–37).

(115) The Court finds that prior to Applicant's trial, Dr. Lynn had edited a book titled "Truth and Memory" in 1998, and co-authored a chapter within the book. (WRR6: 126; SWX: 6).

(116) The Court finds that in 1997, Dr. Lynn co-authored a chapter titled "Hypnosis, Pseudomemories, and Clinical Guidelines: A Sociocognitive Perspective" in a publication entitled "Recollections of Trauma, Scientific Evidence and Clinical Practice." (WRR6: 126; SWX: 6).

(117) The Court finds that Dr. Lynn had also published multiple articles on the topic of hypnosis and memory prior to the time of Applicant's trial, including a 1997 article titled "Recalling the Unrecallable: Should Hypnosis Be Used to Recover Memories in Psychotherapy" and a 1998 journal article titled "Hypnotic Psuedomemories, Prehypnotic Warnings and the Malleability of Suggested Memories." (WRR6: 127; SWX: 6).

(118) The Court finds that prior to, and at the time of Applicant's trial, Dr. Lynn had already provided his expert opinion concerning the use of hypnosis to refresh or recover memories in multiple cases:

- In 1996, Dr. Lynn filed a declaration on behalf of the defendant in the California case *Miller v. Calderon*, CV 91-2652-KN, addressing whether hypnotic eyewitness recall is reliable. (WRR6: 122–23; SWX: 6)

- In 1997, Dr. Lynn testified for the plaintiff in *Nadean Cool v. Kenneth Olsen*, a civil trial in which Lynn testified "regarding the biasing effects of hypnosis in "recovering memories" in a case of dissociative identity disorder. (WRR6: 123; SWX: 6).

- In 1999, Dr. Lynn provided a report for the defendant on hypnotic procedures used on a witness in a capital murder

case in the Orange County, California case *People v. John Stephens*. (WRR6: 124; SWX: 6).

- In August 1999, Dr. Lynn testified for the plaintiff in a civil trial regarding the biasing effects of hypnosis in "recovering memories" in a case of dissociative identity disorder in *Hess and Wausau Insurance Companies v. Wisconsin Patients Compensation Fund and Fernandez, Circuit Court Branch 3, Marathon County, Wisconsin*. (WRR6: 124; SWX: 6).

(119) The Court finds that Dr. Lynn testified as an expert witness in the *Hess* case in August 1999. While Dr. Lynn testified that he did not have any specific recollection of his testimony in that case, Dr. Lynn testified that he had no reason to disagree with the following statements or the State's representation that his testimony consisted of the following: hypnosis creates the risk of false memories, hypnosis does not improve memory, hypnosis creates increased recall of both accurate and inaccurate information, a hypnotized person is vulnerable to misleading information, hypnosis can increase unwarranted confidence in remembered events, memory is reconstructive not reproductive, and memory does not work like a videorecorder. (WRR6: 126).

(120) Accordingly, the Court finds that prior to 1999, Dr. Lynn had conducted research, published articles, edited books and provided his expert opinion and testimony concerning the use of hypnosis to recover or refresh memory.

(121) The Court finds that Applicant's trial began on Monday March 22, 1999 and concluded on Thursday April 1, 1999. The *Zani* hearing occurred on March 24, 1999. (RR36: 12–118).

(122) Accordingly, the Court finds that the substance of Dr. Lynn's present opinion was available in 1999 at the time of Applicant's trial.

(123) The Court finds that, through reasonable diligence, Applicant could have obtained the testimony of Dr. Lynn, or a similar expert, at the time of Applicant's trial.

(119) The Court finds the testimony of State's expert Dr. David Spiegel, M.D. is relevant to this matter.

(120) Dr. Spiegel testified as the State's expert at the subsequent writ hearing on October 16, 2017. (WRR6: 152-271).

(121) In preparation for his testimony, Dr. Spiegel reviewed the video recording of the hypnosis session, the Farmers Branch Police Department Hypnosis Data Sheet prepared by Officer Serna, the transcript of the testimony from the *Zani* hearing, the transcripts of Barganier's testimony at Applicant's trial, the *Zani* case, Dr. Lynn's affidavit filed with the subsequent writ application, the State's Answer filed in the subsequent writ, and several witness statements. (WRR6: 193).

(134) Dr. Spiegel testified that he received his undergraduate degree in philosophy from Yale College in 1967, and his medical degree from Harvard Medical School in 1971. Dr. Spiegel also completed his fellowship training in psychiatry and community mental health at Harvard. (WRR6: 152; SWX: 7).

(135) Dr. Spiegel is presently licensed to practice medicine in California and was previously licensed to practice in Massachusetts and New York. (SWX: 7).

(136) Dr. Spiegel has been a professor of psychiatry at Stanford University since 1975 and currently holds an endowed position as a Wilson Professor. He is also the Associate Chair of Psychiatry and Behavioral Sciences, the Director of the Center on Stress and Health, and the Medical Director of the Center for Integrative Medicine at the Stanford University School of Medicine. (WRR6: 152; SWX: 7).

(137) Dr. Spiegel testified that his position at Stanford University involves both teaching and research and he is currently teaching a course on hypnosis. Dr. Spiegel spends approximately seventy percent of his professional time teaching and conducting research and spends the other thirty percent treating clinical patients at Stanford University. (WRR6: 153).

(138) Dr. Spiegel is a member of the National Academy of Medicine, an elected honor, which has been given to approximately 2000 physicians in the United States. (WRR6: 153).

(139) Dr. Spiegel was the past president of the Society for Clinical and Experimental Hypnosis and is a fellow of the American Society of Clinical Hypnosis. (WRR6: 153). Dr. Spiegel is also a distinguished life fellow of the American Psychiatric Association. (WRR6: 153).

(140) Dr. Spiegel was also the past president of the American College of Psychiatrists. (WRR6: 154).

(141) Dr. Spiegel testified that he has published approximately 370 articles in scientific journals and 150 book chapters, with 110 of those dealing specifically with hypnosis. (WRR6: 154).

(142) Dr. Spiegel is an associate editor of the International Journal of Clinical and Experimental Hypnosis and of the American Journal of Clinical Hypnosis. (WRR6: 154; SWX: 7).

(143) Dr. Spiegel has received numerous awards for his scholarly and professional activities including the Hilgard Award for Best Theoretic Contribution to Hypnosis, from the Society for Clinical and Experimental Hypnosis, approximately ten awards from the Society of Clinical and Experimental Hypnosis, and from Division 30—the hypnosis division of the American Psychological Association. (WRR6: 154; SWX: 7).

(144) Dr. Spiegel is currently conducting a study funded by the National Institutes of Health which examines the use of "repetitive transcranial magnetic stimulation to augment hypnotic analgesia." (WRR6: 155; SWX: 7 at p. 10).

(145) Dr. Spiegel was also a member of the DSM-4 and DSM-5 Work Group on anxiety, obsessive compulsive disorder, post-traumatic stress disorder, and dissociative disorder. He was specifically involved in writing the diagnostic criteria for dissociative disorders. (WRR6: 155–56).

(146) Dr. Spiegel testified that he has been involved in approximately 80 cases in the forensic setting. His role in those cases was to evaluate the use of hypnosis or test hypnotizability, and in five or six of those cases, Dr. Spiegel conducted the forensic hypnosis session himself. (WRR6: 162).

(147) Dr. Spiegel has provided expert testimony in approximately twenty cases, with an even mix of civil and criminal cases. (WRR6: 167–68).

(148) Dr. Spiegel's professional experience with hypnosis spans forty-five years. (WRR6: 168).

(149) Dr. Spiegel testified that over the span of his career he has personally used hypnosis with approximately 7,000 people. (WRR6: 155).

(150) Dr. Spiegel uses hypnosis clinically to treat pain, post-traumatic stress disorder, dissociative disorders, and psychosomatic disorders. (WRR6: 168).

(151) Dr. Spiegel was also part of the American Medical Association's Council on Scientific Affairs panel that evaluated the effects of hypnosis on memory. The group issued a written report of their findings in 1985 called "The Scientific Status of Refreshing Recollection by the Use of Hypnosis." (WRR6: 188; SWX: 8).

(152) Dr. Spiegel testified that the panel found that:

> [F]or certain kinds of nonsense information, information that has no intrinsic logic, hypnosis added nothing at all to your ability to retrieve information. It had some effect for memory of meaningful and complex material, more like what would occur in a -- in a crime scene, for example.
>
> And, basically, it also noted that part of what confounded our understanding of what effect hypnosis has on memory is that rarely do these studies control for the amount of retrieval. So the more information you retrieve, the more correct, but the more incorrect information you'll get. And most studies that studied hypnosis didn't control for how much was produced. So they'd say there's more incorrect information because the people in the hypnosis condition provided twice as much information, so there would be more incorrect, but the ratio was not necessarily any different.

> So it suggested that there can be complications with hypnotically refreshed memory, not unlike the things that are in the *Zani* hearing. And it suggested that caution should be used when hypnosis is used in the forensic setting, that it's no -- sometimes useful new information can – can be brought up. Sometimes false information, or confabulation, can occur. So it should be used with caution.

(WRR5: 189–90; SWX: 8).

(153) Dr. Spiegel testified that the disagreement or controversy in the scientific community concerning whether hypnosis is a reliable means of refreshing memory has existed in the field for at least the forty-five years he has been involved in the field and still exists today. (WRR6: 187–88).

(154) The Court finds that Dr. Spiegel testified that there have been new scientific studies on hypnosis and memory since the time of Applicant's trial, but the new studies have been consistent with what was already known prior to Applicant's trial. (WRR6: 190).

(155) Dr. Spiegel testified that many of the new studies have been "replications" of earlier studies, and that there has not been anything dramatically new or different from what was known before. (WRR6: 190–91).

(156) The Court finds that Dr. Spiegel was present during Dr. Lynn's testimony at the subsequent writ hearing on October 16, 2017.

(157) Dr. Spiegel testified that he was familiar with Dr. Lynn and with his work and also testified: "These concerns about hypnosis are not new and could easily have been presented forcefully by someone like Dr. Lynn or Dr. Lynn himself in 1999. Nothing has happened since then that really changes the picture." (WRR6: 167, 203).

(158) Finally, the Court finds that Dr. Lynn himself testified that if he had been contacted in 1999, he could have evaluated Applicant's case and testified on his behalf. (WRR6: 144).

(159) The Court further finds that a substantial portion of the studies cited by Dr. Lynn in the affidavit he prepared in this case pre-date Applicant's trial. (AWX: 5 at pp. 8–9, 11–13). This is also true of the list of articles that he asserts show significant developments in the scientific community concerning memory and hypnosis since the time of Applicant's trial in 1999. (AWX: 60).

(160) Dr. Lynn failed to provide any testimony concerning how these studies changed the field of hypnosis or memory to constitute new science within the meaning of Article 11.073. The Court finds that simply because there are new studies does not mean that there is new science within the meaning of Article 11.073.

(161) Additionally, Dr. Lynn's testimony was unreliable concerning the dates of relevant scientific developments. Dr. Lynn originally testified that the concept of "imagination inflation" was first introduced in 1998, or 1999; however, on cross-examination, Dr. Lynn testified that the concept was introduced in 1996. (WRR6: 47; 141). The affidavit submitted by Dr. Lynn in this case cites the study as having been published in 1996. (AWX: 5 at pp. 6, 23).

(162) Dr. Lynn also failed to reference his 2015 study, published in "Consciousness and Cognition," which Dr. Spiegel discussed in his testimony:

> And in this study, they had two kinds of movies, and so it's particularly salient to this Court because we're talking about the hypnotic movie theater approach. One was an emotionally compelling movie. One was kind of boring. And the idea was to see whether memory was different in emotionally arousing versus boring movies.
>
> And one of the conditions was to hypnotize people and see if you could get them to provide less accurate information. And the study showed, quite clearly, that hypnosis had zero effect on providing inaccurate

information. So it contradicts what Dr. Lynn has been saying about the likelihood that just using hypnosis would, in fact, produce incorrect information.

(WRR6: 165).

(163) Accordingly, the Court finds that Applicant has failed to meet his burden of proving that the scientific evidence he presents herein was unavailable at the time of Applicant's trial.

(164) Additionally, and to the extent that Applicant is specifically challenging the use of the "movie theater" hypnotic technique used by Serna during the hypnosis session, the Court makes the following findings of fact.

(165) The Court finds that Dr. Lynn stated in his affidavit that the "most egregious problem [with the hypnosis session] was the memory enhancement technique used." (AWX: 5 at p. 15).

(166) Dr. Lynn states in his affidavit that the technique is "firmly grounded in the video recorder model of memory" and "relies on and promotes the use of imagination, which . . . can increase confabulation and increase confidence in memory independent of accuracy." (AWX: 5 at p. 16).

(167) The Court further finds that Dr. Lynn testified that a research study on the "movie theater technique" was conducted by Yuille and McEwan in the mid-1980s. (WRR6: 65–66). Dr. Lynn testified that the study compared those people who were exposed to the movie theater technique with those who were simply asked to review the events. (WRR6: 66). According to Dr. Lynn, the study showed that "there were 9.33 errors in recall in the film technique versus 7.08 in the other technique." (WRR6: 66).

(168) Because that study was available prior to Applicant's trial, Dr. Lynn or a similarly opinioned expert could have presented testimony concerning this study at Applicant's trial in 1999.

(169) Nevertheless, the Court finds that the movie theater technique, and screen techniques in general, are still used by experts in the field.

(170) The Court finds that Dr. Spiegel testified that screen techniques, like the

movie theater technique, are useful in a forensic setting because they help the victim or witness to remain calm and focused enough to do their best at recalling what they saw. (WRR6: 186).

(171) Dr. Spiegel testified that screen techniques are used to help the person face what is causing them stress while keeping their body comfortable because it dissociates the mental stress from the physiological stress. (WRR6: 186).

(172) Dr. Spiegel testified that he uses a version of this technique with his patients daily and testified that it was used in this case to put Barganier in a relaxed state to allow her to try and give the best recollection of what she saw. (WRR6: 184–86).

(173) Dr. George Mount, Ph.D., the clinical psychologist and hypnosis expert called by the State to testify during the *Zani* hearing at Applicant's trial, was also called to testify at the subsequent writ hearing. (RR36: 60–84; WRR5: 142).

(174) Dr. Mount has been licensed to practice in Texas since 1972 and though he is semi-retired, he maintains a private practice in Dallas, Texas. (WRR5: 142–43; SWX: 5).

(175) Dr. Mount's practice included forensic work for many years, including the evaluation of the use of hypnosis in forensic settings. (WRR4: 143).

(176) Dr. Mount helped develop the forty-hour course administered by the Texas Commission on Law Enforcement ("TCOLE") that law enforcement officers take in order to become certified as investigative hypnotists. (WRR5: 147–48).

(177) Dr. Mount testified that TCOLE still certifies peace officers as investigative hypnotists, and the "movie theater technique" continues to be part of the curriculum and is still used. (WRR5: 148).

(178) Dr. Mount explained that a person undergoing hypnosis may experience an abreaction, or emotional reaction, to the memory when there is a trauma involved. (WRR5: 148).

(179) Dr. Mount testified that the movie theater technique is used so that the

individual being hypnotized may visualize their memory without re-experiencing it. (WRR5: 148).

(180) Accordingly, the Court finds that the hypnotic technique used in this case has not been discredited to the extent that Applicant asserts. While the Court finds that there may be disagreement amongst the experts concerning the use of the technique, both Dr. Mount and Dr. Spiegel testified that this technique is still presently used in a clinical and forensic setting, and is useful in a forensic setting.

Reliability of Barganier's Identification Testimony

(181) Moreover, the Court finds that even if Applicant had presented the testimony of Dr. Lynn, or a similar expert, at his trial, the outcome of the *Zani* hearing would not have been different.

(182) The Court finds that Jill Barganier testified at the subsequent writ hearing on October 10, 2017. (WRR4: 31–179).

(183) Prior to testifying at the subsequent writ hearing, Barganier reviewed a transcript of her trial testimony. (WRR4: 35).

(184) Barganier confirmed that she requested the hypnosis session. (WRR4: 82).

(185) Barganier testified that no one had suggested to her that it was a technique that might help her remember better. (WRR4: 82, 144).

(186) Barganier testified that she had never been hypnotized prior to February 4, 1998 and did not believe she had read anything about hypnosis. (WRR4: 83).

(187) Barganier testified that she still believes that Applicant was the man she saw get out of the passenger side of the Volkswagen on the morning of Mrs. Black's murder. (WRR4: 170).

(188) The Court finds that Barganier's testimony at the subsequent writ hearing is consistent with her trial testimony.

(189) Alfredo Roen Serna, the former Farmers Branch Police Officer who performed the hypnosis session in this case, testified at the subsequent writ hearing.

(190) Prior to testifying at the subsequent writ hearing, Serna reviewed his trial testimony and the video of the hypnosis session. (WRR4: 198).

(191) Serna retired from the Farmers Branch Police Department in July 2016 and currently works as an investigator with the Federal Public Defender's Office for the Northern District of Texas. (WRR4: 238).

(192) Serna was a patrol officer with the Farmers Branch Police Department at the time of Mrs. Black's murder. (WRR4: 181–82). Serna was also a crime scene technician and a certified investigative hypnotist. (WRR4: 182; 186–87).

(193) Serna received his certificate in investigative and forensic hypnosis in 1996 from the University of Houston Downtown Criminal Justice Center after completing a forty-hour course. (WRR4: 186–87; SX: 85; AWX: 43).

(194) The Court notes that Serna has not maintained his certification as an investigative hypnotist because his career path moved toward accident investigation and crime scene investigation, and therefore, he had not kept up with the current requirements for investigative hypnosis. (WRR4: 188–89).

(195) Serna confirmed that he had no information about the suspects in this case prior to the hypnosis session. (WRR4: 202).

(196) Serna also testified that his goal in using hypnosis in this case was to help Barganier "to calm down and relax enough to where she would be able to feel comfortable talking" about what she saw. (WRR4: 203).

(197) The Court finds that Serna was aware that some people were not hypnotizable and he could not be certain that Barganier had actually been hypnotized. (WRR4: 244–45). Serna also testified that it occurred to him at the time of the hypnosis session that Barganier was not hypnotized. (WRR4: 245). Serna testified that if she was not hypnotized, the session was simply a witness interview conducted by a police officer. (WRR4: 245).

(198) The Court finds that Serna's testimony at the subsequent writ hearing is consistent with his trial testimony.

(199) Jerry Baker also testified at the subsequent writ hearing. (WRR4: 253–306).

(200) Baker was a criminal investigator with the Farmers Branch Police Department's Criminal Investigation Division at the time of this offense and at the time of Applicant's trial. (WRR4: 256–57). Baker had been a police officer for approximately twelve years at the time of Applicant's trial. (WRR4: 298)

(201) Baker retired from the Farmers Branch Police Department in 2014. (WRR4: 255).

(202) Baker testified that he was present in the room with Barganier and Serna during the entirety of the hypnosis session and his role was to operate the video camera. (WRR4: 272, 276). Baker was sitting off-screen behind Serna during the session. (WRR4: 276–78).

(203) Baker also testified that he had not seen any photographs of the Applicant prior to the hypnosis session and did not know the name "Charles Don Flores." (WRR4: 282).

(204) Baker testified that he did not make any suggestions to Barganier during the hypnosis session and noted that her eyes were closed during the hypnosis. (WRR4: 300).

(205) Baker testified that he had no interactions with Barganier either before or after the hypnosis session. (WRR4: 301).

(206) The Court finds that Baker's testimony at the subsequent writ hearing is consistent with his testimony at Applicant's trial.

(207) The Court is not persuaded by Dr. Lynn's testimony concerning the lack of trustworthiness of Barganier's in-court identification of the Applicant.

(208) The Court notes that Dr. Lynn has never testified on behalf of the party offering the testimony of a witness who has undergone hypnosis. (WRR6:

120–21).

(209) The Court finds that Dr. Lynn does not subscribe to the current definition of hypnosis recognized by the American Psychological Association ("APA").

(210) Dr. Lynn testified that there "are different current scientific understandings of what hypnosis is" and there are "many definitions of hypnosis." (WRR6: 27).

(211) Dr. Lynn testified that the definition he is comfortable with is the following: "A situation that is defined as hypnosis, presumed to be hypno[tized] by a person who is invited to respond to imaginative suggestions." (WRR6: 27).

(212) Dr. Lynn conceded that this definition is not the current definition accepted by Division 30 of the APA. (WRR6: 143). Instead, Dr. Lynn testified that while his definition was accepted by the APA in 1994, it is not the current definition and is a highly controversial definition. (WRR6: 143).

(213) Dr. Spiegel testified that the definition that Dr. Lynn subscribes to is not the current definition and is no longer the accepted definition because "the majority in the field don't agree with it." (WRR6: 163).

(214) Dr. Spiegel explained that "the current definition from Division 30 involves stating that hypnosis is a state of highly focused attention with reduced peripheral awareness and an openness to suggestion, and that's an agreed-upon definition." (WRR6: 163–64).

(215) The Court finds that Dr. Spiegel was involved, along with a number of colleagues, in writing the current definition that is accepted by the APA. (WRR6: 164).

(216) Dr. Spiegel further explained that the "problem with Dr. Lynn's definition is that it tends to imply that people just enter an imagined world in hypnosis and all they're doing is making up things, imagining things rather than experiencing them. And so some of the issues he raises about vulnerability to suggestion are important issues, but I think it is not a comprehensive [definition] and it's not a currently accepted definition of what hypnosis is." (WRR6: 164).

(217) Additionally, the Court finds that Dr. Lynn's analysis of several of the *Zani* factors is incongruous and his evaluation of the *Zani* factors as a whole is not credible.

(218) The Court finds that Dr. Lynn's evaluation of the first *Zani* factor, the level of training in the clinical uses and forensic applications of hypnosis by the person performing the hypnosis, was incongruous.

(219) Dr. Lynn testified that he did not believe that Officer Serna's training in the "clinical uses of forensic hypnosis" was adequate because he "used a technique that previous research even had -- had showed could produce a greater frequency of inaccurate memories." (WRR6: 60).

(220) The Court finds that this is not the relevant analysis for this factor and, in fact, seems to combine two of the *Zani* factors. The appropriateness of the memory retrieval technique is a separate factor to be evaluated under *Zani*, distinct from the qualifications and training of the hypnotist.

(221) The Court finds that the hypnotist in this case, Alfredo Roen Serna, was certified as an investigative hypnotist on August 7, 1996. (SX: 85).

(222) The Court finds that TCOLE, formerly known as TCLEOSE, is permitted to establish minimum requirements for the training, testing, and certification of peace officers who use investigative hypnosis. *See* Tex. Occ. Code Ann. § 1701.403 (West 2012).

(223) The Court finds that "[a] peace officer may not use a hypnotic interview technique unless the officer: (1) completes a training course approved by the commission; and (2) passes an examination administered by the commission that is designed to test the officer's knowledge of investigative hypnosis. Tex. Occ. Code Ann. § 1701.403 (West 2012).

(224) The Court finds that Serna took the requisite forty-hour course approved by TCOLE and was certified at the time he conducted the hypnosis session in this case.

(225) The Court finds that there is no requirement under *Zani* that the person performing the hypnosis session be a psychiatrist or psychologist. *Zani*, 758 S.W.2d at 243–44.

(226) Additionally, the Court notes that the hypnotist in *Zani* was Texas Ranger Carl Weathers. *Zani II*, 767 S.W.2d at 827. Weathers had an associate degree in law enforcement, and had attended a one-week course at the Texas Department of Public Safety Investigative Hypnosis Training School. *Zani II*, 767 S.W.2d at 827. The *Zani II* court found Weather's training and experience sufficient. *Zani II*, 767 S.W.2d at 867.

(227) The Court finds that, at the time of the hypnosis session, Serna had the requisite training and certification to perform the hypnosis session in this case.

(228) Moreover, the Court finds that Dr. Spiegel testified that while he would have done things a little differently from Serna, he did not see anything particularly fatal in the session and thought the way Serna conducted the questioning during the session was reasonable. (WRR6: 194–95).

(229) As for the second *Zani* factor, Dr. Lynn testified that Serna was not sufficiently independent from the investigators, prosecutors or defense to conduct the session. (WRR6: 60).

(230) In *Zani II*, the court determined that though the hypnotist was a Texas Ranger, he had no preconception of the description of the suspect and was not trying to make a case against any particular person. The Court finds that the same is true in this case. The Court finds that Serna testified that he had worked the crime scene as a crime scene technician but had not interviewed any witnesses. Serna also testified that he had not seen a photograph of Applicant or heard Applicant's name at the time of the hypnosis session. Serna also testified that he was not even aware that Barganier had already identified Richard Childs as the driver of the Volkswagen. This is evident in the session due to Serna's spending equal time on descriptions of the passenger and the driver.

(231) The Court finds Serna's testimony regarding this matter at the subsequent writ hearing was consistent with his trial testimony. The Court finds that after observing Serna's demeanor and testimony provided to this court at the subsequent writ hearing on October 11, 2016, the Court finds that Serna is a credible witness and his testimony is credible and reliable.

(232) Dr. Lynn also evaluated the third factor, the existence of a record of any information given or known by the hypnotist concerning the case prior to the hypnosis session, noting that he had seen nothing other than that Serna collected evidence from the crime scene. (WRR6: 61).

(233) However, as noted above, Serna testified concerning his knowledge prior to the session, and the Court accepts that testimony.

(234) As for the fourth factor, the existence of a written or recorded account of the facts as the hypnosis subject remembers them prior to undergoing hypnosis, Dr. Lynn testified that he "received a brief statement to that effect." (WRR6: 61). Presumably, Dr. Lynn is referring to the pre-hypnotic interview conducted by Serna on the video. It does not appear from Dr. Lynn's testimony that he considered any of the notes the Farmers Branch Police Department wrote concerning Barganier's descriptions. (AWX: 10; SWX: 2). Additionally, Dr. Lynn referenced the report generated by Serna following the session, which would not be relevant to the analysis of this factor. (WRR6: 61).

(235) Dr. Lynn testified in regards to the fifth factor, the creation of recordings of all contacts between the hypnotist and the subject, that he did not believe we saw all of the contacts between the hypnotist and subject because "we did not see the full bodies of both the individual who was interviewed and Mr. Serna." (WRR6: 62).

(236) The Court finds that a video recording of the hypnosis video was admitted for record purposes at Applicant's trial and at the subsequent writ hearing. (SX: 84; AWX: 26).

(237) Under *Zani*, there is no requirement that the hypnosis session be video recorded. In fact, the hypnosis session in the *Zani* case was only audio recorded. *Zani II*, 767 S.W.2d 825, at 826. Accordingly, Dr. Lynn's analysis of this factor is incongruous.

(238) Moreover, this factor refers to whether there is a recording of the entirety of the contact between the two. Serna testified that the entirety of his interaction with Barganier is contained on the video recording. (SX: 84; AWX: 26). Barganier also testified that she met Serna for the first time

when she went into the room for the hypnosis session. (WRR4: 86).

(239) Factor six of the analysis involves the presence of other persons in the room and the location of the session. Dr. Lynn testified that it was contrary to good practice and to *Zani* to have another person in the room. (WRR6: 62). Dr. Lynn also testified that it was very concerning that the location of the hypnosis session was at the police department because it was contrary to *Zani* and because it could increase pressure for her to make an identification. (WRR6: 62).

(240) The Court notes that in the *Zani* case, in addition to the hypnotist and witness, there were three other people present in the room during the session, including an artist who actually questioned the witness during the hypnosis session. *Zani II*, 767 S.W.2d at 825.

(241) At the subsequent writ hearing, Barganier testified that her husband had requested a second person to be in the room with her, to act as a sort of "chaperone." (WRR4: 87). Barganier testified that they would not allow her husband to be present during the session because they wanted it to be a "closed environment." (WRR4: 87).

(242) In this case, there was no evidence that Baker made any comments or signaled to Barganier during the session, and even if Baker had attempted to signal Barganier, she had her eyes closed during the session.

(243) The Court also finds that Baker had not seen a photograph of Applicant and could not have fed her a description of Applicant.

(244) The Court also notes that if Barganier felt any pressure to identify anyone as a result of the location of the session and presence of Baker, she failed to identify anyone immediately after the session.

(245) The seventh *Zani* factor is the appropriateness of the induction and memory retrieval technique used. The Court finds that Dr. Lynn gave no opinion as to the induction technique used. Dr. Lynn testified that the memory retrieval technique used in this case, the movie theater technique, was not an acceptable technique. (WRR6: 64). Dr. Lynn testified that this technique required Barganier to use her imagination and asked her to watch a documentary film. (WRR6: 64). Dr. Lynn opined that by stating the

film is a documentary film, there is a notion that the memories will be accurate. (WRR6: 65).

(246) The State's expert, Dr. Spiegel, testified that he was not concerned about the use of the term "documentary" during the hypnosis session. (WRR6: 186). Dr. Spiegel testified:

> I actually think it was a good term because there's a difference between and movie and a documentary. You know, movies are things that are made up. Documentaries are films of real events. And I think what he was saying is, try and get your best recollection of the real event, of what really happened.
>
> So if there is a power to suggestion, I think the use of the word "documentary" was a suggestion to her, just try and remember as clearly as possible what actually happened, what you actually saw. And it did succeed, as she reported, in helping reduce her anxiety. She did not feel as frightened.

(WRR6: 186).

(247) Dr. Spiegel also testified that he was not concerned about Serna's instruction to Barganier to imagine herself in a movie theater. (WRR6: 187). Dr. Spiegel explained that the theater is used to help the person being hypnotized know they are safe and comfortable, and that the person is going to observe an event. (WRR6: 187). Dr. Spiegel testified that this does not automatically contaminate the memory of the event itself. (WRR6: 187).

(248) The Court finds that while Dr. Lynn did not specifically address the eighth *Zani* factor, the appropriateness of using hypnosis for the kind of memory loss involved, the Court finds that it was Lynn's overarching opinion that he did not believe hypnosis was an acceptable method for refreshing memory.

(249) The Court finds that there is a disagreement in the scientific community on whether hypnosis can be reliably used to refresh memory. (WRR6: 187).

(250) The Court finds that Dr. Spiegel testified that he does not believe hypnosis

is a substitute for good police work, and should be a last resort rather than a first resort, but was of the opinion that hypnosis can be useful in the forensic context because hypnosis can help people who have experienced or witnessed traumatic events and are having difficulty recalling the events. (WRR6: 168).

(251) Like Dr. Lynn, Dr. Kovera, and Dr. Mount, Dr. Spiegel also testified that the video recorder model of memory is inaccurate and testified that memory is reconstructive. (WRR6: 169).

(252) Dr. Spiegel also testified that it was his opinion that Dr. Lynn overestimates the dangers of suggestion and confabulation, and in challenging Dr. Lynn's opinion, pointed to some of Lynn's own published work, including Lynn's 2015 study in "Consciousness and Cognition" which "showed, quite clearly, that hypnosis had zero effect on providing inaccurate information." (WRR6: 164–65).

(253) Dr. Spiegel also referenced a 1991 study of Lynn's in the Journal of Personality and Social Psychology that did not support Lynn's present opinion:

> [In that study,] he tried to insert an incorrect experience, a telephone ringing, and had a real experience, pens, pencils dropping out of a jar. And he found that the expectation of the subjects, how they were prepared, whether or not they thought hypnosis would improve memory, had absolutely no effect on their rate of accepting. In fact, none of them ultimately accepted the -- the false suggestion that a phone had rung when it had not.

(WRR6: 165).

(254) Dr. Spiegel testified that "these studies . . . . demonstrate that there are real limits to how much the hypnotic experience can or will contaminate memory or cause people to produce false information." (WRR6: 165).

(255) Dr. Lynn failed to evaluate the ninth *Zani* factor, whether there was any evidence to corroborate Barganier's testimony. (WRR6: 66). Dr. Lynn testified:

> I tried to restrict -- the answer is no. And I tried to restrict -- no. I take that back. I -- I saw there was some reference to multiple corroborators, but I did -- did not focus in on that because I'm not an expert in eyewitness testimony or corroboration. And -- and so I just basically glanced at that.

(WRR6: 66). Dr. Lynn further testified that he did not know if there were any other witnesses who claimed to have seen what Barganier saw that morning. (WRR6: 66).

(256) Dr. Lynn's decision not to consider any corroborating evidence, a factor under *Zani* that goes to the reliability of the testimony, was considered by the Court when weighing the credibility of Dr. Lynn's testimony.

(257) In contrast, the State's expert Dr. Spiegel testified that corroborating evidence is necessary when using hypnosis in a forensic setting. (WRR6: 181).

(258) Dr. Spiegel explained: "Anytime I use hypnosis with a patient or in a forensic setting, I say the fact that you say something in hypnosis doesn't mean it's true, and the fact that you don't recall something doesn't mean it isn't true. It does not add to the truth value, and corroboration is extremely important." (WRR6: 181).

(259) Dr. Spiegel further testified: "For myself, as an expert in hypnosis, evaluating situations like this, corroboration is one of the absolute necessities. And I, in evaluating cases, look at the -- whatever corroborating evidence is there in reaching an overall decision." (WRR6: 182).

(260) Dr. Spiegel testified that because corroboration is a factor to consider under *Zani*, it is very important to look at the corroborating information and decide whether it makes it more or less likely that the testimony that emerged after hypnosis is accurate. (WRR6: 182–83).

(261) The Court finds that there is considerable evidence in this case that corroborates Barganier's identification. (*See supra* finding 61; *see infra* findings 285–329; *see also* RR36: 111–13).

(262) Dr. Lynn also failed to evaluate whether there was any subtle cuing or suggestions of answers during the hypnotic session. In that regard, the Court finds that the video of the hypnosis session is the best evidence on this issue and reveals no evidence of either cuing or suggestion of answers. (AWX: 26). Barganier had her eyes closed throughout the hypnosis session, and there was no evidence of Serna or Baker suggesting answers or cuing her in any way. (AWX: 26).

(263) The Court also finds that Dr. Lynn was not aware that the Texas Court of Criminal Appeals had reaffirmed *Zani* in the case *State v. Medrano* in 2004. (WRR6: 133–34).

(264) The Court further finds that Dr. Mount reviewed his testimony from the *Zani* hearing at Applicant's trial and the video of Barganier's hypnosis session prior to testifying at the subsequent writ hearing. (WRR5: 145). Dr. Mount testified that he was aware that the Court of Criminal Appeals had reaffirmed the *Zani* decision in 2004 in *Medrano*. (WRR5: 149). Dr. Mount testified that he stood by his trial testimony and did not see anything in his testimony that he presently disagreed with. (WRR5: 146).

(265) The Court also finds that, in reaching his conclusions, Dr. Lynn failed to consider Barganier's expectation for the hypnosis session despite having testified that a person's expectations regarding hypnosis were of particular importance.

(266) Dr. Lynn testified that there is a "basic presumption when someone enters into a hypnotic scenario, particularly for forensic purposes, is that it will improve memory and that the memories that ensued following that methodology are likely to be accurate. After all, why would one go through that particular procedure if it would not have -- have value?" (WRR6: 44–45). Dr. Lynn testified that this is problematic "because expectancy is a vital part of how people respond to suggestions more generally." (WRR6: 45).

(267) The Court finds, however, that Barganier testified that that she did not believe that hypnosis could help her remember more. (WRR4: 161). Instead, as Barganier testified to both at Applicant's trial and at the subsequent writ hearing, she requested the hypnosis session to help her

relax. (RR36: 90, 101; WRR4: 160-61).

(268) Dr. Spiegel agreed that it was important to know what Barganier's expectations were for the hypnosis session and important to know whether she believed the hypnosis was for memory retrieval or relaxation. (WRR6: 198-99).

(269) Dr. Spiegel testified that Barganier "asked for the hypnosis, not to improve her memory but simply to help her deal with the anxiety that would come up with trying to remember. And emotion and memory are linked, and so it was a perfectly reasonable request to just say, try and help me handle the anxiety I have while I'm trying to think about what I saw." (WRR6: 180).

(270) Dr. Spiegel testified that not everyone is hypnotizable and it was conceivable that Barganier was not hypnotized because she is not hypnotizable, but there was no way to tell because her hypnotizability was not tested. (WRR6: 178--79, 196). Dr. Spiegel noted that the session did not seem "like such a profound experience to her," there was no dramatic increase in her production. (WRR6: 196).

(271) Dr. Spiegel testified that the retrieval of a memory can be triggered by many things, such as sight, sound, touch and smell. (WRR6: 200).

(272) Dr. Spiegel also testified that is was certainly possible that seeing Mr. Flores in person triggered the retrieval of her memory from the day of the murder. (WRR6: 201).

(273) Dr. Spiegel testified that it was his opinion that Barganier's identification of Applicant had nothing to do with the hypnosis session that occurred thirteen months prior to the identification, but rather that her identification was the result of that being "the first time that she had had a face-to-face confrontation with him since that time 13 months ago, and the -- the totality of her experience of him is what led to her identification." (WRR6: 201).

(274) Dr. Spiegel also testified that it was significant that Barganier did not make an identification when she viewed the photo lineup after the hypnosis session. (WRR6: 201). Dr. Spiegel explained:

> And so she was using her judgment, restraining herself from making an identification, whether she could or she couldn't.
>
> ....
>
> So I think it showed that she was using judgment. She was evaluating her ability to make a decision.
>
> And the time when you would worry about hypnosis influencing somebody would have been the time immediately after the hypnosis session, when she's looking at the lineup, and she did not ID anybody then.
>
> If she were falsely confident about her newly refreshed hypnotic recollection, I think it's likely that right after the hypnosis she would have said, yes, that's him, but she didn't.

(WRR6: 201–02).

(275) Dr. Spiegel also testified that it was highly unlikely that a suggestion that you might remember more or will remember more would survive for 13 months. (WRR6: 202). Dr. Spiegel explained:

> There was a study that Martin Orne, who we talked about before, did in which they hypnotized a bunch of subjects, gave them postcards and said, mail one a day.
>
> And they wanted to see how long the hypnotic instruction would last, and there were two kind of interesting findings. One was it didn't last very long. It was like 24 days on average before people just stopped doing it. But the interesting thing was that just telling people to do it had as much of an effect as a hypnotic suggestion that they should to it. So there was nothing special about hypnosis in getting them to do it.

(WRR6: 202–03).

(276) The Court finds that the State argued at trial that Barganier's testimony

was of independent origin from the hypnosis and was not the product of the hypnosis session.

(277) The Court finds that there is no reason to deviate from its original findings on the reliability and admissibility of Barganier's identification testimony.

(278) Accordingly, the Court finds that, under the totality of the circumstances, the State established by clear and convincing evidence that Barganier's post-hypnotic testimony was reliable.

Evidence Supporting Applicant's Guilt Absent Barganier's Identification

(279) The Court finds that to meet his burden under Article 11.073, Applicant must show not only that the trial court would have excluded Jill Barganier's identification testimony as a result of Applicant's new scientific evidence, he must also show that as a result of that exclusion he would not have been convicted. *See* Tex. Code Crim. Proc. Ann. art. 11.073(b)(2) (West Supp. 2016).

(280) The Court finds that Applicant has failed to show, by a preponderance of the evidence, that he would not have been convicted if Barganier's testimony identifying him as the Volkswagen passenger had been excluded.

(281) Of note, the State was prepared to proceed with Applicant's capital murder trial without Barganier's identification, as no one knew Barganier was able to identify Applicant as the Volkswagen passenger until she saw him in court in the midst of trial.

(282) While Applicant argues that there is no direct evidence linking him to the crime, the Court notes that "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). In circumstantial evidence cases, it is not necessary that every fact and circumstance "point directly and independently to the defendant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances." *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993); *Hooper*, 214 S.W.3d at 13.

(283) This includes evidence as to the identity of the perpetrator, which may be proved by direct or circumstantial evidence. *See Earls v. State,* 707 S.W.2d 82, 85 (Tex. Crim. App. 1986); *Oliver v. State,* 613 S.W.2d 270, 274 (Tex. Crim. App. 1981) (on reh'g).

(284) Juries are permitted to draw multiple reasonable inferences from facts as long as each is supported by the evidence presented at trial. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Hooper*, 214 S.W.3d at 16–17.

(285) The Court finds that at Applicant's trial, Jackie Roberts, Terry Plunk and Judy Haney all testified about a drug deal that occurred in the late evening hours of January 28, 1998 and early morning hours of January 29, 1998, leading up to Mrs. Black's murder.

(286) Jackie Roberts, who was dating Applicant's co-defendant Richard Childs at the time of the offense, met with Childs at her home on the evening of January 28, 1998. (RR34: 118, 119, 120). Childs had asked her to set up a deal with a man named Terry Plunk in which $3,900 was to be exchanged for a quarter-pound of methamphetamine. (RR34: 115, 117, 118). Applicant, whom Roberts had not previously met, was with Childs. (RR34: 118, 119, 120). The two men had arrived in Child's Volkswagen, described as a "hippie" or "slug bug," with dark tinted windows that was haphazardly painted with multiple colors, particularly pink and purple. (RR34:79–81, 230–32; RR35: 64, 92; RR36: 247).

(287) Prior to arriving at Roberts' house, the two men had been in Irving at Applicant's trailer where they had spent several hours "doing drugs" in the company of Jamie Dodge and Jonathan Wait, Jr. (RR34: 78, 79, 98; RR36: 250–52, 257).

(288) Roberts, Childs, and Applicant left Roberts' house to make the drug deal in her El Camino, leaving the Volkswagen blocking the driveway. (RR34: 121). Roberts drove them to Judy Haney's apartment in Dallas, where the drug exchange with Plunk was to take place. (RR34: 122–23). Roberts testified that the original plan was for Roberts and Plunk to make the exchange while Childs and Applicant stayed in the vehicle; Applicant,

however, would not agree to this arrangement, so all three entered Haney's apartment. (RR34: 123–24, 183).

(289) During the deal, Applicant complained that he had been "shorted" on the drugs. (RR34: 127–28, 176–77). Roberts and Haney testified that Applicant weighed the drugs on a digital scale that he had brought with him and claimed that the drugs were short by a quarter ounce. (RR34: 127–28, 176-177).

(290) Terry Plunk testified that he just wanted to get the deal over with, so he put a quarter ounce in a separate bag and gave it to Applicant. (RR34: 128–29, 214). Plunk was then paid. (RR34: 129, 214–15).

(291) Roberts testified that she had seen a small silver gun on Childs and thought Applicant might have a gun because she noticed that he was fidgety. (RR34: 132–33). Because of the presence of weapons, and the fact that the drugs were not noticeably short, Roberts feared that she and Plunk were going to be "ripped off." (RR34:134). Roberts testified that she wanted to stay there with Plunk and Haney, but Childs insisted that she leave with him and Applicant. (RR34:134).

(292) Roberts testified that the three left and went to Applicant's trailer in Irving. (RR34: 134–35). Applicant again weighed the drugs and insisted that he had been "ripped off." (RR34:137–38). Roberts testified that at one point, Applicant held a gun to her head and demanded either the full amount of drugs or his money back. (RR34: 138–150). She further testified that even after Applicant calmed down a bit, he continued to demand either more drugs or $3,900, and was really pressing the issue. (RR34: 150, 152).

(293) Roberts told Applicant that she could get the money from her in-laws' house but she needed a day in which to do it. (RR34: 150). Roberts' ex-husband Gary Black had $39,000 secreted at his parents' house. The money was allegedly kept behind a suitcase in the closet of the Blacks' master bedroom. (RR34: 68–70; RR38: 191). Gary had acquired the money from his drug dealing and was incarcerated at the time of the offense. (RR34: 52, 253; RR38: 137). Childs, who knew about Gary Black's money, confirmed that she could get the money. (RR34: 150–51; RR38: 136). Applicant, however, would not take "tomorrow" for an answer and

saw an opportunity to get an even larger amount of money immediately. (RR39: 101).

(294) The jury heard that in addition to finding the bodies of Mrs. Black and the family dog, police summoned to the crime scene found the Blacks' home in disarray; fixtures had been pulled out of bathrooms, as if someone were looking for something in the walls of the house. (RR35: 199-202).

(295) Additionally, the jury heard the testimony of Vanessa Stovall, one of Childs' girlfriends. Stovall testified that Childs and Applicant came to her home around 6:30 a.m. on the morning of the murder. (RR35: 69, 71, 82, 89). The three of them smoked methamphetamine together. (RR35: 73–74, 90). Applicant and Childs then left Stovall's home, together, in the Volkswagen. (RR35: 75, 95). Accordingly, Stovall's testimony placed Applicant in the Volkswagen with Childs, whom Barganier had positively identified as the driver just moments before the men were seen getting out of the same car at the Blacks' home. (RR35: 75, 95).

(296) The jury also heard from Michelle Babler, and her son Nathan Taylor, also neighbors of the Blacks. Their testimony placed the Volkswagen in front of the Blacks' home at the time Barganier saw the two men. (RR35: 104, 106, 108, 135–39, 144, 149). Babler and Taylor testified that they saw two men get out the car. (RR35: 108, 139). Babler testified that the Applicant and the passenger in the Volkswagen were similar in appearance. (RR35: 115–16). Her son Nathan noticed that the men were dressed in black and had gloves on. (RR35:140).

(297) Jamie Dodge and Judy Haney testified that between the time Applicant left his trailer and Mrs. Black's murder, he was dressed in black clothing, particularly a long black coat called a duster. (RR34: 84–85, 175–76, 195).

(298) The Volkswagen was also seen by Jill Barganier's husband Robert on his way to work just after his wife had seen the vehicle. (RR35: 174–75).

(299) The Court finds that even if Jill Barganier's identification of Applicant had been excluded, she would still have been permitted to testify about the events that occurred prior to her hypnosis, including her positive identification of Richard Childs as the driver of the Volkswagen.

(300) Additionally, Applicant's own statements to those close to him placed him at the Blacks' residence during the offense.

(301) Homero Garcia and Applicant's father-in-law Jonathan Wait, Sr. both testified that Applicant told them that he was at the Blacks' home and participated in the offense.

(302) Homero Garcia, an old high school friend of Applicant's, testified that he saw Applicant the evening after the murder. (RR36: 231–32, 237). Applicant told Garcia that he and Childs had gone to a house to get some money and the whole deal had gone bad. (RR36: 237). Applicant explained that he had shot a dog and that Childs had shot an old lady. (RR36: 220, 224, 234). Applicant then traded guns with Garcia; giving Garcia a .380 in exchange for a .357. (RR36: 220, 222; SX 64, 65). Applicant told Garcia that this was not the gun used in the offense, and forensic analysis confirmed this. (RR36: 228; RR38: 88). However, Garcia also testified that he had seen Applicant with a .380 on prior occasions. (RR36: 221).

(303) Jonathan Wait, Sr., the father of Applicant's common-law wife Myra Wait, testified that Applicant told him that he had set the Volkswagen on fire and needed to get out of the country. (RR37: 85–86). Wait's son had previously called his attention to a newspaper article about the murder and told him that Applicant was the man they were looking for. (RR37:82). When Wait confronted Applicant with the article, Applicant told Wait that he had gotten into a "little trouble" and admitted that he "shot the dog." (RR37: 84–85, 94).

(304) Additionally, the jury heard that Applicant destroyed the Volkswagen that was seen outside the Blacks' residence the morning of the murder.

(305) "Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt." *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004)

(306) Jonathan Wait, Jr., Myra's brother, testified that on Saturday, January 31, 1998, Applicant asked for help with the Volkswagen; Applicant wanted to

tow the vehicle to Ajax Roofing, a business owned by Applicant's father, in Grand Prairie, Texas. (RR36: 261, 263–64, 275). Wait, Jr. steered the vehicle as it was towed, while Myra followed in her red Suzuki. (RR36: 262). At the roofing company, Applicant used three or four cans of Black spray paint to paint the Volkswagen. (RR36:264).

(307) Applicant then hooked the Volkswagen up to the Suzuki. (RR36: 266). Wait, Jr. steered the Volkswagen as Applicant pulled it to an exit ramp at Interstate 30 and West 19th. (RR36: 266–67). Wait, Jr. testified that Applicant then poured gasoline on the car, lit a piece of paper, and threw it onto the Volkswagen. (RR36: 268). The vehicle burst into flame. (RR36:268).

(308) James Jordan testified that he was driving on Interstate 30 when he observed the scene. (RR37: 13–18). Jordan initially thought that another motorist might need assistance and was in the process of pulling off the road to offer help when Applicant "lit the bug." (RR36: 268-69; RR37: 19–20). As Applicant drove off in the Suzuki, Jordan gave chase, intending to get his license number so he could turn Applicant in to the police. (RR36:269; RR37:22).

(309) Applicant attempted to evade Jordan by driving at an excessive rate of speed, swerving in and out of traffic, running red lights, and, at one point, jumping the median into oncoming traffic. (RR36: 270–73; RR37: 27–39). Applicant also fired several gun shots at Jordan's car. (RR36: 269; RR37: 28, 31, 52). Jordan made an in-court identification of Applicant as the man he saw on January 31, 1998. (RR37: 18).

(310) Wait, Jr. testified that Applicant was exhilarated during this time and later referred to it as "drama." (RR36:273). The jury also heard that once Jordan abandoned the chase and stopped to call 911, Applicant stopped at a gas station, bought some beer, and threw away the paint cans. (RR36:273–74; RR37: 39).

(311) Roberts testified that Applicant and Childs procured weapons from a house in Irving just hours before the murder of Mrs. Black; Applicant came out of the house with the smaller of these two weapons. (RR34: 143–44; RR38: 113).

(312) The jury also heard that Childs was arrested on the evening of January 31, 1998. (RR36: 177–79). Ammunition consistent with a shell casing found in the Black home was in his possession at the time. (RR36: 179–82, 183, 194). A search of the premises where he had been staying uncovered a .44 Magnum revolver which was found to have residue on the inside of the barrel consistent with potato starch. (RR36: 197, 211–13; SX: 53, 54).

(313) A .44 magnum is a larger gun than a .380 firearm. (RR38:102,110). The evidence shows that a .380 bullet and spent casing were recovered from the Blacks' home. (RR35: 236–37; SX: 49, 50).

(314) The Court finds that the jury could have reasonably concluded that if Childs had the .44 Magnum, Applicant must have wielded the .380 which killed Mrs. Black. The jury could have also reasonably concluded that Applicant had destroyed or disposed of the .380 used to kill Mrs. Black, just as he had the Volkswagen.

(315) The jury also heard that Applicant went to extreme efforts to avoid apprehension and later to escape from custody.

(316) A few days after the murder, Applicant fled to Mexico, telling Wait, Sr. that he had to get out of the country and was not going to be "taken alive." (RR37: 85–86; RR37: 138, 140, 141).

(317) The jury also heard that on his return from Mexico, Applicant struggled to avoid arrest in Kyle, Texas and gave a false name and false identification. (RR37: 109, 117–27).

(318) On April 18, 1998, at approximately 7:00PM, Kyle Police Officers, Dustin Slaughter and Patsy Oaks, were dispatched to investigate a possible intoxicated driver on the frontage road of the highway. (RR37: 97–103). The vehicle was a blue Volvo, and Applicant was identified as the driver. (RR37: 104, 106, 108–09). Officer Slaughter got behind the vehicle and, when he observed erratic behavior, initiated a traffic stop, though the Volvo was not immediately responsive. (RR37: 104–06).

(319) Officer Slaughter identified himself as a police officer and informed Applicant that he was being stopped for failure to maintain a single lane of traffic and suspicion of DWI. (RR37: 109). When he requested

identification, Applicant said that he had none, gave his name as Juan Jojola and presented a Social Security card with that name. (RR37: 109). He explained that he was coming from Mexico and was on his way to Dallas. (RR37:130). Subsequent evidence revealed that the Volvo re-entered the United States from Mexico on April 18, 1998 at 1:29 p.m. at Progresso, Texas. (RR37: 140, 143-44).

(320) Applicant initially cooperated with the officers, though he performed poorly on a field sobriety test. (RR37: 110-13). Officer Slaughter also received information from a driver who stopped and informed the officer that Applicant "almost ran him off the road costing him his life." (RR37: 115). Subsequent to a pat-down performed by Officer Oaks, Applicant was informed that he was being arrested for DWI. (RR37: 116).

(321) The officers were able to get one handcuff on Applicant when he turned around and hit Officer Slaughter with his elbow. (RR37: 117). Officer Oaks jumped on Applicant and a struggle broke out with Applicant cussing, fighting, and making statements like "fuck you, bitch" and "it wasn't going to happen." (RR37: 118-20, 122-23). Applicant tried to move the struggle onto the highway, where there was heavy traffic, and a posted speed limit of 70. (RR37: 122). Officer Slaughter testified that he feared for his life and that of Officer Oaks. (RR37: 122). The officers were eventually able to subdue Applicant when another deputy arrived to help. (RR37: 123). As a result of this incident, Officer Slaughter had a swollen left eye. (RR37: 127). Officer Oaks suffered a bite on her arm and an injury to one of the bones in her hand. (RR37: 127).

(322) Applicant was booked for DWI and for assault on a police officer under the name of Juan Jojola. (RR37:126-127). He was able to gain release before his true identity was learned. (RR37: 126—27, 134).

(323) Here, it is obvious that Applicant wanted to avoid apprehension by State authorities. Applicant fled Dallas shortly after the murder of Mrs. Black and traveled to Mexico. He had explained to Jonathan Wait, Sr. that he was in some "trouble," and had admitted to both Wait and Homero Garcia that he had shot the Black's dog. The authorities were seeking Applicant for investigation as a suspect in a capital murder case. Applicant was fully

aware of his complicity in the crime and that he could be arrested if located.

(324) Flight is a circumstance from which an inference of guilt may be drawn. *Devoe v. State*, 354 S.W.3d 457, 470 (Tex. Crim. App. 2011); *Alba v. State*, 905 S.W.2d 581, 586 (Tex. Crim. App. 1995).

(325) Avoiding apprehension is similar to flight and constitutes a quasi-admission of guilt. *Cawley v. State*, 310 S.W.2d 340, 342 (Tex. Crim. App. 1957); *see also Alba v. State*, 905 S.W.2d 581, 586 (Tex. Crim. App. 1995). No distinction is made between flight from the immediate scene of the crime and flight from peace officers. *See Burks v. State*, 876 S.W.2d 877, 902 903 (Tex. Crim. App. 1994) (flight from peace officer trying to arrest defendant); *Valdez v. State*, 623 S.W.2d 317, 321 (Tex. Crim. App. 1981) (flight from the scene of the crime); *see also Foster v. State*, 779 S.W.2d at 859 (holding that flight is no less relevant if it is only flight from custody or to avoid arrest).

(326) Moreover, the evidence of false identification and avoiding apprehension is highly probative since a strong inference of guilt may be drawn therefrom. *Cawley v. State*, 310 S.W.2d at 342.

(327) The jury also heard that just prior to his arrest on May 1, 1998, Applicant led FBI agents on a dangerous high speed chase, which ended with a head on collision, a foot race through a residential area, and a violent physical struggle. (RR37: 148–49, 157–69).

(328) The evidence further showed that while being treated at Parkland hospital for a broken kneecap suffered in the May 1st collision, Applicant attempted to escape from custody by taking a deputy sheriff's gun and threatening to kill him. (RR37: 188–91, 193, 194, 201, 208, 220–29). During the struggle, Applicant maced the officer. (RR37: 194, 209, 217, 230–36). It took three to four people to eventually subdue Applicant. (RR37: 195–98, 217–18, 232).

(329) The Court finds that these efforts demonstrate a clear consciousness of guilt. *See, for example, Ransom v. State*, 920 S.W.2d 288, 299 (Tex. Crim. App. 1994); *Alba v. State*, 905 S.W.2d at 586; *Burks v. State*, 876 S.W.2d 877,

902–03; *Felder v. State*, 848 S.W.2d 98; *Cawley*, 310 S.W.2d at 342. Consciousness of guilt is perhaps one of the strongest kinds of evidence of guilt. *See Torres v. State*, 794 S.W.2d 596, 598–600 (Tex. App.—Austin 1990, no pet.).

(330) In light of all of the foregoing evidence, the Court finds that Applicant has failed to show, on the preponderance of the evidence, that he would not have been convicted if Barganier's identification of him as the Volkswagen passenger had been excluded.

VI. ADDITIONAL FINDINGS

Testimony of Dr. Margaret Kovera, Ph.D.

(331) The Court finds that Applicant also offered the testimony of Dr. Margaret Kovera, Ph.D. in support of his claim.

(332) Dr. Kovera received her Ph.D. in psychology from the University of Minnesota in 1994 and is a professor of psychology at the John Jay College of Criminal Justice at the City University of New York. (WRR5: 8–9; AWX: 4).

(333) Dr. Kovera testified that her expertise is in eyewitness identification and memory and specifically with law enforcement's use of eyewitness identification and she provides consultation in that area primarily to defense counsel. (WRR5: 11–12).

(334) The Court finds that Dr. Kovera's knowledge concerning hypnosis was based on reading research studies but she has not conducted any experiments involving hypnosis. (WRR5: 32).

(335) The Court finds that Dr. Kovera is not an expert in hypnosis and is not qualified to render an opinion concerning hypnosis.

(336) The Court finds that Applicant has not raised a claim challenging the eyewitness identification procedures used by the Farmers Branch Police Department.

(337) The Court finds that Applicant has not raised a claim challenging

Barganier's in-court identification on the basis of improper eyewitness identification procedures.

(338) The Court finds that Applicant's instant claim is based on new science concerning the effect of hypnosis on memory.

(339) The Court finds that Dr. Kovera's testimony concerning eyewitness identification procedures is not relevant to the specific claim raised by Applicant in his subsequent writ application.

Applicant's Initial Writ Application

(340) This Court notes that it has taken judicial notice of Applicant's original state habeas proceeding and of its findings in that proceeding, cause number W98-02133-N(A).

(341) In his initial application for writ of habeas corpus, Applicant claimed that defense counsel, Brad Lollar, "suddenly changed his defense strategy" when he argued in closing argument during the guilt/innocence phase of Applicant's trial that Applicant was guilty of burglary of the Blacks' home. (*See* RR39: 83-86). Applicant claimed that this occurred following the testimony of Jill Barganier.

(176) Applicant's trial counsel, Doug Parks and Brad Lollar, provided affidavits addressing several claims of ineffective assistance of counsel raised by Applicant in his initial state habeas application.

(342) In the findings of fact and conclusions of law, the Court found both attorneys to be credible witnesses, that the statements contained in their affidavits were worthy of belief, and accepted the statements contained in the affidavits as true and correct. (Tr. Ct.'s Findings of Fact and Conclusions of Law at pp. 28–29).

(343) The Court finds that Mr. Lollar attested to the following:

> I did not call Myra Wait to alibi the defendant because she told me that he was, in fact, present at the home of the

decedent and witnessed the co-defendant, Rick Childs, murder the decedent, and that at the time they were engaged in the burglary of the decedent. I could not sponsor testimony that I knew was perjurious. Moreover, [Applicant], Mr. Parks and I agreed that the defense we would present was that the defendant was guilty of the burglary, but that the murder of Mrs. Black was an unanticipated independent action of the co-defendant. [Applicant] told me that this was true.

....

Moreover, such testimony [concerning potatoes as silencers] merely confirmed what the defendant told us, that he and the codefendant had gone to the house to do the burglary and had armed themselves with potato-laden guns in order to shoot the Doberman dog they expected to find there.

(Tr. Ct.'s Findings of Fact and Conclusions of Law, Appendix B at pp. 2–3).

(344) The Court finds that Mr. Parks attested to the following:

One of [Applicant's] allegations is that Mr. Lollar and I failed to call Myra Wait as an alibi witness. Prior to trial, we discussed two different defensive strategies. One, which we referred to as "Plan A," was to rely on an alibi, while "Plan B" was to admit that [Applicant] had gone to the Black home with the intention of committing burglary, but had no intention to kill anyone.

Mr. Lollar and I met with Myra Wait in Mr. Lollar's office prior to trial. I recall we discussed alibi as a possible defense. It was clear that Ms. Wait was getting a lot of pressure from [Applicant's] family, particularly his father. We spoke to Myra outside the presence of [Applicant's] parents and she told us that she could not truthfully

> provide an alibi for [Applicant].
>
> A strategic decision was made to go with "Plan B," which was our best defense to capital murder or, in the alternative, to the death penalty. . . . [Applicant] was consulted on this defense and knew prior to trial what our strategy was.

(Tr. Ct.'s Findings of Fact and Conclusions of Law, Appendix E at pp. 1–2).

(345) Accordingly, the Court finds that Barganier's in-court identification did not alter Applicant's defense strategy at trial.

VII. CONCLUSION

(346) The Court finds that Applicant has failed to prove by a preponderance of the evidence that he is entitled to relief under Article 11.073.

(347) The Court recommends that Applicant's subsequent application for writ of habeas corpus be denied.

ORDER

The Clerk is **ORDERED** to prepare a transcript of all papers in cause number W98-02133-N(B) and to transmit the same to the Texas Court of Criminal Appeals as provided by article 11.071 of the Texas Code of Criminal Procedure.

The transcript shall include certified copies of the following documents:

1. Applicant's Subsequent Application for Writ of Habeas Corpus and any other pleadings filed by applicant in cause number W98-02133-N(B), including any exhibits;

2. The State's Answer to Applicant's subsequent application

filed in cause number W98-02133-N(B);

3. Any other pleadings filed by the State in cause number W98-02133-N(B);

4. Any proposed findings of fact and conclusions of law filed by the State and Applicant in cause number W98-02133-N(B);

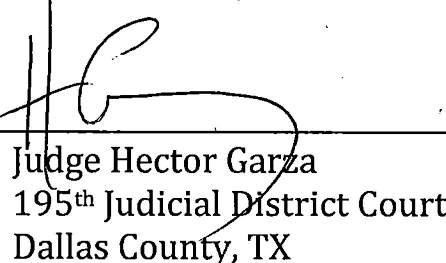
5. This Court's findings of fact and conclusions of law, and order in cause number W98-02133-N(B);

6. Any and all orders issued by the Court in cause number W98-02133-N(B);

7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number W98-02133-N(B), unless they have been previously forwarded to the Court of Criminal Appeals.

The Clerk is further **ORDERED** to send a copy of this Court's findings of fact and conclusions of law, including its order, to Applicant's counsel, the Office of Capital and Forensic writs (Benjamin Wolff and Carlotta Lepingwell), at 1700 N. Congress Ave., Suite 460, Austin, TX 78701, and to counsel for the State, Dallas County Assistant District Attorneys Rebecca Ott and Jaclyn O'Conner Lambert, at Frank Crowley Courts Bldg., 133 N. Riverfront Blvd., LB-19, Dallas, TX 75207-4399.

SIGNED the 3rd day of October, 2018.



Judge Hector Garza
195th Judicial District Court
Dallas County, TX

WR-64,654-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/15/2018 5:17 PM
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DEANA WILLIAMSON
CLERK

THE 195th DISTRICT COURT
DALLAS COUNTY, TEXAS

EX PARTE	§	**Trial Cause No. F98-02133**
CHARLES DON FLORES,	§	**Writ Cause No. W98-02133-N(B)**
Applicant.	§	
	§	**Court of Criminal Appeals No.**
	§	**WR-64,654-02**

APPLICANT CHARLES DON FLORES'S OBJECTIONS TO, AND MOTION FOR WITHDRAWAL OF, TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATION THAT RELIEF BE DENIED

Subsequent Writ Application under Article 11.073
of the Texas Code of Criminal Procedure
on Remand from the Court of Criminal Appeals

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TABLE OF CONTENTS

Table of Contents ii

Table of Authorities vii

Introduction 1

Omitted Context Critical to this 11.073 Proceeding 5

Procedural History Relevant to this 11.073 Proceeding 20

Argument in Support of Objections 27

I. Mr. Flores Objects to the Court's Mischaracterization of His New-Science Claim and to the Misrepresentation of the Law Relevant to the "Science" of Forensic Hypnosis. 27

A. The Court's FFCL mischaracterize Mr. Flores's new-science claim. 27

B. The Court's FFCL inaccurately and incompletely characterize the law regarding forensic hypnosis 30

1. Law relevant to forensic hypnosis testimony up through 2000 32

2. Changes in law relevant to forensic hypnosis testimony since 2004 39

II. Mr. Flores Objects to the Court's Distortion of the "Science" the State Relied on at Trial in 1999 and the Omission of Contemporary Scientific Critique of that Trial Testimony. 45

A. The Court's FFCL do not adequately describe the problematic "science" upon which the State relied at trial to obtain Mr. Flores's conviction, which his 11.073 claim attacks as wrong. 45

1. Dr. Mount's 1999 Testimony 46

2. Dr. Mount's 2017 Testimony 48

B. Mr. Flores presented expert testimony regarding the flaws in the scientific perspective Dr. Mount provided at trial on the State's behalf. 51

1. Dr. Lynn testified about Dr. Mount's misconception of the four-prong dangers of hypnosis, identified in Zani, yet the Court's FFCL ignore this highly relevant testimony. 52

2. Dr. Lynn testified as to how the content of the videotaped hypnosis session was a basis of his opinions, yet the Court's FFCL ignore this highly relevant testimony. 54

III. Mr. Flores Objects to the Court's Failure to Acknowledge the Relevant Evidence Mr. Flores Amassed During This Proceeding Showing Significant Changes in the Relevant Science Since the Time of Mr. Flores's Trial.........57

A. The Court's FFCL ignore all of the evidence regarding scientific studies that have advanced the understanding of hypnosis, memory, and eyewitness identification that are part of the record. 59

B. The Court's FFCL ignore all of the evidence that was admitted regarding changes in the science of hypnosis and memory. 64

C. The Court's FFCL ignore the highly relevant contemporary science attested to by hypnosis expert Steven Lynn, Ph.D. 66

1. The Court's FFCL ignore Dr. Lynn's overview of how the scientific perception of hypnosis has evolved. 67

2. The Court's FFCL ignore the bases for Dr. Lynn's opinions in scientific studies that have investigated the relationship between memory and hypnosis. 68

D. The Court's FFCL ignore the highly relevant contemporary science attested to by memory expert Dr. Kovera. 71

1. The Court's FFCL ignore Dr. Kovera's conclusions as well as the solid bases for those conclusions. 72

2. The Court's FFCL ignore Dr. Kovera's highly relevant opinions on how pre-trial identification procedures can affect the accuracy of identifications. ..75

3. The Court's FFCL ignore Dr. Kovera's highly relevant opinions regarding the specific circumstances of Ms. Barganier's observation relevant to assessing the reliability of her post-hypnotic "memory." 77

4. The Court's FFCL ignore Dr. Kovera's highly relevant opinions regarding the post-observation, pre-trial factors relevant to assessing the accuracy of Ms. Barganier's memory. 79

5. The Court's FFCL ignore Dr. Kovera's well-substantiated conclusions....82

IV. Mr. Flores Objects to the Court's Omission of Critical Evidence about the Context that Led to, and Followed from, the Hypnosis Session......................84

A. The Court's FFCL do not include evidence of the full context of Ms. Barganier's experience on the day of the crime, including details essential to

assessing the reliability of her memory and the integrity of the criminal investigation. 85

B. The Court's FFCL do not include the evidence of relevant events on January 30, 1998, the day after the crime, including details essential to assessing the reliability of Ms. Barganier's memory and the integrity of the criminal investigation 88

C. The Court's FFCL do not include the evidence of relevant events on January 31, 1998, when Ms. Barganier had further contacts with law enforcement, including details essential to assessing the reliability of her memory and the integrity of the criminal investigation. 90

D. The Court's FFCL do not include the evidence of relevant events on February 3, 1998, including details essential to assessing the reliability of Ms. Barganier's memory and the integrity of the criminal investigation...91

E. The Court's FFCL do not include the evidence of relevant events on February 4, 1998—the day that Ms. Barganier's was hypnotized at the Farmers Branch police station. 92

F. The Court's FFCL do not include the evidence of relevant events on March 23, 1999—the day that Ms. Barganier's came to court and claimed, for the first time, to be able to identify Charles Flores. 98

G. The Court's FFCL do not include evidence of relevant events on March 24, 1999—the day the trial court conducted the *Zani* hearing and then permitted Ms. Barganier to testify. 100

V. Mr. Flores Objects to the Court's Omission of Other Significant Evidence Adduced in the 2017 Evidentiary Hearing Relevant to the Reliability of the State's Witnesses in the 1999 *Zani* Hearing. 101

A. Relevant facts newly obtained through Jill Barganier's 2017 testimony are omitted. 101

B. Relevant facts newly obtained through Officer Serna's 2017 testimony are omitted. 105

C. Relevant facts newly obtained through Officer Jerry Baker's 2017 testimony are omitted. 108

VI. Mr. Flores Objects to the Court's Adoption of the State's Advocacy Positions as "Facts" Instead of Serving as an Independent Arbiter of the Evidence. ...113

A. The Court's FFCL improperly treat as "fact" the State's argument that the testimony of its trial expert, Dr. George Mount, regarding the "science" of forensic hypnosis constitutes defensible "science" today. 114

B. The Court's FFCL improperly treat as "fact" the State's argument that all scientific studies of hypnosis since 1999, undertaken by Dr. Lynn and other scientists, is "nothing new." 118

C. The Court's FFCL improperly treat as "fact" the State's argument that the relevant science was "ascertainable" at the time of trial. 122

D. The Court's FFCL improperly treat as "fact" the State's argument that Jill Barganier was not really hypnotized, to conclude that the hypnosis session had no bearing on her post-hypnotic eyewitness identification. 127

E. The Court's FFCL improperly treat as "fact" the State's argument that Ms. Barganier was only hypnotized to help her "relax," not to help her recover a memory. 128

F. The Court's FFCL improperly treat as "fact" the State's argument that, even if new science demonstrates that Ms. Barganier's identification was hopelessly unreliable, there was sufficient "corroborating evidence." 130

VII. Mr. Flores Objects to the Court's Due Process Violation Arising from the Decision to Adopt the State's Proposed FFCL Wholesale..........................137

VIII. Mr. Flores Objects to the Court's Misuse of the Legal Concept of Judicial Notice as a Basis to Rely on Materials That Were Not Admitted into Evidence in This or Any Other Proceeding..140

A. The Court's FFCL rely on a complete misuse of the concept of judicial notice. 142

B. Previously, the CCA rebuffed the State's improper attempts to exploit the substance of these same untested affidavits in this proceeding, yet the Court's FFCL now purports to take "judicial notice" of them. 145

C. The State sought and obtained an order that curtailed Mr. Flores's ability to attack the purportedly "corroborating evidence" that was used to obtain his conviction and to impeach the affiants the State relied on to thwart his previous quest for habeas relief..148

D. Affidavits in general are disfavored as a means to resolve disputed facts, and the 2001 affidavits are not competent "evidence" relevant to any disputed fact in this proceeding. 150

E. The 2001 Affidavits Are Facially Unreliable..154
Conclusion & Prayer..161
Certificate of Service..162

TABLE OF AUTHORITIES

Federal

Anderson v. Bessemer City, 470 U.S. 564 (1985)....137
Armstrong v. Manzo, 380 U.S. 545 (1965)....150
Aron v. United States, 291 F.3d 708 (11th Cir. 2002)....123
Baldwin v. Maggio, 704 F.2d 1325 (5th Cir. 1983)....153
Cf. Harrington v. Richter, 131 S. Ct. 770 (2011)....153
Christeson v. Roper, 135 S. Ct. 891 (2015)....151
Ex parte Charles Don Flores, WR-64654-01, 2006 WL 2706773 (Tex. Crim. App. Sept. 20, 2006)....22
Ex parte Flores, WR-64,654-02 (Tex. Crim. App. May 27, 2016).... 24, 25
Flores v. Quarterman, Cause No. 3:07-CV-413-M (N.D. Tex.)....22
Ford v. Wainwright, 477 U.S. 399 (1986).... 137, 150
Goldberg v. Kelly, 397 U.S. 254 (1970)....150
Hamm v. Allen, 137 S. Ct. 39 (2016)....138
Holland v. Florida, 560 U.S. 631 (2010)....122
Jefferson v. Sellers, 250 F. Supp. 3d 1340 (N.D. Ga. Apr. 10, 2017)....137
Jefferson v. Upton, 560 U.S. 284 (2010)....137
Larence v. Lynch, 826 F.3d 198 (4th Cir. 2016)....122
Martinez v. Ryan, 132 S. Ct. 1309 (2012)....23
Nelson v. Estelle, 642 F.2d 903 (5th Cir 1981)....124
People v. Ebanks, 49 P. 1049 (1897)....32
People v. Romero, 745 P.2d 1003 (Colo. 1987)....36
Rock v. Arkansas, 483 U.S. 44 (1987)....33
Rompilla v. Beard, 545 U.S. 374 (2005)....123
State v. Hurd, 432 A.2d 86 (N.J. 1981)....36
Trevino v. Thaler, 133 S. Ct. 1911 (2013)....23
United States v. Lopez-Solis, 447 F.3d 1201 (9th Cir. 2006)....147
Wood v. Allen, 558 U.S. 290 (2010)....137

State

Bender v. State, 739 S.W.2d 409 (Tex. App.—Houston [Dist. 14th] 1987, writ ref'd)....143
Casso v. Brand, 776 S.W.2d 551 (Tex. 1989)....152

Chambers v. State, 711 S.W.2d 240 (1986 30
Charles v. State, 146 S.W.3d 204 (Tex. Crim. App. 2004)..................................152
Drake v. Holstead, 757 S.W.2d 909 (Tex. App.—Beaumont 1988, no writ) 143
Ex parte Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989)......................................3
Ex parte Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989) 3
Ex parte Davila, 530 S.W.2d 543 (Tex. Crim. App. 1975)......................................3
Ex parte Medina, 361 S.W.3d 633 (Tex. Crim. App. 2011) 22
Ex parte Reed, 271 S.W.3d 698 (Tex. Crim. App. 2008)............................ 137, 138
Ex parte Robbins, 478 S.W.3d 678 (Tex. Crim. App. 2014)...................... 1, 64, 122
Ex parte Simpson, 136 S.W.3d 660 (Tex. Crim. App. 2004) 138
Flores v. State, AP-73 (Tex. Crim. App. 2001)..20
Garza v. State, 996 S.W.2d 276 (Tex. App.—Dallas 1999, pet. refused).... 142, 146
Gaston v. State, 63 S.W.3d 893 (Tex. App.—Dallas 2001, no pet.) 142
Griego v. State, 345 S.W.3d 742 (Tex. App.—Amarillo 2011, no pet.) 141
Holloway v State, 666 S.W.2d 104 (Tex. Crim. App. 1984) 142
In re R.A., 417 S.W.3d 569 (Tex. App.—El Paso 2013, no pet.) 142
Manzi v. State, 88 S.W.3d 240 (Tex. Crim. App. 2002).......................................150
Roark v. Commonwealth, 90 S.W.3d 24 (Ky. 2002) 32
SEI Bus. Sys., Inc. v. Bank One Tex., N.A., 803 S.W.2d 838 (Tex. App.—Dallas 1991, no writ)..142
State v. Medrano, 127 S.W.3d 781 (Tex. Crim. App. 2004)...................... 36, 38, 39
State v. Moore, 902 A.2d 1212 (N.J. 2006) 39, 40, 41, 118
Stokes v. State, 548 So.2d 188 (Fla. 1989) 32
Stowe v. State, 745 S.W.2d 568 (Tex. App.—Houston [1st Dist.] 1988, no pet.).144
Watts v. State, 99 S.W.3d 604 (Tex. Crim. App. 2003) 141
Zani v. State, 758 S.W.2d 233 (Tex. Crim. App. 1988) .... passim

Statutes

28 U.S.C. § 2246 150
TEX. CODE CRIM. PROC. art. 11.04 .... 135, 138
TEX. CODE CRIM. PROC. art. 11.071 .... 3, 135, 136, 141
TEX. CODE CRIM. PROC. art. 11.073 .... passim
TEX. R. APP. P. 73.4 26
TEX. R. CIV. PROC. 166a...151
TEX. R. EVID. 201 .... 141, 150
TEX. R. EVID. 201b 143

TEX. R. EVID. 401 30

Other Authorities

American Bar Association Formal Opinion 10-456 July 14, 2010, *Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim* 151

Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1 (1991) 36

Simons, D.J., & Chabris, C.F., *What People Believe About How Memory Works: A Representative Survey of the US Population*, PLOS One (2011).......................124

Steven Goode, Olin Guy Wellborn III, M. Michael Sharlot, Texas Practice: Guide to the Texas Rules of Evidence Civil and Criminal § 201.2 (3rd. ed.1993) 141

Trial by Trance: The Admissibility of Hypnotically Enhanced Testimony, 20 COLUM. J.L. SOC. PROB. 237 (1986) 35

INTRODUCTION

Applicant Charles Flores, by and through counsel, respectfully requests that this Honorable Court:

- consider the objections presented here;
- withdraw its Order dated October 3, 2018 (Order), which includes Findings of Fact and Conclusions of Law (FFCL) and contains a recommendation that habeas corpus relief be denied;
- enter revised FFCL correcting the significant mistakes of fact and law enumerated below;
- and recommend relief in the form of a new trial.

As Mr. Flores argued to the Court, since his trial in 1999, Texas has made notable strides to try to prevent and unwind wrongful convictions by adopting policies and enacting legislation to improve the reliability of criminal verdicts—including the passage in 2013 of Senate Bill 344, which amended the Code of Criminal Procedure to add article 11.073. 7 EHRR 7-8; *see also Ex parte Robbins*, 478 S.W.3d 678, 704 (Tex. Crim. App. 2014) ("in 2013, the Texas Legislature also chose accuracy over finality by enacting Article 11.073"). Unfortunately, the Legislature's intent to make it *easier* to address wrongful convictions based on outdated science has been thwarted in this proceeding as the Court has abdicated the role of neutral arbiter, ignored the evidentiary record and instead adopted wholesale the State's error-ridden Proposed FFCL.

The error starts with the very framing of the new-science claim that Mr. Flores alleged (and proved). This case involves a wrongful conviction based on an unreliable eyewitness identification following a highly suggestive, police-conducted, hypnosis session. The Court's FFCL ignore the fact that the hypnosis session at the heart of his new-science claim is significant only because the hypnotized witness later claimed to be able to identify Mr. Flores as one of two people seen outside of a crime scene. Using new developments in the fields of memory and hypnosis, Mr. Flores demonstrated why, thirteen months after-the-fact, this "eyewitness," was able to assert with unwarranted confidence that, instead of the white male, with long, wavy hair this witness had described the day of the crime, Mr. Flores, an obese, Hispanic male with very short hair, was one of two men she had glimpsed getting out of a strange car in the pre-dawn hour while she looked through the mini-blinds from a window in the house next door. Mr. Flores also demonstrated, in light of contemporary scientific understanding, why the "science" the State used at trial to convince the fact-finder that the purported identification was reliable is wrong.

As Justice Newell recognized when Mr. Flores's 11.073 new-science claim was remanded to this Court for consideration on the merits, the forensic hypnosis aspect of this case is inextricably linked to the issue of eyewitness identification more broadly: "As we have noted in *Tillman v. State*, eyewitness misidentification

is the leading cause of wrongful convictions across the country. . . . I cannot imagine that the concerns regarding suggestive eyewitness identification evaporate when eyewitness testimony is enhanced through hypnotism." *Ex parte Flores*, WR-64,654-02 (Tex. Crim. App. May 27, 2016 (Newell, J., concurring) (emphasis added).

While state habeas courts are given discretion over the methods for developing and receiving evidence to resolve contested factual claims, *see, e.g.*, TEX. CODE CRIM. PROC. art. 11.071, § 9(a), the fact-finding procedures must be adequate for reaching "reasonably correct results." *Ex parte Davila*, 530 S.W.2d 543, 545 (Tex. Crim. App. 1975) (citing *Townsend v. Sain*, 372 U.S. 293, 316 (1963)).

The Court of Criminal Appeals (CCA), which will ultimately decide this matter following a *de novo* review, is not bound by the trial court's FFCL. *Ex parte Brandley*, 781 S.W.2d 886, 887-88 (Tex. Crim. App. 1989). In deciding whether to defer to a trial court's findings, the CCA will ask whether the findings are supported by the record, *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex. Crim. App. 1989). Here, they are not. Nor were the fact-finding procedures "adequate for reaching reasonably correct results" in light of the Court's decision to ignore most of the evidentiary record. *Davila*, 530 S.W.2d at 545. Instead, the Court's FFCL adopt the State's advocacy positions as "facts" and rely heavily on suspect materials that were never admitted into evidence in this, or any proceeding—after limiting Mr. Flores's ability

to put on evidence relevant to rebut the State's purported "corroborating evidence" of guilt.

The Court's manifest errors of law and fact and indefensible omissions are best explained by its decision to adopt, *in toto*, the State's Proposed FFCL. This Court should revise its FFCL to remedy several fundamental errors including:

- The Court's Mischaracterization of Mr. Flores's New-Science Claim and the Misrepresentation of the Law Relevant to the "Science" of Forensic Hypnosis;
- The Court's Wholesale Distortion of the "Science" the State Relied on at Trial in 1999 and the Contemporary Scientific Critique of that Trial Testimony;
- The Court's Omission of the Evidence Amassed During This Proceeding Showing Significant Changes in the Relevant Science Since the Time of Mr. Flores Trial;
- The Court's Omission of Evidence Amassed during this Proceeding about the Context that Led to, and Followed from, the Hypnosis Session;
- The Court's Omission of Other Significant Evidence Adduced during this Proceeding Relevant to the Reliability of the State's Witnesses in the 1999 *Zani*[1] Hearing;
- The Court's Due Process Violation Evidenced by the Decision to Adopt the State's Proposed FFCL Wholesale;
- The Court's Adoption of the State's Advocacy Positions as "Facts" Instead of Serving as an Independent Arbiter of the Evidence;

[1] "*Zani*" refers to *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988), the CCA decision announcing the standard that must be met to permit witnesses who had been subjected to forensic hypnosis to testify.

- The Court's Misuse of the Legal Concept of Judicial Notice to Rely on Materials That Were Not Admitted into Evidence in this or Any Other Proceeding.

OMITTED CONTEXT CRITICAL TO THIS 11.073 PROCEEDING

The Court's FFCL, adopted wholesale from the State's proposal, largely ignore the three-day evidentiary hearing held in this Court and the voluminous exhibits admitted into evidence during this proceeding. *See* Volumes 4-8 EHRR;[2] *see also* **APPENDIX A** (Mr. Flores's Proposed Findings of Fact and Conclusions of Law). The Court's FFCL completely ignore the highly relevant expert testimony of Dr. Steven Lynn and Dr. Margaret Kovera, although, during the hearing, the Court accepted both as qualified experts whose testimony was relevant to his new-science claim and reliable. 5 EHRR 38; 6 EHRR 26-27. The Court's FFCL make no adverse credibility determinations to justify these glaring omissions.

In brief, the Court's FFCL fail to address the expert testimony that support Mr. Flores's claim that, "today, a virtual consensus exists among cognitive scientists and the larger psychological community that hypnosis imposes risks of false memory creation and that hypnosis further carries a risk of unwarranted confidence in memories, with attendant risks of grievous errors in eyewitness identification." AppX5; *see, e.g.*, 6 EHRR 110 (explaining the difficulty of cross-examining a

[2] "EHRR" refers to the Reporter's Record created in this proceeding, which included an evidentiary hearing; "RR" refers to the Reporter's Record at trial. For example, a citation to "2 EHRR 32" refers to Volume 2 of the Evidentiary Hearing Reporter's Record at page 32. "AppX" refers to applicant's exhibits admitted during the evidentiary hearing, found in 8 EHRR.

hypnotized witness because "the witness confidently believes that a false memory is true and has difficulty distinguishing between pre- and posthypnotic memories").

More specifically, the FFCL ignore the testimony of Dr. Lynn, this country's leading scientist on memory and hypnosis,[3] who opined that the four-prong dangers of hypnosis identified in *Zani* are quite real. 6 EHRR 51, 56-57. Hypnosis is associated with hypersuggestibility and the expectation of greater recall in response to imaginative suggestions. 6 EHRR 52. Hypnosis is associated with a loss of critical judgment because, as Dr. Lynn explained, "when people expect that their recall will be accurate recall, without analyzing it carefully or monitoring it"—something enhanced by "eye closure and relaxation"—they don't second-guess themselves. 6 EHRR 53. Hypnosis risks not just confabulation but believing that false memories generated to fill in gaps in memory, are accurate. 6 EHRR 53-54. Hypnosis also risks "memory cementing," such that individuals are more confident in memories produced by hypnosis even though inaccurate. 6 EHRR 54. The research shows that

[3] Dr. Lynn is a distinguished professor of psychology at the State University of New York at Binghamton. This is a higher rank than "full professor" awarded based on Dr. Lynn's significant contributions to the field of psychological science. 6 EHRR 7; AppX7. His current research interests include hypnosis, disassociation, trauma, memory, and forensic psychology. 6 EHRR 8. He has published extensively in the fields of hypnosis, pseudoscience, and psychology, including 27 books, 6 on hypnosis alone, 6 on topics exposing pseudoscience, and 4 psychology textbooks. 6 EHRR 11. He has published 196 articles on hypnosis and serves on several different editorial boards for academic journals. 6 EHRR 12. He has conducted 15 research laboratory studies specifically on hypnosis and memory. 6 EHRR 13.

hypnosis engenders a low threshold for construing imagined events as if they were actual memories. 6 EHRR 55-56.

The Court's FFCL also ignore copious testimony and exhibits regarding the facts that led to, and followed from, the hypnosis session conducted by the Farmers Branch police officer investigating the murder for which Mr. Flores was convicted.

The Court's FFCL include no facts establishing the sequence of events that led a purported eyewitness, Jill Barganier,[4] to go from providing police with a vague description of "two white males" with similar "long hair" on the morning of the crime, to agreeing to be hypnotized at the police station, to, thirteen months later, upon seeing Mr. Flores in the courtroom at trial, claiming for the first time to be "more than 100 percent positive" that he, an exceptionally large Hispanic male with close-cropped hair, was one of the two men she had seen. 36 RR 115-16.

The Court's FFCL omit the evidence establishing the factual circumstances of Ms. Barganier's initial observation on the morning of the crime, the memory of which the police hoped to "recover" through hypnosis (and which contemporary science shows aided the creation of a false memory). *See* APPENDIX A at pp. 27-53.

The Court's FFCL likewise do not mention that Ms. Barganier had initially emphasized to the police that the two men she had seen looked alike. AppX10;

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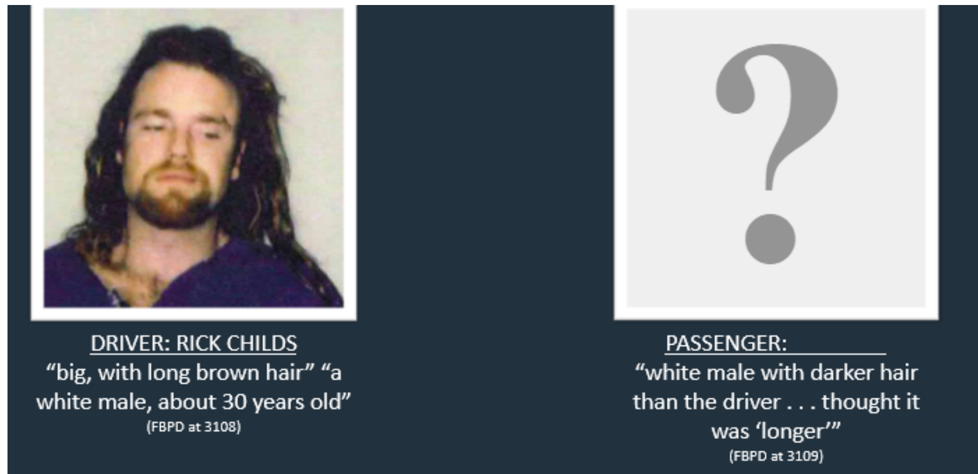
[4] Her last name is misspelled throughout the trial record as "Bargainer." This error was corrected during this post-conviction proceeding.

AppX26. Nor do the FFCL mention what the driver looked like—a man whom Ms. Barganier picked from a photo array immediately: a thin white male with long hair named Rick Childs who was already in police custody when Ms. Barganier made the identification.[5]



See AppX20, AppX10; AppX57.

The Court's FFCL do not mention Ms. Barganier's fixation on the beer bottle from which the car's driver was drinking at that early hour, which still commanded her focus during the hypnosis session. AppX26.

The Court's FFCL do not recount the evidence adduced about the events that led up to Ms. Barganier being hypnotized at the police station six days after her initial observation or how, at that point, she could still only describe "two white

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[5] After Mr. Flores was sent to death row, Rick Childs signed a Judicial Confession, stating that he had been the one to drive the Volkswagen Bug to the house next door to Ms. Barganier and he had been the one who shot her neighbor, Ms. Black. He went on to serve 15 years in prison and is now out on parole. Mr. Childs did not testify at Mr. Flores's trial.

males" with "long, dirty hair," and the passenger as someone who "looks a lot like his friend." *Id.*

Moreover, the Court's FFCL do not mention any of the evidence about the facts surrounding the highly suggestive hypnosis session, conducted by a police officer involved in the investigation, who had never hypnotized anyone before and who never did so again. 4 EHRR 185, 240. Nor do the Court's FFCL refer to the many problems with the hypnosis session in light of contemporary scientific understanding of memory-formation about which, Dr. Steven Lynn testified. The Court's FFCL do not address Dr. Lynn's conclusion regarding Ms. Barganier's inflated confidence about her ability to make an accurate identification for the first time thirteen months after-the-fact, which he found best explained by the multiple suggestions, made to her while under hypnosis, "that she would be able to recall other things as time move[s] on." 6 EHRR 92-93.

The Court's FFCL do not mention any of the evidence of what occurred during the hypnosis session, when the hypnotist invited Ms. Barganier to imagine herself in a "movie theater" armed with a remote control and repeatedly suggested to her that her memory worked like a video recorder such that she could pause, rewind, zoom in, and otherwise manipulative images in her mind's eye to try to recover a memory of what she had seen six days earlier when she had glimpsed two men get out of a car in the driveway next door during the pre-dawn hour. *See*

AppX26; AppX54; 6 EHRR 59-87 (expert describing multiple issues within the hypnosis session).

Additionally, the Court's FFCL do not mention the unrebutted evidence that one of the two lead investigators, who was part of setting up the hypnosis session and sat in on the procedure, had lied to the court during the *Zani* hearing about whether he and his team already knew of Charles Flores and considered him to be a potential suspect at the time of the hypnosis session.[6]

The Court's FFCL do not address Ms. Barganier's two composite sketches, the second of which she made right after the hypnosis session to try to capture her

[6] Officer Baker, the second investigator assigned to the Black murder case, testified during the *Zani* hearing that he did not know what Flores looked like and had not even heard his name at the time he sat in on the hypnosis session on February 4, 1998. But police records obtained during the post-conviction investigation show that this was not true. A Farmers Branch Police Department record indicates that, by 7:30 p.m. on January 31, 1998, the police investigating Ms. Black's murder had already decided that Charles Flores was a suspect. AppX9. At the very least, Officer Baker had learned of Flores's identity, including a physical description, by 11:00 p.m. on that date, January 31, 1998. He acquired this knowledge during a custodial interview of Rick Childs' girlfriend, Vanessa Stovall. AppX8. Police records indicate that Baker had contacted Ms. Stovall by phone earlier in the day, and she had agreed to come in after learning that police had already arrested her boyfriend, Rick Childs. In response to questions during the custodial interview, which was not recorded, Stovall told Baker at some point that Rick Childs knew a man named "Charlie," a large Hispanic male with short hair. 4 EHRR 285-286.

Thereafter, Officer Baker met with Ms. Stovall again, on February 3, 1998 around 1:10 p.m., on the day before Ms. Barganier's hypnosis session. AppX45; 4 EHRR 288. Officer Baker worked with SID investigators to interview Ms. Stovall. 4 EHRR 289. By 3:00 p.m. that day, police records indicate that SID had identified "Charlie" as Charles Don Flores. AppX8; 4 EHRR 290-91. Moreover, by then, the team had obtained a photo of him and shared the information with CID, the police division for which Baker and lead investigator Callaway worked; they had his photo in hand in time to prepare the photo array that was presented to Ms. Bargainer by law enforcement right after the hypnosis session on February 4, 1998. AppX8; 4 EHRR 290-291.

memory that the passenger she had glimpsed looked like the driver, a man she had already identified:

See AppX20; AppX28.

The Court's FFCL do not mention the evidence that Ms. Barganier had *never* suggested to police that she had seen a very large Hispanic male of Aztec-Mayan descent with very short hair. Similarly, the FFCL do not mention the evidence establishing that, right after the hypnosis session and Ms. Barganier's second attempt to create a composite sketch, the Farmers Branch police started showing her pictures of Hispanic males—even though those images bore no resemblance to her previous descriptions.

One of the photo arrays featuring Hispanic males which was shown to Ms. Barganier right after the hypnosis session, was admitted into evidence. It features six Hispanic males, including a mug shot of Charles Flores (at 2). His photo, prominently displayed in the middle of the array, was the only photo *without* a white

strip covering part of the image and the only one *with* a distinctive background and clothing:

AppX30.

The Court's FFCL ignore the evidence that, after being shown these pictures of Hispanic males, which bore no resemblance to her previous description of the men she had observed, Ms. Barganier's still could not make an identification.

The Court's FFCL likewise make no mention of the news articles that Ms. Barganier admitted seeing before she made her identification, some of which were admitted into evidence during this proceeding. These articles feature the same mug shot of Charles Flores that was used in the photo array shown to Ms. Barganier right after she was hypnotized at the police station:

Defense lawyers press murder trial witness

By Kendall Anderson
Staff Writer of The Dallas Morning News

Investigation, differences in testimony questioned

Defense attorneys for Charles Don Flores pressed hard Tuesday on several prosecution witnesses, including a police investigator and a mother and son who said they saw a man resembling the defendant at a slaying victim's house.

If convicted, Mr. Flores, 29, could be sentenced to death in the capital murder case. He and Richard Lynn Childs are accused of shooting 64-year-old Betty Black and her Doberman in her Farmers Branch home when they went to look for money they thought was hidden there.

Mr. Flores learned there was money in the house from the prosecutor's key witness. Jackie Roberts, the Blacks' daughter-in-law, testified Monday that she told Mr. Flores about the cash when he threatened her life because he thought her drug dealer had cheated him.

Charles Don Flores   Betty Black

One of the Blacks' neighbors told jurors Tuesday that she and her young children were getting into their car across the street when they saw a pink-and-purple Volkswagen Beetle pull into the Blacks' driveway the morning of Jan. 29, 1998. The neighbor said she saw two men get out of the car, including one who she agreed was built like Mr. Flores.

Lead prosecutor Jason January mentioned the distinctly painted car many times in his opening argument Monday, saying numerous people have identified the suspects with the vehicle.

Under cross-examination by defense attorney Doug Parks, the neighbor boy's account differed slightly from his mother's. The boy recalled seeing the car's passenger, who prosecutors think was Mr. Flores, turn and look across the street at the family after he got out of the car. The mother had said she was sure it was the driver of the distinctive car who had turned and looked across the street.

Lead defense attorney Brad Lollar also questioned the thoroughness of the Farmers Branch police investigation. He asked Investigator James Stephens why he and others hadn't tried to open the electric garage door by ha[...] also asked why they hadn't tr[...] a garage door opener that wa[...] from the scene as one of mar[...] es of evidence.

Witnesses testified that th[...] noticed the Blacks' garage do[...] partially up that morning an[...] they saw the two men fro[...] Volkswagen climb under it.

"Most garage door opene[...] have these electric opener[...] are installed so someone[...] doesn't have an opener can'[...] and open the door, right?" M[...] lar asked Investigator Stephe[...]

Defense attorneys have re[...] their right to an opening stat[...]

Investigator Stephens al[...] plained how pieces of potat[...] tered about the crime scen[...] cate that the suspects stuck p[...] on the ends of their guns to [...] silencers.

DART fires bus driver involved in fatal cras[...]

By Tony Hartzel
Transportation Writer of The Dallas Morning News

Union president says decision will be appealed

A DART bus driver involved in a fatal accident last month has been [...]

spokesman Morgan Lyons said.

Mr. Askew could not be reached [...]

missels only after an operator has had four preventable accidents in [...]

"DART is trying [...] show it's doing [...]

See AppX57.

In short, the FFCL fail to note that Ms. Barganier only made her identification of Charles Flores thirteen months later, after being exposed to multiple suggestive procedures. The identification came only: *after* she had been exposed to multiple photo lineups, most of which are not part of the police file and none of which were double-blind; *after* she had created two composite sketches of white males with long hair; *after* she had been hypnotized by a police officer investigating the case while one of the lead investigators looked on; *after* she had been shown a lineup of only Hispanic men with short hair, including a picture of Charles Flores; *after* she had failed to pick Mr. Flores out of that lineup; *after* she had seen the same mug shot of Mr. Flores in the newspaper; and only *after* she saw him in court sitting at the defense

table during his trial. Only then did Ms. Barganier suddenly decide that she could make an identification. 4 EHRR 121-22.

The Court's FFCL do not mention the science that explains the suggestive procedures used on Ms. Bargainer so that she went from describing the passenger as a "white male with long hair a lot like his friend" (the driver) to identifying a Hispanic male who was distinctively overweight with very short hair who looks nothing like the purported driver. Indeed, during the evidentiary hearing in this proceeding, Ms. Bargainer admitted she learned that the police were looking for a Hispanic man named Charles Flores "[p]robably when they were talking about it in the news"—*i.e.*, before she made an identification. 4 EHRR 117-18. Indeed, the uncontroverted evidence is that Ms. Barganier knew that the police were looking to identify a Hispanic male before she identified Charles Flores and only because the police started showing her pictures of Hispanic males right *after* her hypnosis session, during which she was actively encouraged to "remember more" later on.

After the highly suggestive hypnosis session, which the Court's FFCL does not discuss, and after seeing Mr. Flores's picture repeatedly in both police photo arrays and in the newspaper, it was not much of a challenge for her, months later, to pick out the only Hispanic male in the courtroom during his trial. As Judge Nelms, who presided over the trial, acknowledged at the time: ***"honestly you don't have to be a rocket scientist to pick out who is the Hispanic individual in the Courtroom."***

36 RR 108 (emphasis added). Yet because of the "science" the State used at trial to vouch for Ms. Barganier's post-hypnotic, eleventh-hour identification, Ms. Barganier was permitted to testify before the jury about her purported eyewitness observation. She was permitted to testify after a hastily convened "*Zani* hearing," in which numerous misrepresentations of fact were made about circumstances surrounding the hypnosis, but to which the State's expert gave a scientific stamp of approval. 36 RR 12-117. This information too is missing from the Court's FFCL.

Further, the Court's FFCL do not discuss the extensive evidence of scientific advances that support having grave doubts that Ms. Barganier had encoded *any* memory of the passenger's face that could be recovered—through hypnosis or otherwise. Her fleeting observation was made under circumstances now known to adversely affect memory formation, such as:

- low illumination;
- considerable distance;
- divided attention;
- unusual object diverting her focus from the men's faces;
- limited duration of observation;
- no reason at the time to pay careful attention to her observation; and
- the difficulties people have generally with recalling the faces of strangers with any accuracy.

5 EHRR 20-23, 50-55.

The Court's FFCL entirely ignore the highly relevant testimony of Dr. Margaret Kovera, a scientist who specializes in the study of memory formation and eyewitness identification. 5 EHRR 40-106, 132-39. The FFCL do not include her testimony about contemporary studies about: how memory is encoded in the first place; how even if encoded, memory decays very rapidly; how a long interval between an event observed and "memory" retrieval adversely affects the accuracy of memory. Nor do the Court's FFCL include Dr. Kovera's expert opinion that Ms. Barganier was subjected to every kind of suggestive pre-trial procedure that has been identified by cognitive scientists, most notably: a hypnosis session at the police station conducted by men involved in the underlying investigation giving her false confidence in her ability to recover an accurate "memory" months later. *See id.*

The Court's FFCL also do not report that Dr. Kovera analyzed the facts surrounding Ms. Barganier's post-hypnotic, in-court identification of Charles Flores, and concluded that none of the criteria "that are necessary for ensuring that accuracy is related to confidence were present here." 5 EHRR 77.

The Court's FFCL, adopted wholesale from the State's proposal, also diminish the importance of Ms. Barganier's compelling trial testimony in obtaining Mr. Flores's conviction. There was no physical evidence linking Mr. Flores to the crime scene; and all the other witnesses who testified about his involvement in

events before and after the murder were themselves drug dealers and addicts with extensive criminal records, who were clearly biased, and whose stories did not add up to anything close to a coherent narrative.[7] *Compare* FFCL at p. 60 (279) – p. 68 (328) *with* **APPENDIX A** at 108-130.

The Court's FFCL fail to acknowledge that Ms. Barganier was the linchpin of the State's case at trial. She testified to the jury with great conviction that Mr. Flores was the passenger she had seen get out of a Volkswagen in front of the house next door, pointing him out in court. 36 RR 283. The FFCL do not mention that Ms. Barganier confabulated on the stand, providing details she had never before mentioned to police about "meeting eyes" with Flores, which made her "real nervous." To great dramatic effect, she suggested for the first time on the stand: "I thought we made eye contact. They knew someone was there watching them." 36 RR 285. She then repeated "I saw him look at me, and I thought he was watching me." 36 RR 286. When asked again if Flores was the man who had gotten out of the passenger's side of the car, she assured "I'm positive." 36 RR 294. She then added

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[7] The witness who spent the most time on the stand for the State at Flores's trial was Jackie Roberts, daughter-in-law of the victim, whose drug-dealing son was then in prison and had recently threatened to cut Jackie off from access to his "dirty money" stashed in the Blacks home. Court records show that Jackie Roberts was indicted for capital murder based on her incriminating statements while in police custody. But those charges were dropped after she testified for the State against Charles Flores. Her trial testimony is plagued with internal inconsistencies and contradicts previous statements made during police interviews. *See* 34 RR 99-164; 38 RR 110-172; AppX57. Mr. Flores was not, however, permitted to call Ms. Roberts as a witness during this proceeding to expose these issues. *See* 3 EHRR.

for good measure that she was "Over 100 percent [positive]. He's the man I saw that morning." *Id.*

The Court's FFCL do not mention the evidence adduced during the 2017 evidentiary hearing showing how Ms. Barganier's testimony bore little resemblance to: the initial description she provided to the police the day of her observation; her vague description in the pre-hypnotic interview with police; her more detailed description during the hypnosis session (none of which mention the concept of "meeting eyes" with the car's passenger). In each of these descriptions, she had consistently been able to say little more than that the passenger was a "white male with long hair." *See* AppX10; AppX26; AppX12; AppX27.

The Court's FFCL also fail to note how, at the recent evidentiary hearing, in an unguarded moment, Ms. Bargainer admitted that she may have just imagined that whole story she had told the jury about "meeting eyes" with the passenger:

> Q. But you hadn't remembered, at least before the hypnosis session, any locked eyes, that anybody had seen you, correct?
>
> A. I'm not real clear if that was my imagination or not, but to me, he looked at me.

4 EHRR 132.

Likewise, the Court's FFCL ignore Ms. Barganier's admission that, the morning of the crime, she "may have been confusing" the driver and the passenger—

likely because she had only barely observed the two men, through slits in her mini-blinds in a window of the house next door, when she was busy getting her family ready for the day before the sun had even come up. 4 EHRR 140; 4 EHRR 40-44.

From reading the Court's FFCL, one would never know that Mr. Flores's claim is about the junk science that was used to permit a purported eyewitness to testify and place him outside a crime scene after that witness had been working with law enforcement for many months, since the day of the crime, to try to come up with an identification. The Court's FFCL also do not acknowledge what the trial record shows: that Ms. Barganier, ***literally hypnotized by law enforcement***, was the *only* person to place Mr. Flores outside the crime scene, and she was among the only non-drug-dealing, highly compromised witnesses in the State's entire case.[8] *See also* AppX57 (including *Dallas Morning News* article reporting on questions arising at trial about differences between State's witnesses' testimony and problems with the investigation).

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[8] *See* APPENDIX A at 126-130 summarizing the vast problems with the State's supposed "corroborating" guilt-phase case evident from the face of the record. Even the State's Proposed FFCL, adopted by the Court, show that the State's guilt-phase case relied extensively on extraneous bad acts (which Mr. Flores never denied committing) after he learned that he was being accused of committing a murder that he consistently maintained that he did not commit. *Compare* State's Proposed FFCL at p. 64 (306) – p. 68 (328) *with* Court's FFCL at p. 64 (306) – p. 68 (328).

Inexplicably, the Court's FFCL leave out *all* discussion of the specific contents of the hypnosis session[9]—including extensive testimony by a scientist with forty-years' experience studying the effects of hypnosis on memory. *See, e.g.*, 4 EHRR 91-99; 6 EHRR 59-87.

Without all of this evidence, as elaborated below, Mr. Flores's new-science claim is deprived of essential context.

PROCEDURAL HISTORY RELEVANT TO THIS 11.073 PROCEEDING

Mr. Flores has been confined under a sentence of death pursuant to the judgment of the 195th District Court, Dallas County, Texas since 1999. Mr. Flores's conviction and death sentence were affirmed on direct appeal in an unpublished opinion. *Flores v. State*, AP-73,463 (Tex. Crim. App. 2001).

Mr. Flores's first appointed state habeas counsel became ill and asked that another lawyer be appointed to assist with the state writ. That lawyer then hired a disbarred attorney to do the investigation. Although Mr. Flores, from death row, provided lists of witnesses who should be interviewed, copious notes about the factual errors in the draft writ, and urged counsel to pursue viable claims, habeas counsel never conducted a proper investigation and meritorious claims were not

[9] A copy of the video-taped hypnosis session that was conducted on Jill Barganier at the Farmers Branch police station on February 4, 1998 was made part of the record during trial but has been missing for years. A copy, however, was authenticated and admitted into evidence during this proceeding. *See* AppX26. However, for some reason, the court reporter in this proceeding failed to transcribe any of the clips of the videotaped hypnosis session that were played during the evidentiary.

raised. Aside from failing to do their job, the lawyers engaged in in-fighting, blaming each other for their inaction.

Ultimately, the first two appointed lawyers withdrew before the writ application was filed. Thereafter, the trial judge (Judge Nelms) allowed a third lawyer to enter an appearance—but he failed to file any pleading on Mr. Flores's behalf. The trial court later threatened this lawyer with contempt-of-court charges when it became obvious that he had not even retrieved the trial record. Although the threat of contempt eventually prompted the lawyer to pick up the record, he never filed anything. Finally, a fourth attorney began assisting at the eleventh hour, but it was too late to ensure that Mr. Flores's rights were protected or that he had evidentiary support to satisfy the 11.071 pleading standard.

Mr. Flores is not a lawyer, but he recognized that claims that were not raised in state habeas would be barred from consideration in federal court. After desperate communications with his attorneys failed, he wrote directly to the CCA in an attempt to secure some minimal level of legal representation. In a letter dated September 10, 2000, he informed the CCA of his repeated pleas to his writ counsel to investigate the ineffective assistance of his appointed trial counsel. He also entreated the trial court: "please appoint me new co-counsel that is competent and willing to do their job." He accurately noted: "Your Honor I have done all I possibly can to further my investigation. It is not my fault that these men did not do their job. Please help me

solve this problem." But no relief was afforded; and no investigation was ever conducted.[10]

The record shows that Mr. Flores tried to raise cognizable claims in *pro se* filings, which were ignored because Mr. Flores had appointed counsel. Meanwhile, the writ application that was filed on his behalf by counsel was unsupported by any evidentiary proffers. Mr. Flores's critical "one bite" at the habeas apple, which a death-sentenced individual is generally afforded, was essentially a nullity. *Ex parte Medina*, 361 S.W.3d 633, 642 (Tex. Crim. App. 2011). No evidentiary hearing was held to develop a record to support the conclusory claims. *See Ex parte Flores*, No. WR-64,654-01, 2006 WL 2706773 (Tex. Crim. App. 2006) (per curiam) (noting "[a]lthough a hearing was not held, the trial judge has entered findings of fact and conclusions of law and recommends that relief be denied").

In light of this history of shoddy representation, it is unsurprising that the trial court failed to recommend habeas relief or that the claims were later summarily denied by the CCA. *Ex parte Charles Don Flores*, WR-64654-01, 2006 WL 2706773 (Tex. Crim. App. Sept. 20, 2006).

Mr. Flores's case then moved into federal court. But, unfortunately, he again experienced remarkable bad luck. When his federal petition was filed on March 24,

[10] The facts regarding the representation that Mr. Flores received during his initial state habeas proceeding are recounted in several pleadings filed in federal habeas proceedings. *See Flores v. Quarterman*, Cause No. 3:07-CV-413-M (N.D. Tex.).

2008, the Supreme Court had not yet clarified that, as a matter of equity, state post-conviction counsel's ineffectiveness could, in some circumstances, excuse a procedural bar to defaulted claims. The cases that announced that rule, *Martinez* and *Trevino*, were not decided until 2012 and 2013, respectively. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) (finding that a procedural default in state habeas would not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if counsel in the state post-conviction proceeding had also been ineffective). Solely because he was forced to file his federal habeas petition before the Supreme Court had decided that equity demanded that persons such as Mr. Flores should not be penalized in federal court for inadequate state post-conviction representation, Mr. Flores was unable to raise all of his constitutional claims in federal habeas review.

After efforts to try to get his habeas claims heard on the merits failed, the State sought and obtained a date for Mr. Flores's execution. Then, on May 19, 2016, relying on a statute enacted in 2013, Mr. Flores filed a subsequent application for a writ of habeas corpus, under Article 11.073 of the Texas Code of Criminal Procedure. Article 11.073 provided a vehicle to challenge the science the State had used to argue for the reliability of the memory of the only purported "eyewitness" who claimed at trial to place him outside of the crime scene. Mr. Flores's new-science claim arises from an in-court identification made by Jill Barganier, who,

after being hypnotized by the police, claimed thirteen months later to be able to identify Mr. Flores as one of two men she had seen, at 6:45 a.m., before the sun came up at 7:25 a.m., on January 29, 1998, through her mini-blinds, getting out of a Volkswagen that had pulled into the driveway next door to where the victim, Elizabeth Black, was later found murdered. *See* Subsequent Writ App. at pp. 8-12.

Just five days before he was scheduled to be executed on June 2, 2016, the CCA found that his new-science claim satisfied Article 11.071, section 5, stayed Mr. Flores's execution, and remanded his new-science claim to this Court for adjudication on the merits. *Ex parte Flores*, WR-64,654-02 (Tex. Crim. App. May 27, 2016).

At that time, no judge was presiding over the 195th district court. The Honorable Hector Garza assumed the bench in January 2017.

On October 4, 2017, a hearing was held on Applicant's Motion for Disclosure of Favorable and Impeachment Evidence. 3 EHRR. Mr. Flores outlined the reasons to suspect that *Brady* material existed that had not yet been disclosed. 3 EHRR 7-17. The State insisted that there was nothing to disclose and then asked that most of the witnesses on Mr. Flores's witness list be struck. The Court granted the State's request, radically truncating the number of witnesses that Mr. Flores was permitted to call. 3 EHRR 44.

On October 10, 11, and 16, 2017, this Court held an evidentiary hearing in this proceeding to enable adjudication of the new-science claim. *See* 4-6 EHRR.

At the beginning of the hearing, the State's counsel asked the Court to take "judicial notice of the record from [Mr. Flores's] original writ proceeding[.]" 4 EHRR 10. Mr. Flores's counsel objected to the extent that the State intended to rely on evidentiary proffers attached to pleadings in that previous writ proceeding as substantive evidence in this subsequent writ proceeding, since no evidentiary hearing had been conducted in the original writ proceeding and nothing was ever "admitted" into evidence during a hearing of any kind. 4 EHRR 10-11; *see also Ex parte Flores*, No. WR-64,654-01, 2006 WL 2706773 (Tex. Crim. App. 2006) (per curiam).

On December 11, 2017, applicant's counsel filed a Memorandum of Law Regarding the Proper Scope of Judicially Noticed Materials, explaining that "judicial notice" is a legal term of art defined in the Texas Rules of Evidence that cannot be used to treat as settled fact the substance of highly contested affidavits never subjected to adversarial testing—as the State was urging the Court to do. Moreover, those materials were never before the jury in the underlying trial and thus could not be construed as "corroborating evidence" relevant to deciding any element of the claim at issue in this subsequent writ proceeding.

On December 18, 2017, Mr. Flores filed his Proposed FFCL. *See* APPENDIX A. Both sides presented closing arguments. 7 EHRR. Later that same day, the State filed its Proposed FFCL.

Over nine months later, on October 4, 2018, undersigned counsel for Mr. Flores was served with the Court's signed FFCL and Order recommending that relief be denied. The Court's FFCL are virtually identical to the State's Proposed FFCL except that the Court's FFCL, in executing the cut-and-paste function, accidentally leave out numbered paragraphs (53)-(62) found on pages 23-25 of the State's proposal.[11] The Court also deleted the following sentence from the State's proposed Order: "The Court adopts and incorporates the above proposed findings of fact and conclusions of law submitted by the State in *Ex parte Charles Don Flores*." Although this sentence was omitted from the Court's Order at page 73, a comparison of the State's full proposal and the Court's FFCL shows that they are otherwise essentially the same.

These objections and this motion to withdraw the Court's FFCL follow and are timely filed. *See* TEX. R. APP. P. 73.4(b)(2).

[11] The inference that this omission was an accident is supported by the fact that the numbered paragraphs in the Court's FFCL jump from (52) at the bottom of page 23 to (63) at the top of page 26 and do not include pages numbered 24-25. This seemingly accidentally omission includes details from the State's summary of the testimony from the *Zani* hearing held at trial about the hypnosis session at the center of Mr. Flores's new-science claim.

ARGUMENT IN SUPPORT OF OBJECTIONS

In its FFCL, the Court erroneously concludes that Mr. Flores failed to satisfy his burden under article 11.073. The CCA cannot defer to this conclusion because, for each of the following reasons, the factfinding is unreliable.

I. Mr. Flores Objects to the Court's Mischaracterization of His New-Science Claim and to the Misrepresentation of the Law Relevant to the "Science" of Forensic Hypnosis.

A. The Court's FFCL mischaracterize Mr. Flores's new-science claim.

As the Court's FFCL note in passing, Mr. Flores pled in his subsequent application that the State had obtained his conviction by relying "on scientific evidence regarding hypnosis and memory that has since been discredited," and that "[s]cientific knowledge now confirms that the scientific principles on which the State relied at trial actually increase the likelihood of critical error and wrongful convictions, casting a large shadow of doubt on Barganier's identification of Flores." AppX42; FFCL at p. 15, ¶6 (emphasis added). Moreover, Mr. Flores's new-science claim is based on "scientific studies since the trial" that firmly establish "hypnosis as an unreliable memory recovery technique." AppX39-40; AppX5 at pp. 20-21. In other words, the claim at issue in this case was plainly pled as involving a change in the scientific understanding of the relation among hypnosis, memory, and eyewitness identifications.

Mr. Flores's new-science claim was and remains a challenge to the scientific expertise that the State relied on at trial to vouch for the reliability of Ms. Barganier's memory following a highly suggestive hypnosis session conducted at the police station, which encouraged her to feel confident about her ability to identify Mr. Flores for the first time over a year later as one of two men she had briefly glimpsed get out of a strange car in the pre-dawn hour on January 29, 1998.

Despite the clarity of the pleading, the State argued throughout this proceeding that Mr. Flores's claim does not implicate the science of eyewitness identification—as if the hypnosis issue had nothing to do with Ms. Barganier's subsequent "more than 100 percent" confidence, thirteen months later, that she could accurately identify Mr. Flores. 36 RR 115-16. That argument is baseless. The only reason the hypnosis issue has any legal significance is because it was part of the sequence of events that ultimately culminated in a purported eyewitness identification, and that identification was the critical evidence the State used to convict Mr. Flores of capital murder. *See* 36 RR 277-278 (defense made a running objection to Ms. Barganier's testimony, which the trial court granted, expressly stating: "Yes, you may have that. I consider you object to any of her testimony involving the identification of your client.").

The hypnosis session conducted by a police officer and law enforcement's manner and means of obtaining an identification from the hypnotized subject are

inseparable issues. That is why the Court seemed to recognize that it would be grossly unfair to deny Mr. Flores the chance to put on his eyewitness identification expert, Dr. Margaret Kovera, during the evidentiary hearing. 5 EHRR 33-39 (argument from counsel about the relevance of Dr. Kovera's testimony and the Court's ruling permitting her to testify).

But the FFCL that the Court has now signed ignore the fact that the State's baseless relevance argument was *rejected. See* FFCL at p. 69, (336)-(339). The FFCL ignore the plain relevance of all of the expert testimony regarding the science of memory and the factors, including hypnosis, that can adversely affect the reliability of eyewitness identifications and which likely rendered Ms. Barganier's "memory" a fiction. Mr. Flores provided this expert testimony through Dr. Margaret Kovera, a Professor of Psychology and Presidential Scholar at John Jay College of Criminal Justice at the City University of New York. 5 EHRR 8-9; AppX4. She is a practicing scientist engaged in empirical research, collecting and analyzing data in the field of memory and eyewitness identification. 5 EHRR 9.

How can the Court logically (or fairly) conclude in its FFCL that "Dr. Kovera's testimony concerning eyewitness identification procedures is not relevant" when the Court overruled the State's relevance objections and its attempt to prevent her from testifying during the evidentiary hearing? *Compare* FFCL at p. 70, (339) *with* 5 EHRR 38. "Relevance" is a threshold concept that is to be broadly construed

to achieve the ends of justice. *See* TEX. R. EVID. 401; *see also* TEX. R. EVID. 102 (directing that "[t]hese rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."). It is also a basic legal principle that, once admitted, evidence enjoys an equal status to other admitted evidence with probative value to support the judgment in favor of the party offering it. *Chambers v. State*, 711 S.W.2d 240, 245-47 (Tex. Crim. App. 1986).

As discussed more fully below, the Court's FFCL are devoid of the evidence amassed in this proceeding as to: (a) what Ms. Barganier purportedly saw that led to, and followed from, the hypnosis session; (b) the contemporary scientific understanding of the importance of these factors in assessing the vulnerability of Ms. Barganier's memory to hypnosis; or (c) how numerous scientific studies have now demonstrated the near impossibility of guarding against the dangers of hypnosis to manipulate, as opposed to recover, memories. The Court's failure to include this key substantive information in its FFCL is error reflecting a distortion of the new-science claim that was pled and in support of which ample evidence was adduced.

B. The Court's FFCL inaccurately and incompletely characterize the law regarding forensic hypnosis.

The Court's FFCL do not fully or accurately report the relevant legal history showing how the law has lagged behind science in the field of forensic hypnosis and

how it has recently begun to catch up in jurisdictions around the country. *See* FFCL at pp. 16-20.

The net result is a deceptively static and inaccurate portrait of the law and science that the CCA relied on in deciding the seminal forensic hypnosis case *Zani v. State*, 758 S.W.2d 233 (1988). The Court's FFCL fail to address how that foundation has shifted dramatically since the CCA reaffirmed its *Zani* decision in *State v. Medrano*, 127 S.W.3d 781 (Tex. Crim. App. 2004).

Medrano was decided just five years after Mr. Flores's trial, which was the last time the CCA considered the "science" of forensic hypnosis, and then only incidentally. To suggest, as the Court's FFCL do, that the law announced in *Zani* and then affirmed in *Medrano* controls here is to completely miss the mark as to the nature of Mr. Flores's new-science claim and of an Article 11.073 claim generally. The degree to which *Zani* and *Medrano* are out of step with contemporary scientific understanding and how the law has evolved to try to catch up with science is illustrated in the legal history that the Court's FFCL leaves out.[12] That the CCA has yet to revisit the scientific assumptions underpinning *Zani* and *Medrano* is precisely why Mr. Flores has had to rely on Article 11.073 to bring the junk-science issue to the Court's attention. Article 11.073 exists to permit an applicant like Mr. Flores to

[12] Mr. Flores provided a history of the law on forensic hypnosis in his Proposed FFCL, which this Court disregarded. *See* APPENDIX A at pp. 16-27.

endeavor to prevent an execution based on a wrongful conviction enabled by an "eyewitness identification" that arose from what are now understood as highly suggestive processes, most notably, forensic hypnosis. *See* TEX. CODE CRIM. PROC. art. 11.073(a) (permitting claims based on "scientific evidence that: (1) was not available to be offered by a convicted person at the convicted person's trial; or (2) contradicts scientific evidence relied on by the state at trial.").

1. *Law relevant to forensic hypnosis testimony up through 2000*[13]

For many decades, hypnotism was not recognized as a subject susceptible to scientific inquiry at all. *See, e.g., People v. Ebanks*, 49 P. 1049, 1053 (1897) ("the law of the United States does not recognize hypnotism"). Thereafter, "hypnosis has taken a rollercoaster ride through the courts, finding favor in some states, uncertainty in others, and complete disfavor in still others." *Stokes v. State*, 548 So.2d 188, 190 (Fla. 1989). As one court wrote in 2002, "[p]erhaps no issue in the law of evidence has been more hotly debated over the past twenty-five years than the admissibility of testimony by a witness who has been previously subjected to hypnotism." *Roark v. Commonwealth*, 90 S.W.3d 24, 29 (Ky. 2002).

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[13] Mr. Flores's initial writ application was filed on September 13, 2000. But as explained below, the relevant date in terms of determining whether his new scientific evidence could have been ascertained through reasonable diligence, per Article 11.073(c), should be the time of trial (1999) since the vehicle for bringing the instant subsequent application did not exist until 2013. But whether the Court relies on 1999 or 2000, Mr. Flores discharged his burden. He established both that the relevant scientific evidence (1) was not available to be offered at the time of his trial and (2) contradicts scientific evidence relied on by the State at trial—although the statute only requires (1) *or* (2). *See* TEX. CODE CRIM. PROC. art. 11.073(a) (1) & (2).

In 1987, the Supreme Court of the United States rejected the notion of a *per se* exclusionary rule with respect to post-hypnosis testimony. *See Rock v. Arkansas*, 483 U.S. 44 (1987). The Supreme Court in *Rock* did not praise, defend, or recommend the use of hypnotically enhanced testimony; the issue in that case was not whether hypnosis is a legitimate memory-retrieval tool but whether a defendant's Fifth, Sixth, and Fourteenth Amendment rights to present his own testimony could be trumped by a state rule of evidence. But the Supreme Court did note that "there is no generally accepted theory to explain the phenomenon [of hypnosis], or even a consensus on a single definition of hypnosis[, t]he use of hypnosis in criminal investigations . . . is controversial, and the current medical and legal view of its appropriate role is unsettled." *Id.* at 59 (internal citations omitted). The Supreme Court declined to adopt any rule regarding the admissibility of hypnotically enhanced testimony, but recognized that a state "would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony." *Id.* at 61. The Supreme Court also pointed out that, at that time, "scientific understanding of the phenomenon and of the means to control the effects of hypnosis [was] still in its infancy." *Id.* (emphasis added). This was in 1987. The Supreme Court explained its holding by noting that there was simply not enough

evidence to definitively determine whether hypnotically enhanced testimony was inherently unreliable.[14] *Id.*

Following *Rock*, various jurisdictions considered the issue of the extent to which hypnosis could be used "as a means for 'refreshing' memory reliable enough to be vetted in the criminal adversarial process." *Zani*, 758 S.W.2d at 237. Texas took up the issue in the *Zani* case.

In *Zani*, the CCA acknowledged "the four-prong dangers of hypnosis," identified as:

- "hypersuggestibility,"
- "loss of critical judgment,"
- "confabulation," and
- "memory cementing."

Id. at 243. The CCA also acknowledged that there were then psychologists debating whether there were safeguards that could prevent the occurrence of the loss of critical judgment and confabulation (the process of unconsciously filling in gaps in memory) already associated with hypnosis. For instance, the CCA cited authority demonstrating that some experts argued that safeguards "cannot prevent the subtle

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[14] The holding in *Rock* was that no state evidentiary rule, whatever it may be, could impinge on a defendant's own right to testify and present evidence in support of his case; and since Arkansas's *per se* rule excluding all posthypnosis testimony infringed on the right of a defendant to testify on his own behalf, it had to give way. *See Rock*, 483 U.S. at 62.

and unobserved suggestions that create false memory; they cannot prevent the hardening of false memory; they may in fact increase the distortion level and mislead the jury into believing false memory." *Id.* at 242 (quoting Belasic, *Trial by Trance: The Admissibility of Hypnotically Enhanced Testimony*, 20 COLUM. J.L. SOC. PROB. 237, 272 (1986)).

The CCA concluded, however, that the science of the day supported the conclusion that certain factors could be utilized to determine the trustworthiness of posthypnotic recall. *Zani*, 758 S.W.2d at 243-44. These factors are:

> the level of training in the clinical uses and forensic applications of hypnosis by the person performing the hypnosis; the hypnotist's independence from law enforcement investigators, prosecution, and defense; the existence of a record of any information given or known by the hypnotist concerning the case prior to the hypnosis session; the existence of a written or recorded account of the facts as the hypnosis subject remembers them prior to undergoing hypnosis; the creation of recordings of all contacts between the hypnotist and the subject; the presence of persons other than the hypnotist and the subject during any phase of the hypnosis session, as well as the location of the session; the appropriateness of the induction and memory retrieval techniques used; the appropriateness of using hypnosis for the kind of memory loss involved; and the existence of any evidence to corroborate the hypnotically-enhanced testimony.

Id. at 243-44.

The CCA in *Zani* also required trial courts to consider the presence or absence of overt or subtle cuing or suggestion of answers during the hypnotic session. *Id.*

Zani further required a case-by-case, totality-of-the-circumstances approach similar to the approach adopted by other jurisdictions at that time. The *Zani* factors

were adopted from the Colorado Supreme Court's decision in *People v. Romero*, 745 P.2d 1003, 1017 (Colo. 1987). *See Zani*, 758 S.W.2d at 243-44 (citing *People v. Romero*, 745 P.2d at 1017). In *Romero*, the Colorado Supreme Court had looked to factors adopted by several other jurisdictions, including the New Jersey Supreme Court. *See State v. Hurd*, 432 A.2d 86, 95-97 (N.J. 1981) (hereafter "*Hurd*") (holding that "testimony enhanced through hypnosis is admissible in a criminal trial if the trial court finds that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory."); *see also Romero*, 745 P.2d at 1017 (citing, *inter alia*, *Hurd*, 432 A.2d at 95-96); *see also Romero*, 745 P.2d at 1025 n.3 (Kirshbaum, J., concurring in part and dissenting in part) ("the majority's list of suggested factors for the trial court to consider is apparently patterned after the *Hurd* test"); Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1, 37 n. 186 (1991) (explaining that the *Zani* court "adopted a version of *Hurd* for all hypnotically enhanced recall").

In addition to taking inspiration from *Romero* and *Hurd* in crafting the *Zani* factors, the CCA adopted the same standard of proof for admissibility of hypnotically enhanced testimony established in *Hurd*. *See State v. Medrano*, 127 S.W.3d 781, 790 (Tex. Crim. App. 2004) (Cochran, J., concurring) (noting that the "clear and convincing" standard of proof was established in *Zani* "without reliance

upon any Texas statute, rule, or case authority"); *see also id.* at 790, n. 11 (Cochran, J., concurring) (pointing out the "clear and convincing" standard of proof was required by the New Jersey Supreme Court in *Hurd*). The *Hurd* court viewed hypnosis as "an accepted medical tool for . . . memory recall." *Id.* at 90. Although *Hurd* acknowledged that "hypnosis . . . is also prone to yield sheer fantasy, willful lies, or a mixture of fact with gaps filled in by fantasy[,]" *id.* at 92, the *Hurd* court, like the *Zani* court, nevertheless concluded that, if "carefully controlled," hypnosis could be "generally accepted as a reliable means of obtaining accurate recall." *Id.* at 93.[15]

In *Zani*, the CCA held that the proponent of "posthypnotic testimony" had to demonstrate, by clear and convincing evidence, that the "procedural safeguards" had been utilized such that the testimony was trustworthy. 758 S.W.2d at 243.

Importantly, in *Zani* itself, the CCA did not conclude that the "the four-prong dangers of hypnosis" had been successfully guarded against in that particular case. Yet that is what this Court's FFCL imply. *See* FFCL at p 53 (reciting facts of the hypnosis session and subsequent eyewitness identification at issue in *Zani* and incorrectly suggesting that those circumstances were approved by the CCA).

[15] One dissenter remained openly skeptical: "In sum, this Court should hold that trial courts of this State may not allow juries of this State to convict accused persons on what many, including myself, consider at this time to be nothing less than irrelevant 'gypsy-voodoo' evidence." *Zani*, 758 S.W.2d at 249 (Teague, J., dissenting).

Contrary to this Court's FFCL, the CCA in *Zani* made no findings about whether the hypnosis session underlying that case had been appropriate and instead remanded for further proceedings in light of its decision. *Id.* at 235 ("Finding that in some instances hypnotically enhanced testimony may be admissible, we will remand the cause to the court of appeals to determine admissibility of [hypnotized witness's] testimony in accordance with the standard we set out today.").

Subsequently, in 2004, five years after Mr. Flores's trial, the CCA upheld the *Zani* standard in *State v. Medrano*, 127 S.W.3d 781, 787 (Tex. Crim. App. 2004). The *Medrano* court, however, did not revisit the scientific validity of hypnotically enhanced testimony or consider whether there had been any advances in scientific understanding, but simply whether the *Zani* factors would still govern the admissibility of hypnosis testimony outside of the *Frye*-admissibility context. *Id.* ("[O]ur opinion in *Zani* exhaustively analyzed both the dangers and solutions inherent in hypnotically enhanced testimony."). At that time, the CCA merely reaffirmed the *Zani* standard as "the appropriate framework to protect against the four-prong dangers of hypnosis . . . [it] minimizes these dangers and, consequently, ensures the reliability of the testimony." *Id.* at 787. "[B]ecause *Zani* is faithful to the primary objective of ensuring reliability in the admission of scientific evidence[,]" the CCA held, "*Zani* remains the standard to be applied by Texas trial courts in

assessing the reliability and determining the admissibility of hypnotically enhanced testimony." *Id.*

2. *Changes in law relevant to forensic hypnosis testimony since 2004*

The Court's FFCL are utterly silent about the changes in the law with respect to forensic hypnosis since the CCA decided *Zani* in 1988 and then *Medrano* in 2004. But evidence and argument of this important shift in the legal landscape affecting the science at issue here was presented during the evidentiary hearing and briefed to this Court. *See* APPENDIX A at 16-27; 6 EHRR 108-114. For instance, the Court was informed during the evidentiary hearing, over the State's objection, that the New Jersey Supreme Court had reversed the *Hurd* decision after *Medrano* was decided; and *Hurd* was a key precedent shaping *Zani*. *See State v. Moore*, 902 A.2d 1212 (N.J. 2006); *see also Medrano*, 127 S.W.3d at 790.

The Court's FFCL ignore *Moore*: which, seven years after Mr. Flores's trial, expressly overruled *Hurd* because of intervening advances in scientific understanding. In *Moore*, the New Jersey Supreme Court stated that it was "no longer of the view that the *Hurd* guidelines can serve as an effective control for the harmful effects of hypnosis on the truth-seeking function that lies at the heart of our system of justice." *Moore*, 902 A.2d at 1213. Citing expert testimony presented at the trial level and the "substantial body of case law" that had developed since *Hurd*, the *Moore* court acknowledged that the *Hurd* approach had, in the interim, "been

challenged by the experts and rejected by the majority of courts considering the issue" due to concerns about the "inherent unreliability of hypnotically refreshed memory" and the "efficacy of the [*Hurd*] guidelines in controlling the adverse impacts of hypnosis." *Id.* at 1227.

When *Hurd* was decided, its guidelines had been supported and in fact shaped by a leading expert in the field, Dr. Martin Orne. *Hurd*, 432 A.2d at 96. At that time, "only a few courts had held such testimony *per se* inadmissible in a criminal trial based on a finding that hypnosis was not generally accepted by experts in the field[,]" *Moore*, 902 A.2d at 1218 (internal citations omitted). Although *Moore* notes that "[t]he difference between the testimony of the experts at the time *Hurd* was decided, and the experts who testified on remand in this case [was] largely a difference in degree, not substance[,]" the court described that difference as "telling." *Id.* at 1227. Indeed, that difference was enough to make the *Moore* court unequivocal in its rejection of hypnotically enhanced testimony as a reliable source of evidence. The *Moore* court made key findings that should have informed this Court's reasoning too:

- "[T]he cumulative import of the testimony below, the scientific literature, and the case law from other states is that there is at this point no way to gauge the reliability of hypnotically induced testimony." *Id.* at 1227;
- "[T]here is a lack of empirical evidence supporting the popular notion that hypnosis improves recall." *Id.* at 1228;

- "The theory that hypnosis is a reliable means of improving recall is not generally accepted in the scientific community." *Id.* at 1229.

The Court's FFCL do not mention *Moore* or the change in scientific understanding by the very scientist (Dr. Orne) whose work had given credibility to the *Zani* factors. The Court's FFCL only quote Dr. Spiegel's oblique reference to Dr. Orne, whose significant change in perspective was based on intervening scientific studies discussed in *Moore* and in Dr. Lynn's testimony before this Court. *See* FFCL at p. 59, (275); *Moore*, 902 A.2d at 1221-22; 6 EHRR 116-17.

The Court's FFCL make no mention of how the *Moore* court found that "more recent studies reaffirm[ed] and strengthen[ed] earlier understandings about how hypnosis affects both memory and attitude." *Id.* at 1227. Specifically, the *Moore* court noted that "the testifying experts and the scientific literature are consistent in their description of the effects of hypnosis—suggestibility, confabulation or 'gap filling,' pseudomemory or 'false memory,' memory hardening or 'false confidence' in one's recollections, source amnesia, and loss of critical judgment[,]" and that, by contrast, the public erroneously believes that "hypnosis [is] a powerful tool to recover accurate memories." *Id.* at 1228. Furthermore, the *Moore* court found that there had been "a shift in expert opinion suggesting that the problems associated with the use of hypnotically refreshed testimony are less amenable to correction through controls on the hypnotic process." *Id.* at 1227.

In sum, the *Moore* decision responded to the fact that "scientific understanding of the phenomenon and of the means to control the effects of hypnosis" is no longer "in its infancy." *Rock*, 483 U.S. at 61. Rather, a substantial body of scientific studies and literature has developed since *Hurd* was decided in 1981 and *Zani* was decided in 1988, indicating that hypnosis is not conducive to producing accurate recall nor are there safeguards that can successfully guard against its dangers—none of which is acknowledged in the Court's FFCL.

An expert who testified for the State in *Moore* against a *per se* ban on the admissibility of hypnotically induced testimony was Dr. David Spiegel—the State's expert in this proceeding. *Moore*, 902 A.2d at 124. According to *Moore*, Dr. Spiegel had admitted "that memory is 'reconstructive' and thus cannot be 'played back' like a videotape." *Id.* Dr. Spiegel further "opined that hypnosis does not significantly affect accuracy, but does tend to increase confidence, with the result that 'people who have been hypnotized tend to think that what they [a]re reporting is more accurate, even though the actual rate of accuracy may not have increased much or at all.'" *Id.* Dr. Spiegel also "acknowledged identifiable problems with forensic hypnosis, such as confabulation and memory hardening, which can lead to difficulty in cross-examination." *Id.* Yet, as the *Moore* court reported, "in Dr. Spiegel's view, those problems do not significantly differ from problems related to memory generally." *Id.* The New Jersey Supreme Court then noted that Dr. Spiegel's opinion

reflected "the majority approach in *Hurd*, *supra*, 86 N.J. at 538, 541-43, 432 A.2d 86." *Id.* But *Hurd* was overruled in *Moore* based on intervening advances in scientific understanding.

Another expert who testified in *Moore* as to both historical concerns about forensic hypnosis and his own contemporary scientific research was Dr. Steven Lynn—Mr. Flores's hypnosis expert in this proceeding. *Id.* at 1224; 6 EHRR 109-110. Dr. Lynn's testimony was cited in *Moore* in support of that court's decision to announce a *per se* ban on post-hypnotic testimony:

> Dr. Lynn testified that hypnotically induced testimony is not reliable and that hypnosis, in fact, has an adverse effect on accuracy. . . . In his own research, he found that cross-examination of a hypnotized individual could prove difficult or impossible "if [the] witness confidently believes that a false memory mirrors reality and has problems distinguishing pre- and post-hypnotic memories." Dr. Lynn concluded that the *Hurd* guidelines do not reduce the effects of hypnosis in respect of false confidence, confabulation, uncued errors, recall problems, and response to pseudomemory. He opined that the guidelines simply do not obviate problems [such as] the fact that the hypnotized subject enters with expectations that the procedure will be very helpful, expectations that the memories elicited will be accurate, and ... any problems in memory that may be present prior even to the implementation of hypnosis and the *Hurd* guidelines.

Id. at 1224-1225. Unlike Dr. Spiegel, Dr. Lynn's testimony in *Moore* was consistent with his testimony in this proceeding, a fact that should have mattered to this Court in assessing the relative credibility of these two experts: one of whom is a leading researcher in the field (Dr. Lynn) and one of whom does no scientific studies on hypnosis and memory but rather uses hypnosis in his medical practice for therapeutic

treatment (Dr. Spiegel). *See* 6 EHRR 237-240 (exposing inconsistencies in Dr. Spiegel's past and past testimony).

As noted above and during the evidentiary hearing, since *Moore* was decided in 2006, the CCA has not yet had an opportunity to revisit the holdings announced in *Zani* and *Medrano* or to expressly question the rationale underpinning those holdings. The CCA's decision to remand the present claim for adjudication on the merits, however, strongly signals the CCA's interest in revisiting *Zani*.

To resolve Mr. Flores's claim in his favor, this Court did not need to overrule *Zani*; it merely needed to apply Article 11.073. Article 11.073 provides the vehicle whereby this Court, like the trial court in *Moore*, could and should have looked at the evidence and concluded that the scientific premises upon which *Zani* (like *Hurd*) are based are at odds with the contemporary scientific consensus regarding the relationship between memory, hypnosis, and eyewitness identifications. Those incorrect premises are twofold. First, *Zani* assumes that certain "procedural safeguards," now known as the *Zani* factors, can be utilized during a forensic hypnosis session to prevent the "four-prong dangers of hypnosis" ("hypersuggestibility," "loss of critical judgment," "confabulation," and "memory cementing"). *Zani*, 758 S.W.2d at 243. Second, *Zani* assumes that, if courts find that the totality of the circumstances suggests that the procedural safeguards were followed in a given forensic hypnosis session, then a court may conclude that an

eyewitness's post-hypnosis testimony about what she remembers is trustworthy and thus admissible. *Id.* at 244. As the evidence adduced in this proceeding shows, these premises have not withstood scientific study. Acting like *Moore* does not exist is indefensible.[16] Mr. Flores objects to these glaring omissions in the Court's FFCL.

II. Mr. Flores Objects to the Court's Distortion of the "Science" the State Relied on at Trial in 1999 and the Omission of Contemporary Scientific Critique of that Trial Testimony.

In 1999, during the *Zani* hearing at issue in this case, Dr. George Mount was offered and accepted as an expert in investigative and forensic hypnosis. 4 EHRR 215-16. Dr. George Mount was and is a clinical psychologist with a Ph.D. with extensive experience conducting hypnosis sessions for law enforcement. His resume was offered into evidence at trial. *See* State's Trial X86.

A. The Court's FFCL do not adequately describe the problematic "science" upon which the State relied at trial to obtain Mr. Flores's conviction, which his 11.073 claim attacks as wrong.

The scientific perspective at issue in this case was provided by State's forensic hypnosis expert at trial: Dr. George Mount. The Court's FFCL do not fully or fairly present Dr. Mount's positions and instead muddy the water surrounding those opinions by comingling them with those of the State's contemporary rebuttal expert who did not even understood that Dr. Mount's opinions were an issue in this case.

[16] The State went so far as to object to Mr. Flores even bringing *Moore v. State* to the Court's attention. But a copy of the case was made part of the record. *See* AppX55.

Mr. Flores has not, for instance, attacked the view that hypnosis may have some therapeutic value to assist people in relaxing or in recovering from trauma or illness. Rather, his claim is that the science presented at trial about the legitimacy of a post-hypnotic eyewitness identification (on which the trial court relied in permitting Ms. Bargainer to testify) is wrong in light of the contemporary scientific understanding of the inter-play between hypnosis and memory.

1. *Dr. Mount's 1999 Testimony*

At trial, Dr. Mount testified that sufficient procedural safeguards were employed during Officer Serna's hypnosis of Ms. Barganier, and thus the "four-prong dangers of hypnosis" identified by the CCA in *Zani* were not a concern. He vouched for the "movie theater technique" that Officer Serna had used in conducting the hypnosis session. Dr. Mount noted that Officer Serna had taken a course taught by Michael Boulch, the hypnotist named in *Zani*. Dr. Mount found it sufficient that Officer Serna had "taken the course" offered by law enforcement in forensic hypnosis. 36 RR 65; AppX43. Dr. Mount did not know, or was not bothered by the fact that, the hypnosis of Ms. Barganier was Officer Serna's one and only time to conduct such a procedure, a fact revealed during the instant proceeding. 4 EHRR 185, 240.

Dr. Mount also offered the following expert opinions back in 1999:

- A forensic hypnotist is sufficiently independent from law enforcement if he only investigated the crime scene but did not interview witnesses. 36 RR 66.

- It is not a problem for an investigator, who had knowledge of the criminal investigation and potential suspects, to be in the room during the hypnosis session. 36 RR 68.

- Using the "movie theater technique," as Officer Serna did, was common, permissible, and appropriate. 36 RR 69-70.

- Hypnosis was something that might enable Ms. Barganier to recall what she had observed. 36 RR 70.

- He saw nothing in the hypnosis session suggesting that she come to the courtroom thirteen months later and positively identify Flores. 36 RR 72-73.

- He saw no problem with the passage of time between the hypnosis session and the identification in this case in light of *Zani*. 36 RR 73.

- He believed that Ms. Barganier's memory of what she had seen "was there" and something triggered it to surface thirteen months later. 36 RR 73.

- He disagreed that hypnosis is inherently suggestive. 36 RR 79.

- He did not believe that Jill Bargainer showed a desire to please the hypnotist because she disagreed with him about some things. 36 RR 65.

The trial court accepted the State's position that Ms. Barganier's eyewitness identification was reliable based on assurances provided by the State's expert, Dr. Mount, and based on Officer Serna's testimony regarding their understanding of the science of hypnosis and memory. 36 RR 117-18. These assurances from the State's trial expert are what Mr. Flores's new-science claim attacks.

2. *Dr. Mount's 2017 Testimony*

During the evidentiary hearing in this proceeding, the State called Dr. Mount as a fact witness; and the Court's FFCL demonstrate that the Court credited Dr. Mount's opinions—although they contradict those of Dr. Lynn, a leading scientist, and even those of Dr. Spiegel, the State's contemporary expert. Dr. Mount initially testified that he does not disagree with any of his testimony from 1999, but, on cross-examination, he admitted that he disavows several of the opinions offered to the trial court back in 1999. 5 EHRR 146; *see also* 5 EHRR 154-160 (admitting that he had incorrectly suggested that confabulation is something one can see; that inviting someone to remember or imagine things during hypnosis can trigger false memories and increase confidence in the accuracy of what are really false memories; that Officer Serna had asked leading questions). None of the changes or nuances in his opinions are discussed in the Court's FFCL.

Dr. Mount still believes that the movie theater technique that Officer Serna used is legitimate as a memory retrieval device and testified that it is still taught to law enforcement. 5 EHRR 148, 156-57. He admitted, however, that his views about the movie theater technique are not based on any empirical research. *Id.* He personally has not done any empirical research since the 1980s; he has instead been a clinician in private practice. 5 EHRR 157.

He still claimed to believe the absurd notices that Officer Serna was sufficiently independent from law enforcement because he only investigated the crime scene and that having an investigator in the room during the hypnosis session was not a problem. 5 EHRR 155-56.

Dr. Mount admitted that the mind does not work like a videotape recorder to store memories, yet that is what Officer Serna believed at the time. Dr. Mount added that this belief was "common" among law enforcement in 1998 and 1999. 5 EHRR 154.

Dr. Mount acknowledged that he had previously testified that he did not "see" any confabulation in the hypnosis video and now admitted that one cannot "see" or otherwise test whether someone is confabulating without being inside the person's mind. 5 EHRR 154-55.

Dr. Mount testified that he believes hypnosis may have enabled Ms. Barganier to later recall what she had seen thirteen months before. 5 EHRR 158.

Dr. Mount never saw Ms. Barganier's initial statements to police so could not say whether her descriptions of what she had seen had changed by the time of, or following, the hypnosis session. 5 EHRR 159.

Dr. Mount still sees no significance in the passage of time between the event observed and the identification Ms. Barganier made. 5 EHRR 159. He did, however, admit that inviting someone to remember something can trigger a false memory and

inviting them to imagine a past event can increase confidence in the accuracy of what is actually a false memory—which is what Officer Serna did repeatedly during the hypnosis session. 5 EHRR 160; *see* AppX26.

Dr. Mount admitted that the question "Is his hair neatly trimmed?", which Officer Serna asked Ms. Barganier during the hypnosis session, was leading, especially since she had described the passenger's hair as long, wavy, and dirty—the opposite of "neatly trimmed." 5 EHRR 160. Likewise, he agreed that telling someone "You will remember" something in the future is suggestive. 5 EHRR 161. He then shared his view that physical evidence is more reliable than eyewitness testimony because memories can change and can be influenced by stress and "a lot of things." 5 EHRR 163.

Dr. Mount represents the "scientific" view that the State relied on at trial to convince the fact-finder that Ms. Bargainer should be permitted to testify about her post-hypnotic identification of Mr. Flores. The Court's FFCL fail to acknowledge how Mr. Flores established that Dr. Mount's view, as a non-research clinical psychologist who spent his career working with law enforcement, is both: somewhat inconsistent with his trial testimony in acknowledging some problems with the reliability of post-hypnotic identifications; and entirely inconsistent with the contemporary scientific understanding of those actually conducting scientific research in the fields of hypnosis, memory, and eyewitness identification.

The Court's FFCL ignore entirely the expert evidence challenging the accuracy of Dr. Mount's past and present defense of the efficacy of the forensic hypnosis performed on Ms. Barganier. And the Court did so, not because he found that Dr. Lynn's opinions, described below, were not credible. The Court simply ignores the opinions without any justification for doing so.

B. Mr. Flores presented expert testimony regarding the flaws in the scientific perspective Dr. Mount provided at trial on the State's behalf.

Dr. Steven Lynn, a leading scientist in the fields of hypnosis and forensic psychology,[17] presented expert testimony about: the flaws in the hypnosis session that law enforcement performed on Ms. Jill Barganier on February 4, 1998; the elements of the hypnosis session that made her subsequent in-court identification thirteen months later unreliable; how the scientific perspective on hypnosis has evolved and the data supporting that evolution; and concerns about using hypnosis as a forensic tool because of the inability to sufficiently guard against the four-prong dangers of hypnosis identified in the *Zani* case. 6 EHRR 7-23.

Dr. Lynn's scholarly work has been recognized with numerous awards, including the Prose Award for Professional and Scholarly Excellence, for his 2010 book The 50 Great Myths of Popular Psychology. 6 EHRR 14. That book tackles pervasive and persistent myths endorsed by the general public, including the

[17] *See* AppX7.

incorrect belief that human memory works like a video recorder and the assumption that hypnosis is a reliable means to retrieve accurate memories. 6 EHRR 16-17. This same book also describes the problem of eyewitnesses misidentifying innocent people because of inaccurate memories expressed in court with utmost confidence due to common misconceptions about how human memory works. 6 EHRR 18-19.[18]

Although the Court accepted him as an expert qualified to opine on hypnosis, memory, and pseudoscience, 6 EHRR 26-27, his critique of Dr. Mount's views are nowhere to be found in the Court's FFCL.

1. *Dr. Lynn testified about Dr. Mount's misconception of the four-prong dangers of hypnosis, identified in Zani, yet the Court's FFCL ignore this highly relevant testimony.*

Dr. Lynn testified that contemporary scientific understanding does not support the notion that procedural safeguards can be adopted so as to sufficiently reduce the dangers of hypnosis. 6 EHRR 57. Therefore, he disagrees with the expert testimony Dr. Mount provided during the *Zani* hearing back in 1999.

Dr. Lynn also disagreed with Dr. Mount's assessment of the degree to which the procedural safeguards were even adhered to during the 1998 hypnosis session:

- Dr. Lynn disagreed with Dr. Mount that Officer Serna was sufficiently trained to perform a forensic hypnosis. His hypnosis of Ms. Barganier was his first;

[18] An excerpt from his book refers to the fact that, of the 239 criminal defendants who have been freed based on DNA testing, 75 percent were convicted based on inaccurate eyewitness identification. Dr. Lynn noted that the number of wrongful convictions that had been exposed at the time of his testimony in this proceeding was up to 338. 6 EHRR 19.

and the only training he had received was through a police organization. 6 EHRR 60.

- Dr. Lynn disagreed with Dr. Mount about the "movie theater technique" that Officer Serna used in the hypnosis session. Research has shown that this technique can actually "produce a greater frequency of inaccurate memories." *Id.*

- Dr. Lynn disagreed with Dr. Mount that Officer Serna was sufficiently independent from law enforcement; he was not only a police officer but also on the team investigating this crime. 6 EHRR 60-61.

- Dr. Lynn did not see a record of all information known to the hypnotist before the session because the only records the police made were the videotape and the short form Officer Serna created afterwards. 6 EHRR 61.

- Dr. Lynn does not agree that the videotape captures "all contacts between the hypnotist and the subject" as *Zani* recommends; nor did the videotape capture the full body of the hypnotist or any of the observer (Officer Baker). 6 EHRR 62.

- Dr. Lynn disagreed with Dr. Mount that conducting the hypnosis in a police station was acceptable. Dr. Lynn opined that this setting could only have "increased the pressure on her to identify the culprit." 6 EHRR 62-63.

- Dr. Lynn disagreed with Dr. Mount that a second law enforcement agent in the room was not problematic. Dr. Lynn opined that Officer Baker's presence added "subtle pressure to come forward with information helpful to the police." Moreover, the quality of the tape was such that it is impossible to tell if Officer Baker, who knew the police's desired suspect, gave her any auditory clues or encouragement. 6 EHRR 63.

- Dr. Lynn disagreed with Dr. Mount and Officer Serna about the use of the movie theater technique. Dr. Lynn opined that this technique actually increases, not decreases, the dangers associated with hypnosis. 6 EHRR 64. The technique implied that a "documentary film" of Ms. Barganier's experiences and memories existed that she could visualize. 6 EHRR 65. Studies about the problems with this precise technique existed at the time of

the hypnosis session, but Dr. Mount was either unaware or failed to apprise the court of the controversy. 6 EHRR 65-66.

In sum, Dr. Lynn opined that Dr. Mount's 1999 testimony wrongly suggested that most of the *Zani* factors were complied with. 6 EHRR 66. He then identified other problems with the process that Dr. Mount failed to note. For instance, Ms. Barganier was not tested for her hypnotizibility beforehand, a standard practice. 6 EHRR 79.

2. Dr. Lynn testified as to how the content of the videotaped hypnosis session was a basis of his opinions, yet the Court's FFCL ignore this highly relevant testimony.

The Court's FFCL do not discuss the actual content of the hypnosis session at all or the evidence critiquing it. Dr. Lynn testified that he found Officer Serna's pre-hypnotic interview wholly inadequate. 6 EHRR 67; *see* AppX26. Ms. Barganier was only asked one question in response to which she provided minimal information. For instance, she mentioned seeing a Volkswagen Bug but did not describe the color. She described two men—but referred to both of them as "the passenger." While she mentioned that she "distinctly remembered" the hair of the first person, the hypnotist did not ask her what she remembered. 6 EHRR 69. Dr. Lynn explained that she should have been asked for "a detailed rendition of exactly what she saw" from beginning to end of the observation so that one could later evaluate the contribution of the hypnosis. 6 EHRR 67, 71.

Based on the video and Ms. Barganier's own subjective statements, Dr. Lynn believed that she had been hypnotized. 6 EHRR 79-80; 142-43. Dr. Lynn, however, found numerous aspects of the actual hypnosis session concerning. Dr. Lynn identified and explained how numerous statements made during the hypnosis session reflected the risks now associated with inducing false memories. He provided some examples:

- "you're going to be seeing a documentary, you're going to be seeing a film of the events that occurred on that day, on that morning."
- "As I said, this is your very own special theater and the theater can be decorated in any way you like."
- "The five buttons are the stop, rewind, fast forward, pause, and play button."
- "When I reach the number zero, if you could just press the play button, this play button will take us to Thursday, January 29. It's a very important day of significance."
- "Relax, take your time. You're doing fine."
- "Focus on the gentleman we call Letter A. Pan in on his face. Can you tell me what his face looks like?"
- "Try and imagine, if you will, the shape of his face, if it's round or oval or square."

6 EHRR 72-79.

Dr. Lynn also noted Ms. Barganier's eagerness to please the hypnotist and be helpful as a witness, reflected in her statement: "Did I do ok? . . . . Did I help in any

way?" He explained how this pressure to accommodate law enforcement's needs added to the risk of confabulation. 6 EHRR 78.

Dr. Lynn further noted that, although the witnesses told the court during the *Zani* hearing that nothing new had come from the hypnosis session,[19] in fact much of the information was new relative to the pre-hypnotic interview. 6 EHRR 80-82.

Dr. Lynn also identified multiple leading and suggestive statements made during the hypnosis session, contrary to Dr. Mount's expert testimony at trial that he saw no leading questions or suggestive statements of any kind:

- "You will also remember everything that you've said in this session and *you might find yourself being able to recall other things as time moves on.*"
- "You'll remember everything that was said in this interview. *And as I said, you'll be able to recall more of these events as time goes on.*"
- "Ok, oftentimes, like I told you before I brought you out, that hypnosis, uh, you might find yourself recalling things, things that might not have to do with the accident itself. You might be at home doing an everyday chore and something might come to you about that incident or anything else. It's almost a phenomenon the way that it happens, so *it's not uncommon to just remember something after the fact, after the session*."

6 EHRR 83 (emphasis added).

Instead of minimizing the risk of confabulation, Dr. Lynn concluded that, consciously or not, Officer Serna invited confabulation with the technique he used.

[19] No evidence of what Ms. Barganier had told police officers about her observation was put before the trial court during the *Zani* hearing. The police file, which includes some of that information, does not include a copy of a witness affidavit that Ms. Barganier seemingly completed and signed shortly after the crime. *See* AppX17; 4 EHRR 59.

Dr. Lynn observed that the trial testimony of both Officer Serna and Dr. Mount showed that they misrepresented or misunderstood the nature of confabulation—which is not something one can "see." 6 EHRR 84. As Dr. Lynn explained, "we cannot really determine whether someone is confabulating, nor can they, because memory is not laid down like a multisensory video or tape recorder or computer recording." 6 EHRR 90-91. Yet that is what Officer Serna believed at the time.

The Court's FFCL utterly ignore the relevant scientific evidence Mr. Flores adduced that "contradicts scientific evidence relied on by the state at trial." TEX. CODE CRIM. PROC. art. 11.073(a)(2). Mr. Flores objects.

III. Mr. Flores Objects to the Court's Failure to Acknowledge the Relevant Evidence Mr. Flores Amassed During This Proceeding Showing Significant Changes in the Relevant Science Since the Time of Mr. Flores's Trial.

As Mr. Flores freely acknowledged, the debate within the scientific community about the risks associated with forensic hypnosis were discussed by courts in cases like *Hurd*, *Romero*, and *Zani* before his trial. But the State's, and now the Court's position, that "nothing new" has happened since the 1980s and 1990s is patently wrong.[20] There have been considerable scientific advances that have now

[20] Importantly, the State's retained expert, Dr. David Spiegel, is a medical doctor, not a cognitive psychologist; he uses hypnosis as a therapeutic tool. He is not an expert who has conducted laboratory studies on the effect of hypnosis on memory in recent decades. 6 EHRR 158-60; 162-63. Also, his concept of hypnosis is so broad as to be meaningless. He testified that he believes people are routinely "self-hypnotizing" while, for instance, watching movies or playing sports. 6 EHRR 221. Dr. Spiegel showed that he had little relevant experience in the scientific field of assessing the effect of hypnosis on the accuracy of memory—the subject of this proceeding.

led to a near consensus in the field of cognitive psychology that forensic hypnosis is so problematic that there is no way to guard against the "dangers" the CCA identified in *Zani*. *See* 6 EHRR 23, 56, 114, 117-18; 5 EHRR 55-58; AppX5.

With *Zani*, decided in 1988, the Texas courts followed the lead of other jurisdictions that accepted the representations of experts, like Dr. Martin Orne, who argued that certain procedural safeguards could be used to reduce the risks associated with hypnosis, which are hypersuggestibility, loss of critical judgment, confabulation, and memory cementing. *Zani*, 758 S.W.2d at 243.

Since that time, not only has Dr. Orne changed his position, but numerous studies have advanced the understanding of how hypnosis is associated with the risk of inducing false memories and inflated confidence in the accuracy of such "memories." This is a pronounced change from the consensus among clinical psychologists in the 1970s and 1980s. Back then, as Dr. Lynn explained during the evidentiary hearing, psychologists had great confidence that hypnosis could be used effectively as a tool to recover memories. 6 EHRR 29-30. By the mid-1980s, scientists, like Dr. Lynn, began conducting laboratory studies that, to Dr. Lynn's surprise, revealed concerns about the use of hypnosis to recover accurate memories. As a result of his early findings, Dr. Lynn decided to devote his research to the study

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While hypnosis may be valid as a clinical or therapeutic tool, in the way that Dr. Spiegel uses it, the claim at issue in this proceeding is about the empirical studies showing that hypnosis can no longer be viewed as a reliable forensic tool.

of hypnosis and memory, conducting numerous laboratory studies over the next four decades. 6 EHRR 30-33.

A. The Court's FFCL ignore all of the evidence regarding scientific studies that have advanced the understanding of hypnosis, memory, and eyewitness identification that are part of the record.

Relevant scientific scholarship and studies, published after 1999 when Mr. Flores was tried, include the following relevant research cited in the sworn affidavit of Dr. Steven Lynn and that reflect the shift in scientific understanding since Mr. Flores's trial:

- Lynn, S.J., Neuschatz, J., Fite, R., & Rhue, J.R., *Hypnosis and Memory: Implications for the Courtroom and Psychotherapy*, Memory, Suggestion, and the Forensic (2001) (suggesting implications of memory research on accuracy of courtroom testimony);

- Newman, A.W., & Thompson, W., *The Rise and Fall of Forensic Hypnosis in Criminal Investigation*, Journal of American Psychiatry and Law (2001) (identifying pitfalls associated with forensic hypnosis);

- Alvarez, C.X., & Brown, S.W., *What People Believe about Memory Despite the Research Evidence*, The General Psychologist (2002) (demonstrating that a considerable portion of the American public believes the brain permanently stores accurate records of memories);

- Scorbia, A., Mazzoni, G., Kirsch, I., Milling, L.S., *Immediate and Persistent Effect of Misleading Questions and Hypnosis on Memory Reports*, Journal of Experimental Psychology (2002) (finding that hypnosis and misleading questions significantly increase memory errors, with misleading questions producing more errors than hypnosis);

- Neuschatz, J., Lynn, S.J., Benoit, G., & Fite, R., *Hypnosis and Memory Illusions: An Investigation Using the Deese/Roediger Paradigm*, Imagination,

Cognition, and Personality (2003) (finding no support for the proposition that hypnosis is an appropriate memory enhancement procedure);

- Lampinen, J.M., Odegard, T.N., & Bullington, J.L., *Qualities of Memories for Performed and Imagined Actions*, Applied Cognitive Psychology (2003) (finding that false memories are qualitatively different from memories of real events);

- Webert, D.R., *Are the Courts in a Trance-Approaches to the Admissibility of Hypnotically Enhanced Witness Testimony in Light of Empirical Evidence*, American Criminal Law Review (2003) (finding that there is no consensus amongst contemporary scientific data and judicial approaches to the admissibility of hypnotically enhanced testimony);

- Smith, S.M., Stinson, V., & Prosser, M.A., *Do They All Look Alike? An Exploration of Decision-Making Strategies in Cross-Race Facial Identifications*, Canadian Journal of Behavioural Science (2004) (discussing the variable accuracy of cross-race and same-race identifications in regards to impacting memory clarity, finding that race did impact reported clarity of respondents);

- Krackow, E., Lynn, S.J., & Payne, D.G., *The Death of Princess Diana: The Effects of Memory Enhancement Procedures on Flashbulb Memories*, Imagination, Cognition, and Personality (2005) (explaining results of experiments showing that recall of memory was more accurate when hypnosis was not used);

- Mazzoni, G., & Lynn, S.J., *The Use of Hypnosis in Eyewitness Memory: Past and Current Issues*, Handbook of Eyewitness Psychology: Volume 1: Memory for Events (2006) (finding that hypnosis did not compromise memory but did not improve memory recall either);

- Schmechel, R., et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, Jurimetrics (2006) (demonstrating that jurors generally have a tenuous grasp on how memory works, resulting in a belief that a witness on the stand is effectively narrating a video recording of events that had been captured perfectly in their memory);

- Scorbia, A., Mazzoni, G., Kirsch, I., *Effects of Misleading Questions and Hypnotic Memory Refreshment on Memory Reports: A Signal Detection Analysis*, International Journal of Clinical and Experimental Hypnosis (2006) (finding that, where individuals expect that hypnosis will increase the volume and accuracy of their memories, this expectation increases motivation to search for memories that can lead to imagined or vaguely recalled events);

- Clifasefi, S.L., Garry, M., & Loftus, E., *Setting the Record (or Video Camera) Straight on Memory: The Video Camera Model of Memory and Other Memory Myths*, Tall Tales About the Mind & Brain: Separating Fact from Fiction (2007) (presenting an overview of eyewitness memory research and challenging the persistent video-camera model of memory);

- Wagstaff, G.F., *Hypnosis and the Law: Examining the Stereotypes*, Criminal Justice and Behavior (2008) (demonstrating that laypeople do not understand hypnosis, and most professionals think that hypnosis should not be used because of these popular misconceptions, ultimately recommending changing hypnosis terminology);

- Sharman, S.J., & Scoboria, A., *Imagination Equally Influences False Memories of High and Low Plausibility Events*, Applied Cognitive Psychology (2009) (finding that imagining events made the experiment's subjects more confident that those events actually occurred, regardless of the plausibility of the event);

- Lilienfeld, S., Lynn, S.J., Ruscio, J., & Beyerstein, B., *Myth #12: Hypnosis is Useful for Retrieving Memories of Forgotten Events*, 50 Great Myths of Popular Psychology: Shattering Widespread Myths and Misconceptions About Human Behavior: Second Edition (2010) (dispelling the common misconception that hypnosis eases the ability for people to recall forgotten events);

- Brewer, N., & Wells, G.L., *Eyewitness Identification. Current Directions in Psychological Science*, Current Directions in Psychological Science (2011) (explaining that more research on eyewitness identification is required using emerging techniques to create a better understanding of the field);

- Simons, D.J., & Chabris, C.F., *What People Believe About How Memory Works: A Representative Survey of the US Population*, PLOS One (2011) (finding that the majority of experiment's respondents erroneously believed memory works like a video recorder and that hypnosis is useful in helping memory recall, while 0% of memory experts believed that memory operates similarly to a video recorder and that hypnosis facilitates accurate memory recall);

- Simons, D.J., & Chabris, C.F., *Common (Mis)beliefs About Memory: A Replication and Comparison of Telephone and Mechanical Turk Survey Methods*, PLOS One (2012) (corroborating findings that a significant disparity exists between popular beliefs about memory and positions held by memory experts);

- Zhu, B., Chen, C., Loftus, E.F., He, Q., Chen, C., Lei, X., & … Dong, Q., *Brief Exposure to Misinformation Can Lead to Long-Term False Memories*, Applied Cognitive Psychology (2012) (suggesting brief exposure to misinformation can cause a false memory to persist long-term, similarly to the persistence of true memories);

- Loftus, E.F., *Eyewitness Testimony in the Lockerbie Bombing Case*, Memory (2013) (explaining why, in light of current scientific understanding of memory, the identification made of suspect in this specific case was likely false);

- Howe, M.L., *Memory Lessons from the Courtroom: Reflections on Being a Memory Expert on the Witness Stand,* Memory (2013) (explaining why having a memory expert at trial is paramount in cases in which eyewitness testimony is employed);

- Lynn, S.J., Malaktaris, A., Barnes, S., & Matthews, A., *Hypnosis and Memory in the Forensic Context*, Wiley Encyclopedia of Forensic Science (Online) (2013) (finding hypnosis increases the sheer volume of recall, including false memories that can override real ones, as well as increasing recall confidence even when memories are false);

- Patihis, L., Ho, L.Y., Tingen, I.W., Lilienfeld, S.O., & Loftus, E.F., *Are the 'Memory Wars' Over? A Scientist-Practitioner Gap in Beliefs About Repressed Memory*, Psychological Science (2014) (showing that the majority of the general public stills believes that hypnosis can accurately retrieve forgotten memories);

- Hirst, W., Phelps, E.A., Meksin, R., Vaidya, C.J., Johnson, M.K., Mitchell, K.J., *et al.*, A., *A Ten-Year Follow-Up of a Study of Memory for the Attack of September 11, 2001: Flashbulb Memories and Memories for Flashbulb Events*, Journal of Experimental Psychology: General (2015) (demonstrating that even traumatic memories that have had a significant impact on one's community are vulnerable to inconsistencies over time);

- Bushnell, T., & Sinha, A., *Show Me Real Eyewitness ID Reform*, St. Louis Post Dispatch (2016) (stating that in 2014, the National Academy of Sciences released a comprehensive report on established practices, leading to consensus that the science on eyewitness identification was settled);

See AppX5; AppX16.

Dr. Lynn's affidavit was submitted in support of Mr. Flores's subsequent application and admitted into evidence during the evidentiary hearing. AppX5; 5 EHRR 38. Additionally, he created a list of recent studies, also admitted into evidence, relevant to the precise issues in this case, adding to the sources identified in his affidavit. *See* AppX60.

Aside from identifying publications and studies that demonstrate that the scientific understanding of the relationship among memory, hypnosis, and eyewitness identifications has changed since 2000, Mr. Flores adduced live testimony from qualified experts that illuminates grave concerns with the reliability

of Ms. Barganier's testimony regarding her in-court eyewitness identification of Charles Flores, especially in light of the hypnosis session that the State's expert at trial deemed proper. The Court made no adverse credibility findings with respect to any of this scholarship. The Court simply ignored all of it.

B. The Court's FFCL ignore all of the evidence that was admitted regarding changes in the science of hypnosis and memory.

The Court's FFCL, adopted from the State, lack basic understanding of how science works, as discussed by the relevant experts who testified in this proceeding. The FFCL's view of science is also at odds with CCA opinions interpreting Article 11.073. *See Ex parte Robbins*, 478 S.W.3d at 695 (Johnson, J., concurring) ("Whether 'debunked' ***or 'refined' for increased accuracy***, changes in scientific knowledge in general, and therefore changes in scientific testimony by individuals, must be acknowledged and addressed.") (emphasis added).

Generally speaking, scientific understanding takes time to evolve. Studies have to be undertaken and replicated with incremental developments over time before consensus emerges. 5 EHRR 136; 6 EHRR 56, 113. Although concerns about hypnosis existed when the *Zani* case was decided, as *Zani* itself reports, Dr. Lynn explained that there is now a near uniform consensus about how the dangers cannot be overcome. 6 EHRR 114. By now, no cognitive psychologist in the field of memory believe that procedural safeguards reduce the risk associated with

hypnotically enhanced memory. And by now, twenty-seven jurisdictions have decided to bar hypnotically enhanced testimony as too untrustworthy. 6 EHRR 117.

Both Dr. Kovera and Dr. Lynn, experts who testified in this proceeding, also explained that the scientific community is not monolithic. There is often a tension between (1) clinicians (like Dr. Mount and Dr. Spiegel), who tend to reach conclusions based on anecdotal experiences reflected in individual case studies, and (2) scientists (like Dr. Lynn and Dr. Kovera) who conduct empirical research and perform controlled studies in laboratories. 5 EHRR 80-82, 137; 6 EHRR 115. Experimental scientists and clinicians have different goals, with the latter looking primarily to personal experience with the objective of helping people. 5 EHRR 137. But by now, there is a consensus among scientists in the field of memory and eyewitness identification that hypnosis is an inherently suggestive pre-trial procedure based on data that supports that perspective. 5 EHRR 84.

Dr. Kovera reported that "experts in the science of eyewitness memory believe that hypnosis is problematic in terms of negatively affecting the accuracy of eyewitness memory." 5 EHRR 85. There is also now consensus that hypnosis is problematic in three specific ways. First, hypnosis implies that memory works like a video recorder that can be played back. Second, the witness is "repeatedly asked to imagine things" which makes it difficult to distinguish between things that are "imagined" and things that "were actually experienced." Third, where a hypnotist

reassures a subject that more memory can "come later" this is concerning because memory generally does not work that way. 5 EHRR 86. Research studies show that the additional material that is "remembered" after a hypnosis session is not necessarily accurate. 5 EHRR 87.

Dr. Kovera also opined that law enforcement practices have shifted away from using hypnosis as a forensic tool since the 1990s because of a growing awareness that hypnosis increases "the probability of unreliable results in eyewitness identification" 5 EHRR 101. But from the perspective of experts who study eyewitness identifications and eyewitness memory, it is now a "settled issue" that hypnosis is problematic. 5 EHRR 102.

As for the larger field of research on eyewitness memory, the first studies on double-blind procedures were not published until the mid-2000s and, while some research on suggestive lineups started to emerge in the mid-1980s, significant developments occurred in the mid-2000s and even later. 5 EHRR 107.

None of this evidence about significant changes in the science of memory, hypnosis, and its implications for eyewitness identifications is included in the Court's FFCL.

C. The Court's FFCL ignore the highly relevant contemporary science attested to by hypnosis expert Steven Lynn, Ph.D.

Standing alone, the Court's decision to minimize, misrepresent, and ignore Dr. Lynn's testimony regarding the scientific studies of hypnosis and memory make

it impossible to have any confidence in the accuracy or fairness of the Court's fact-finding.

1. The Court's FFCL ignore Dr. Lynn's overview of how the scientific perception of hypnosis has evolved.

Hypnosis expert Dr. Steven Lynn explained that, when he earned his Ph.D. in psychology in 1976, he, like others in the field, was a "true believer" in hypnosis as a technique to improve people's memories. 6 EHRR 29-30. In the 1980s, the vast majority of psychologists (84%) believed that hypnosis could be used to recover buried memories. 6 EHRR 30. When the *Zani* case was decided in 1988, medical and scientific communities saw hypnosis as at least a valuable psychotherapeutic tool, but there was much more debate about the use of hypnosis in a forensic context. 6 EHRR 48-50. But memory expert Dr. Martin Orne gave courts confidence that certain safeguards could be utilized in conducting hypnosis so that hypnotically induced testimony could be deemed sufficiently reliable. 6 EHRR 50-51. The Texas court in *Zani* then followed the lead of New Jersey and other jurisdictions in reaching the same conclusion. *Id.*

Beliefs about hypnosis started to change within the scientific community as a result of laboratory studies that Dr. Lynn conducted. As a result of his early findings, he decided to devote his research to the study of hypnosis and memory, conducting numerous laboratory studies over the next few decades. 6 EHRR 30-33. His studies

of the accuracy of hypnotically induced memories resulted in many surprising findings, including that even events experienced and described vividly during hypnosis are not necessarily accurate. 6 EHRR 41. His research also revealed that subjects who had been hypnotized had the greatest divergence between an initial recorded memory and the memory as relayed 11-12 weeks later. *Id.*

Dr. Lynn reported that multiple studies have now shown an increase in the number of false memories and misinformation reported by hypnotized v. nonhypnotized subjects. 6 EHRR 41. In 2012, his team reviewed twenty-three studies, all of which showed that hypnosis "increases confidence relative to nonhypnotic memories of events that [the subjects] earlier denied occurred when they were not hypnotized." 6 EHRR 42. He also found that the results of his own studies have, by now, been replicated by cognitive scientists around the world. *Id*. Dr. Lynn opined that these results raise "very serious questions about the use of hypnosis in forensic situations." *Id*.

2. *The Court's FFCL ignore the bases for Dr. Lynn's opinions in scientific studies that have investigated the relationship between memory and hypnosis.*

The Court ignored Dr. Lynn's explanation of how the problems with hypnosis arise from the nature of memory. He explained that, "confabulations occur all the time" as we endeavor to fill in gaps in memory that are inevitable, and we do so naturally, utilizing hunches, fantasies, or our histories. 6 EHRR 43. We can only tell

the difference between accurate and false memories with certainty by recourse to external documentation. 6 EHRR 44. Yet forensic hypnosis rests on the expectation that memories are locked down in the mind and can be faithfully retrieved. 6 EHRR 44-45. Studies have shown, however, that the expectancy that hypnosis improves memory induces undue confidence and actually increases the risk of inducing false memories. 6 EHRR 44. That is, confidence in the ability of hypnosis to help retrieve memory increases the risk that the subject will assume that memories—that may be mere guesses or imaginings—are accurate when they are not. 6 EHRR 45.

Dr. Lynn also emphasized that hypnosis increases the risk of suggestibility, and the process of eye closure and relaxation used in hypnosis discourages critical thinking. 6 EHRR 46-47. Similarly, the act of imagining, as occurs in hypnosis, has been proven to increase the confidence that one actually experienced an event that was only imagined. 6 EHRR 47.

Dr. Lynn opined that "numerous studies now show that asking people to imagine events can create false memories or increase confidence in the likelihood that a particular event occurred." 6 EHRR 72.

Dr. Lynn found that Dr. Mount's opinions were not scientifically sound. 6 EHRR 94-95. Dr. Lynn has worked in the field of hypnosis and memory for nearly four decades and has never heard of Dr. Mount, who has not been engaged in hypnosis research in decades. 6 EHRR 95; 5 EHRR 157. Most critically, Dr. Lynn

found that Ms. Barganier had been given strong suggestions during the hypnosis session that she would "remember more later" that likely induced undue confidence in her ability to recover accurate memories in the future. 6 EHRR 96-99 (inventorying disagreements with Dr. Mount's unscientific testimony).

Dr. Lynn concluded that Officer Serna did in fact plant a seed in Ms. Barganier's mind in the form of suggestive statements that she would be able to remember something later and that would be accurate. 6 EHRR 89-90.

Dr. Lynn found Ms. Barganier's confidence in the accuracy of her memory, thirteen months after the hypnosis, "astounding." 6 EHRR 92. He found her insistence that she was "[m]ore than one hundred percent positive" was "highly suspicious" but best explained by the hypnotic "suggestion that she would be able to recall other things as time move[s] on." 6 EHRR 92-93.

Dr. Lynn further explained that, even discounting the problematic nature of the hypnosis session that the inexperienced Officer Serna had conducted and the ill-informed opinions offered by Dr. Mount, Dr. Lynn's empirical studies support the opinion that safeguards against the four-prong dangers of hypnosis, identified in *Zani*, cannot in fact safeguard against the inherent dangers of hypnosis. 6 EHRR 106. Guidelines, such as those found in the *Zani* case, "allow evaluation of what transpired during the hypnosis rather than [serve] to minimize risks of memories being tampered [with]." 6 EHRR 118.

Mr. Flores objects to the Court's unjustifiable decision to disregard all of this testimony regarding the contemporary science relevant to his new-science claim.

D. The Court's FFCL ignore the highly relevant contemporary science attested to by memory expert Dr. Kovera.

Although the Court rejected the State's baseless relevance objections to Dr. Kovera's entire area of expertise, the FFCL that the Court has now adopted completely ignore her highly relevant testimony. *See* FFLC at p. 70 (dismissing as "irrelevant" all testimony from Dr. Kovera at 5 EHRR 8-139). This glaring omission alone is sufficient to undermine any confidence in the accuracy or fairness of the Court's fact-finding.

Dr. Kovera is an expert in the science of memory and current research in this field that "informs contemporary scientific understanding of eyewitness identifications and suggestive pretrial procedures, like hypnosis, that can render eyewitness identifications untrustworthy." 5 EHRR 8, 33. She is primarily a researcher and a professor. 5 EHRR 8-9. She sees her goal when testifying as an expert in cases of this nature as educating the fact-finder about how particular variables affect the accuracy of memory, by recourse to scientific studies that have been replicated, so as to reduce the risk of misidentifications. 5 EHRR 134. The Court accepted her as an expert qualified to opine on this topic. 5 EHRR 38.

Dr. Kovera presented evidence regarding the factors that influence the reliability of eyewitness memory, her particular area of expertise. 5 EHRR 11. She

offered the opinion that the use of hypnosis is problematic in the context of eyewitness identification, problems that were compounded in this case because of questions regarding the degree to which the witness, Jill Barganier, had encoded any memory of the passenger's face in the first place. 5 EHRR 17. Dr. Kovera explained that, when the memory of an observation is initially vague, a person is "especially susceptible to suggestive procedures," such as hypnosis, which "increase the likelihood the witness will confabulate[.]" *Id.* Confabulation involves incorporating "information through imagination techniques into the memory." *Id.* Additionally, the entire process of hypnosis "increases one's confidence in the accuracy of one's memory." *Id.*

Dr. Kovera also opined about contemporary research showing reasons to suspect eyewitness identifications unless collected "under very specific procedures that are nonsuggestive," not present in this case. 5 EHRR 17-18.

Dr. Kovera opined about the current consensus among memory experts regarding the reliability of hypnotically refreshed memory. 5 EHRR 18. She explained that "an overwhelming number of experts" in the specific field of eyewitness identification and eyewitness memory now believe that hypnosis is "an unreliable technique." 5 EHRR 18.

1. *The Court's FFCL ignore Dr. Kovera's conclusions as well as the solid bases for those conclusions.*

Dr. Kovera agreed that the brain does not work like a video recorder and memory is not stored like a videotape. 5 EHRR 43. "There's no recording in your mind that you can go back and replay and skip chapters and fast forward and rewind." 5 EHRR 19. Yet that is the process that Officer Serna used with Ms. Barganier during the forensic hypnosis session. AppX26.

Dr. Kovera explained that memory is formed through three different phases, during each of which "errors can intrude." 5 EHRR 19.

The first phase is "encoding," which begins with attending to information sufficiently so that it can be stored. 5 EHRR 47. Because we are continuously exposed to so much stimuli, in every moment, part of our brain works to filter out information that we do not need at that time. *Id.* We do not encode everything we observe. Instead, "encoding only happens when you're in front of the material," not after the fact. 5 EHRR 59. Dr. Kovera identified factors that affect our ability to encode accurate memories; they include: split focus, distance, illumination, exposure duration, and cross-race issues. 5 EHRR 20, 28, 48-49. Any memory that has been encoded will "decay pretty rapidly after the initial encoding." 5 EHRR 48. Moreover, post-event exposure to information can alter an initial memory, assuming a memory was encoded in the first place. 5 EHRR 21, 29. If nothing was encoded, there is nothing there to decay. 5 EHRR 48. This is why experts in eyewitness

identification believe initial descriptions tend to be the most accurate. 5 EHRR 128-29.

The second phase of memory that Dr. Kovera described is “storage.” 5 EHRR 21. Storage involves holding the memory until it is later used. During that phase, Dr. Kovera explained, several things happen. As with “any other type of trace evidence, memory fades over time. And what we know from the psychological literature is that memory decays really rapidly at the beginning, very, very rapidly within the first few hours, even minutes, of seeing a face.” 5 EHRR 21. Also, post-event information can interfere with memory during storage. *Id.* Post-event information “can either alter the initial memory so that that initial memory is never retrievable again, or that memory could just be sitting aside the original memory, and it depends on retrieval which memory you pull out.” *Id.*

The third phase of memory is “retrieval.” *Id*. Memory is not retrieved because it is lying dormant in the brain. That is, Dr. Kovera contrasted the way human memory works with a DVD, with chapters you can identify and open. “[M]emories don’t work that way. It’s not like you can just go back, necessarily, and accurately say, okay, at this moment, what was I doing. Because we find that we don’t necessarily always have the right retrieval queues [sic] to go back to … what was laid down at the time we witnessed an event. Sometimes we go back to things that we witnessed after the event; and we think it was the event we witnessed initially,

but it was something that happened to us later." 5 EHRR 46-46. Dr. Kovera reviewed the videotape of the hypnosis session conducted on Ms. Barganier. *See* AppX26. Dr. Kovera opined that the session reflects a belief in the false premise that memories are stored intact like a videotape and can be retrieved at will. 5 EHRR 45-46. The practice of hypnosis presupposes that a memory can be retrieved and "replayed" in "its totality and accurately" yet memory "does not work like that." 5 EHRR 46.

Dr. Kovera described special problems associated with retrieving memories of faces. The problem is that, once a person is shown a face, the face then feels familiar so that, thereafter, the person is more likely to identify that same face whether or not it is truly the face of the perpetrator. 5 EHRR 22.

2. *The Court's FFCL ignore Dr. Kovera's highly relevant opinions on how pre-trial identification procedures can affect the accuracy of identifications.*

Dr. Kovera explained that another problem affecting accurate identifications that is particularly concerning in the forensic setting is the lay assumption that "high confidence" in an identification equals "high accuracy." 5 EHRR 22. The research does not support this assumption unless the identification was obtained through "pristine procedures." *Id.* Such procedures mean that "the identification was obtained with a single lineup with a single suspect" following "instructions that a perpetrator may or may not be present in the lineup, that the lineup was fair, meaning there were fillers along with the suspect that did not cause a suspect to stand out in

any way and that that lineup was conducted using double-blind procedures, meaning that the police officer was not aware of who the suspect was and the confiden[ce] statement is taken [from the witness] by that double-blind administrator immediately after the identification and not later in time." *Id.* Dr. Kovera opined that, only when these conditions are met does the science support having confidence in the accuracy of the identification. 5 EHRR 23.

Dr. Kovera noted that nothing in the records produced by the Farmers Branch Police Department in this case suggests that these conditions were met in the pre-identification procedures that culminated in Ms. Barganier making an in-court identification of Flores thirteen months after her observation and after her hypnosis session with law enforcement. 5 EHRR 23, 70-71; AppX57; AppX46. By contrast, the record does show that the presentation of photographic lineups was conducted by a person (the lead investigator, Officer Callaway) who already knew who their suspects were. 5 EHRR 71-72. Dr. Kovera's own research has demonstrated how this approach is "a highly suggestive procedure." 5 EHRR 71. The police are not necessarily cueing witnesses intentionally, but can do so inadvertently "through nonverbal behaviors." 5 EHRR 71.

Dr. Kovera also testified that a "live identification" is only more reliable than photo identifications under certain circumstances not found in this case. 5 EHRR 18. Moreover, in-court identifications are inherently suggestive because "they basically

tell the witness who the suspect is, given that the suspect is sitting at Defense counsel table." 5 EHRR 29. Such procedures are akin to show-ups absent any fillers. 5 EHRR 74-76. Dr. Kovera is of the opinion that a live identification made in court, such as the one Ms. Barganier made of Charles Flores, is ***always unreliable***. 5 EHRR 30.

Dr. Kovera further opined that hypnosis is a particularly suggestive pre-identification procedure because it does three things. First, "it makes people more likely to report things that are not true." 5 EHRR 32. Second, "due to the use of the imagination" in the hypnosis session, hypnosis inflates the belief "that false memories are true." *Id.* Third, hypnosis can "increase confidence … in the accuracy of what [the subject is] reporting." *Id.*

3. *The Court's FFCL ignore Dr. Kovera's highly relevant opinions regarding the specific circumstances of Ms. Barganier's observation relevant to assessing the reliability of her post-hypnotic "memory."*

Dr. Kovera expressed grave doubts that Ms. Barganier had ever encoded more than a vague memory of what she had observed during the predawn hour on January 29, 1998. 5 EHRR 50-51. The observation that Ms. Barganier made was without the benefit of streetlights at 6:45 a.m. before sunrise, suggesting low illumination. 5 EHRR 50. Ms. Barganier viewed the scene from a distance—at least the length of a room between the window through which she was viewing to the end of her house and then there was some grass and a driveway. The passenger would have been even farther away. This is "a distance that would make it difficult at that light to see well

but not so far away that might cause the witness to pause" and, appropriately, doubt the ability to make an identification. 5 EHRR 50-51.

Additionally, Ms. Barganier's descriptions during the hypnosis session, at trial, and in this proceeding show that her attention was focused on the beer bottle carried by the driver and her sense that that was unusual. Dr. Kovera described scientific literature about how a focus on unusual objects adversely affects the ability to focus on the perpetrator's face and thus decreases the accuracy of identifications. 5 EHRR 51.

Dr. Kovera noted that Ms. Barganier consistently reported that her focus was on the beer bottle, not faces, as she looked out of her window to the driveway of the house next door. Dr. Kovera believes that Ms. Barganier had not focused her attention on the passenger sufficiently to suggest "enough attention to reliably encode the face." 5 EHRR 51. Memory is a "finite resource." 5 EHRR 53. And we do not tend to pay attention to things that we do not have reason to believe, at the time, are important. 5 EHRR 58. The existence of the car, multiple perpetrators, and the beer bottle all split her attention. 5 EHRR 53.

Further, Dr. Kovera noted that Ms. Barganier made her observation for only a brief amount of time, further limiting her ability to encode something that could later be retrieved from memory. 5 EHRR 54.

Dr. Kovera also noted that the "retention interval" between the event witnessed and the identification was significant here: thirteen months. 5 EHRR 54. She explained that within twenty minutes, we lose a lot of information; within two-three days, we have lost half of what we initially learned. That loss "doesn't come back; it's gone." *Id.* Dr. Kovera explained that the loss of 50 percent of the initial information learned is of material that was "originally encoded"—and no one starts with 100 percent accuracy. 5 EHRR 55. The issue of memory decay is compounded by hypnosis, which has a demonstrably adverse effect on the recall of *accurate* information. 5 EHRR 56.

4. *The Court's FFCL ignore Dr. Kovera's highly relevant opinions regarding the post-observation, pre-trial factors relevant to assessing the accuracy of Ms. Barganier's memory.*

Dr. Kovera described the research showing that hypnosis "changes the ratio of correctly recalled information to inaccurately recalled information." 5 EHRR 56. Hypnosis also reduces the ability to discriminate between accurate and false memory while also increasing the subject's "willingness to report" and feel "very high confidence" about what may be false information generated through the invitation to "imagine things." 5 EHRR 56-57. Confidence about an identification is malleable, increasing even though accuracy is not increased. 5 EHRR 72-73, 75-76.

Dr. Kovera also opined about the issue of cross-race identifications. Since Ms. Barganier is white, and her initial descriptions of the two men were that they were

white, the research on cross-race identification suggests that she would be more likely to reliably identify a person of her own race. 5 EHRR 52. Ms. Barganier never suggested that the passenger was Hispanic; instead, law enforcement simply started showing her pictures of Hispanic men in a photo array after she had repeatedly described both the driver and the passenger as "white males." *Id*. This conduct completely undermined the likelihood of her making a reliable identification thereafter.

Dr. Kovera also explained how post-event information, told to a witness, can be incorporated, and interfere with, the original memory or create a new memory that can be mistaken for the original experience. 5 EHRR 51. As a rule, people have "source monitoring problems when it comes to information," which means difficulty "differentiating between information" they seek to retrieve at different times. 5 EHRR 62. After her initial observation, Ms. Barganier was exposed to new and different information about the scene she had observed. This could explain why she originally described the Volkswagen Bug as "yellow" the same morning she made the observation but later described it as "purple and pink with waves" during the hypnosis session. The latter information, obtained later, may have been incorporated into her "memory" changing what she "remembered" seeing. 5 EHRR 63. For instance, the day after her initial description to police, on January 30, 1998, the *Dallas Morning News* ran a front-page story about Ms. Black's murder that included

a description of the multi-colored Volkswagen Bug that the police were searching for. 38 RR 21; AppX57 at 2705-06.

Similarly, the record shows that Ms. Barganier was exposed to multiple images of Flores by the police and in the news, each time affecting her memory and increasing the risk of a false identification. 5 EHRR 3-64. Each time, her sense of familiarity with a particular face was increased and its significance was underscored by the context of viewing the face in a police station as part of a criminal investigation. 5 EHRR 65. This phenomenon whereby familiarity is created through post-event exposure occurs because memory is *not* like a videotape that is stored in tact and can be replayed at will; and the feeling of familiarity is created without the person associating the familiarity with the repeated exposure. 5 EHRR 63-66.

Dr. Kovera noted that the photo array that Ms. Barganier was shown with Flores's picture in it was itself suggestive because his photo, in the center, was the only one without a white strip covering up part of the image. Research shows that, to avoid false identifications "there should be nothing about the suspect that makes him or her stand out from the fillers." 5 EHRR 67.[21]

Dr. Kovera did not suggest that Ms. Barganier had been intentionally manipulated, but rather had been "unwittingly manipulated" up to the moment of

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[21] Dr. Kovera explained that the first standards to avoid suggestive identification procedures were promulgated in 1998 and then in 1999 but did not start to trickle down to reshape law enforcement practices for some time—and have still not been fully embraced. 5 EHRR 68.

making her in-court identification. 5 EHRR 69. In Dr. Kovera's opinion, once a person is exposed to the face of a suspect and cannot make an identification at that time, then that person cannot thereafter make a reliable identification. 5 EHRR 68-69. Yet law enforcement repeatedly asked Ms. Barganier to look at photos and attempt to make an identification. *See infra*, pp. 85-99.

Dr. Kovera noted that, before her in-court identification, Ms. Barganier had been consistent about a few details. She had consistently described the passenger as having longer hair than the driver's and being of the white race like the driver. She had also consistently described one of the two men drinking out of a beer bottle. The fact that she repeatedly confused whether it was the driver or the passenger she had seen drinking the beer suggested to Dr. Kovera that the memory was weak as well as "quite vague." 5 EHRR 89-91.

Dr. Kovera also referenced studies that show that the process of doing a composite sketch, which Ms. Barganier did twice, interferes with memory. 5 EHRR 91.

5. *The Court's FFCL ignore Dr. Kovera's well-substantiated conclusions.*

Based on her knowledge, skill, experience, training, and education, and having analyzed the facts surrounding Ms. Barganier's post-hypnosis in-court identification of Charles Flores as reflected in the police file, *see* AppX57, Dr.

Kovera reached a series of conclusions that this Court has, inexplicably, ignored—while making no adverse credibility finding.

Dr. Kovera concluded that "none of the criterion that are necessary for ensuring that accuracy [of an identification] is related to confidence were present here." 5 EHRR 77. Yet Ms. Barganier expressed a high degree of confidence in her in-court identification. 36 RR 294. As. Dr. Kovera explained, "studies show that jurors are highly influenced by expressions of witness confidence, almost to the exclusion of any other variable[.]" 5 EHRR 79. This research illuminates how wrongful convictions, based on multiple eyewitness identifications, are possible and often are only exposed by subsequent DNA testing. 5 EHRR 123.

Based on her knowledge of the relevant science, Dr. Kovera repeatedly expressed "grave concerns" about the accuracy of Ms. Barganier's in-court identification of Flores. Dr. Kovera noted that Ms. Barganier's ability to encode a memory of the face of the passenger was "severely" limited by "illumination and distance." The amount of exposure time, the multiple perpetrators, and the focus on the beer bottle all drew her attention away from the passenger's face that she saw only briefly, if at all. *Id.* Also, Dr. Kovera emphasized that thirteen months "is an extremely long time between exposure and identification[.]" 5 EHRR 103. Additionally, Dr. Kovera found the photo array that Ms. Barganier had been shown with Flores's image was highly suggestive and not administrated in a double-blind

procedure. The in-court identification was even more problematic. Most problematic of all was the hypnosis. 5 EHRR 104-05.

Based on what science indicates about how hypnosis adversely affects memory, Dr. Kovera opined that Jill Barganier's testimony can be deemed unreliable despite, or even because of, her post-hypnotic claim that she was "over a hundred percent confident, which isn't even possible." 5 EHRR 95-96.

Dr. Kovera concluded that Ms. Barganier only formed a vague memory of what she had observed from her window on January 29, 1998 and that vague memory "was not capable of surviving the suggestiveness of the procedures" so as to allow for a reliable identification. 5 EHRR 119.

IV. Mr. Flores Objects to the Court's Omission of Critical Evidence about the Context that Led to, and Followed from, the Hypnosis Session.

The Court's FFCL leave out the vast majority of facts about how Ms. Barganier came to identify Mr. Flores, which were developed in this proceeding based on: the trial record, the testimony of fact witnesses, and documentary evidence obtained through discovery, including what remains of the police file. *See, e.g.*, AppX57.

A. The Court's FFCL do not include evidence of the full context of Ms. Barganier's experience on the day of the crime, including details essential to assessing the reliability of her memory and the integrity of the criminal investigation.

On January 29, 1998, the Barganiers were living at 2959 Bergen Lane next door to the Blacks in Farmers Branch, a suburb of Dallas. 4 EHRR 32-33. At about 6:45 a.m. on January 29, 1998, Jill Barganier heard a noise, looked out a front window on the right side of her house through the mini-blinds and saw an unfamiliar car in the driveway of the Blacks' house located at 2965 Bergen Lane. The blinds were down, but cracked open. The Blacks' driveway was on the far left side of Ms. Barganier's house. She saw two men get out of the car. 36 RR 280-81. She made this observation while she was in the process of getting her kids ready for school and just before waking up her husband. *Id.* She noticed one of the men drinking out of a beer bottle and that caught her attention because it was so early in the morning. *Id.*; 4 EHRR 40-44, 131.

The lights were on inside Ms. Barganier's house but not outside. 38 RR 13-19. Sunrise was recorded that day in Dallas, Texas as 7:25 a.m. per the *Dallas Morning News*. 38 RR 19; Defendant's Trial X1; 5 EHRR.

A photograph of Bergen Lane, where the Barganiers' and Blacks' house were located, shows that there were no streetlights on the block. State's Trial X3, X4.

At 9:15 a.m., police respond to a 911 call from 2965 Bergen Lane (the Blacks' house). Mr. Black had come home and found his wife, Betty Black, and the family

dog, a Doberman Pincher, shot dead. AppX57 at 66. Farmers Branch Police Department responded and began an investigation. After walking through the crime scene, officers began to canvass the neighborhood and found some witnesses who had seen "two white males, 25 years of age or older." *Id*.

Shortly after 10:00 a.m., according to Lt. D.C. Porter of the Farmers Branch Police Department, Jill Barganier "arrived at the scene," and Ms. Barganier described what she remembered seeing earlier that morning. Ms. Barganier described the car as "a yellow Volkswagen bug." She described the driver as "big, with long brown hair"; "a white male, about 30 years old and with a large build" with "a quart beer bottle in his hand when he got out of the car and that he stopped and put the bottle back into the VW before he walked up to the house." She described the passenger as "also a white male with darker hair than the driver. She described his hair as almost black and thought it was 'longer.'" 4 EHRR 44-48.

Later that morning, the Farmers Branch Police Department broadcast a description announcing that two men had been seen entering the Blacks' house. 4 EHRR 297.

At some later time, unidentified in the documents, the lead investigator assigned to the case, Officer Callaway, interviewed Ms. Barganier and made some

notes. AppX12.[22] Ms. Barganier could not identify these notes or the date or time when she first spoke with Officer Callaway. 4 EHRR 170-71. She did, however, remember telling Officer Callaway about the driver carrying a beer bottle. 4 EHRR 48.

At some point on January 29, 1998, Ms. Barganier went to the Farmers Branch Police station and was shown a photographic lineup of some sort. At that point, she was unable to make an identification. Officer Callaway signed the photographic lineup form. AppX57 at 557. Other neighbors also went to the police station and were shown unidentified photographic lineups; but none of them were able to make an identification either. Officer Jerry Baker, the second investigator assigned to the case, signed some of the forms, and Officer Callaway signed others. AppX57 at 714-16; *id.* at 2596. There are no extant records of what photographs these witnesses were shown on this date. *See* AppX57.

That same afternoon, several neighbors, including Michele Babler and her two minor sons, Nathan and Nicolas Taylor, provided written witness affidavits to the police describing seeing a car pull into the Blacks' driveway and two white males about the same age get out. AppX16. Police records also refer to a witness affidavit

[22] Another version of this document was admitted during the evidentiary hearing in this proceeding. State's Writ X2. That version includes additional notes added by someone whose handwriting Ms. Barganier could not identify. *See* 4 EHRR 170-71.

reportedly provided by Jill Barganier. AppX17. Ms. Barganier testified during the evidentiary hearing in this proceeding that it was "possible" she signed a similar witness affidavit, but she did not specifically recall doing so. 4 EHRR 59. The witness affidavit from Ms. Barganier, which is referred to in the police records, is not in the selection of Farmers Branch Police Department records produced to Flores in this proceeding. AppX9. One of the investigators, Officer Jerry Baker, acknowledged during this proceeding that the police report suggests that Ms. Barganier did in fact prepare a witness affidavit for the Farmers Branch Police Department at some point. 4 EHRR 272.

That same night, around 9:00 p.m., Doug Roberts dropped his ex-wife Jackie, daughter-in-law of the murder victim, at a motel where she hid from police. He then went to the police to tell them that Childs, with whom Jackie Roberts was then having a sexual relationship, owned the Volkswagen that was seen outside of the Blacks' house that morning. 34 RR 241-43; 34 RR 246-47.

B. The Court's FFCL do not include the evidence of relevant events on January 30, 1998, the day after the crime, including details essential to assessing the reliability of Ms. Barganier's memory and the integrity of the criminal investigation

On January 30, 1998 the *Dallas Morning News* ran a front-page story about Ms. Black's murder. The article included a description of the multi-colored Volkswagen Bug that the police were looking for. 38 RR 21; AppX57 at 2705-2706.

That morning, Ms. Barganier worked with the Farmers Branch Police Department to create a composite sketch of the driver, which was then printed out. AppX19. By this time, Farmers Branch investigators had already identified Richard "Rick" Childs as a suspect and had obtained one of his mug shots. AppX20; AppX57 at 197; AppX57 at 199.

After doing her first composite sketch, Farmers Branch police showed Ms. Barganier a photographic lineup that included a picture of Rick Childs. AppX22; AppX57 at 226-27. There are no records of any instructions she may have been provided at the time. But the administration was not double-blind as the lead investigator, Officer Callaway, signed the form demonstrating that he was the one who had presented her with the photographic lineup, and he already knew that Childs was a suspect. 36 RR 289; AppX22; AppX57 at 226-27. Ms. Barganier was able to pick out Childs's picture (no. 2) out of the six-image lineup. AppX22; AppX57 at 226-27.

That day, Officer Callaway also showed Ms. Barganier's neighbor, Michele Babler, a photographic lineup of some sort, but she was again unable to make an identification of the driver or the passenger. AppX57 at 1894.

C. The Court's FFCL do not include the evidence of relevant events on January 31, 1998, when Ms. Barganier had further contacts with law enforcement, including details essential to assessing the reliability of her memory and the integrity of the criminal investigation.

At the Farmers Branch Police Department, Ms. Barganier was shown another photographic lineup that included a different, more recent picture of Rick Childs who was, by then, under arrest. She again picked Childs' picture (no. 4) out of the lineup. Officer Callaway signed the form. AppX57 at 229-31; AppX24. Officer Callaway was the individual who made the decision to include two different pictures of Childs in the two different photo arrays, with Childs being the only common denominator between the two arrays. 36 RR 32.

That same day, Officer Callaway again showed Ms. Barganier's neighbor, Michele Babler, a photographic lineup of some sort, but she was again unable to make an identification. AppX57 at 230-31; *id.* at 749.

That same day, Ms. Barganier was shown another photo array of some kind. She signed another Farmers Branch Police Department Photographic Lineup Form and changed the date to January 31, 1998, but the form was otherwise left incomplete. *Id.* at 527.

D. The Court's FFCL do not include the evidence of relevant events on February 3, 1998, including details essential to assessing the reliability of Ms. Barganier's memory and the integrity of the criminal investigation.

That night, Officer Callaway and another unidentified officer with the Farmers Branch Police Department went to Ms. Barganier's home. 4 EHRR 81-82. The officers wanted her to report to the Farmers Branch Police Department again the next morning to try to do a second composite sketch, this time of the passenger. Ms. Barganier testified that she was, at that time, a "wreck," feeling "responsible," "very nervous," "scared for the safety of herself and children." She "couldn't stop shaking." She claimed that she asked the police to put her under hypnosis to help her relax and "do a good composite." 36 RR 289-91; 4 EHRR 81-82.

During the evidentiary hearing in this proceeding, Ms. Barganier testified that she only went to the police station to be hypnotized to help her relax, not to help the police obtain more information or to help her remember more. 4 EHRR 145-46. That testimony is not credible, as it contradicts: statements made during the hypnosis session, Officer Serna's testimony, and common sense. 4 EHRR 145-46; 4 EHRR 230 (Serna testifying "we wanted to elicit more information from her."). Also, when the hypnosis session was conducted, Officer Serna acknowledged in writing that the purpose was: to obtain "[a]ny additional information pertaining to the suspect's identity and any other information pertinent to the case." AppX27. No extant Farmers Branch Police Department documents memorialize the conversation

between Ms. Barganier, Officer Callaway, and the other officer at her home the night before the hypnosis session or subsequent conversations about setting up the hypnosis session. AppX57.

At some point that night, Officer Callaway contacted a patrol officer, Alfredo Roen Serna, about hypnotizing Ms. Barganier the next morning. 4 EHRR 185. Officer Serna had just joined the Farmers Branch Police Department. 4 EHRR 187. He had already been involved in collecting evidence at the crime scene and had logged at least two hours at the Blacks' home on the day of Ms. Blacks' murder. AppX52.[23] Officer Serna had never hypnotized anyone before, but he had received a certification after taking a law enforcement course two years before in 1996. AppX43.

E. The Court's FFCL do not include the evidence of relevant events on February 4, 1998—the day that Ms. Barganier's was hypnotized at the Farmers Branch police station.

Some time before 10:00 a.m., Ms. Barganier reported to the Farmers Branch Police Department for the hypnosis session. AppX27; AppX57 at 334-35; 36 RR 27; 36 RR 31. She met Officer Callaway there. 4 EHRR 85. The hypnosis session was videotaped. AppX26. There is, however, no documentation reflecting when Ms. Barganier arrived, when she entered the office where the hypnosis was to be

[23] Officer Serna logged in at 10:41 a.m., out at 12:36 p.m., back in at 12:48 p.m., but did not log out again.

conducted, or when the camera was turned on. 4 EHRR 278-280. The video camera was set up by Officer Baker, who sat in on the hypnosis session, but he is mostly off camera. AppX26. Likewise, the camera only captures a small part of Officer Serna's body, not including his face. *Id.* There is no police record of the interview that took place before the videotape started.

The videotape shows that Officer Serna conducted a brief pre-hypnotic interview with Ms. Barganier. During that interview, she mentioned that she looked out a window, saw a Volkswagen Bug, saw two men get out, noticed the driver's hair, noticed one man drinking out of a beer bottle, described the passenger as having hair "basically like the driver's," and mentioned them closing the door and walking off, after which she closed her blinds. AppX26; *see also* 6 EHRR 69-71. In explaining her memory of what she had seen, she confused the driver and the passenger, referring to both men as the "passenger," including the person she saw drinking out of a beer bottle, an action she had previously attributed to the driver. 4 EHRR 95, 219; AppX26. Officer Serna asked no follow-up questions. AppX26.

During the hypnosis session itself, Officer Serna invited Ms. Barganier to "imagine" many things. AppX26. For instance, he invited her to imagine glue on her fingers, a special building that was "her special place," a "special leather chair," an elevator ride, a "yellow button" to push on an imaginary remote control, "magical letters" floating over the two men's heads, and a time-travel door she could walk

through. 4 EHRR 217-218; AppX26. He also instructed her to imagine "you're going to be seeing a documentary, you're going to be seeing a film of the events that occurred on that day, on that morning." AppX26.

He noticed that she kept coming back to the beer bottle, thus he eventually asked her to use her imaginary "remote control" to "fast forward" passed that scene eventually. AppX36; 4 EHRR 220. Ms. Barganier described the passenger's hair as follows: it "looked a lot like his friend's"—the driver's—which she described as "dirty, long and wavy." 4 EHRR 220; AppX26.

Throughout the hypnosis session, Officer Serna repeatedly said "you're doing good" and "you're doing fine." AppX26. At the conclusion of the hypnosis session, Ms. Barganier repeatedly asked "Did I do ok? . . . . Did I help in any way?" *Id.*

The hypnosis session yielded a number of new details that were not shared in the pre-hypnotic interview, including:

- "I'm getting my coffee."
- "like little waves. Waves. On the bottom." [about the car]
- "Pink top." [about the car]
- "Yes, a man in his car, in the driveway."
- "They look a bit purple." [about the car]
- "Blonde. . . . Dark blonde. . . . Long, wavy" [driver's hair]
- "Kinda young." [driver]

- "Blue eyes. Pretty eyes." [driver]
- "Big, big, brown beer bottle. Why, it's so early in the morning."
- "A lot like his friend's. . . . I see it to his shoulders. [passenger's hair]
- "He has brown eyes." [passenger]

AppX26.

At no time during the pre-hypnotic interview or the hypnosis session did Ms. Barganier tell law enforcement that she had locked eyes, crossed eyes, or made eye contact with the passenger who had exited the Volkswagen. 4 EHRR 96.

The session did include a number of suggestive statements, including:

- "Is his hair short, is it shaved, is it neatly cut?" [asked about the driver]
- "Does he have it neatly cut or is it trimmed?" [asked about the passenger after Ms. Barganier had already described his hair as "A lot like his friend's" and "Dark, long." and "Dark, not black. Not all black, but darker, like dark brown, not solid black."]
- "You will also remember everything that you've said in this session and you might find yourself being able to recall other things as time moves on."
- "You'll remember everything that was said in this interview. And as I said, you'll be able to recall more of these events as time goes on."
- "Ok, oftentimes, like I told you before I brought you out, that hypnosis, uh, you might find yourself recalling things, things that might not have to do with the accident itself. You might be at home doing an everyday chore and something might come to you about that incident or anything else. It's almost a phenomenon the way that it happens, so it's not uncommon to just remember something after the fact, after the session."

AppX26.

The videotape of the hypnosis session lasts approximately one hour. *Id.* There is no extant record of Ms. Barganier's interactions with law enforcement personnel before the tape was turned on or after the tape was turned off. 4 EHRR 278-280.

After the hypnosis session, Officer Serna created a form to record a short summary of his impression of what had happened in the hypnosis session. On the form, Officer Serna wrote a very brief summary of how he remembered the session, noting that Ms. Barganier had reported "two dirty men had exited the vehicle[.]" "She described Man B [the passenger] as having dark brown or blonde shoulder length hair. She said that he had turned and looked at her and she saw that he had brown eyes," although she did ***not*** actually say in the videotape that the passenger looked at her. AppX26. Officer Serna's form also included the "purpose" for the hypnosis referral: to obtain "[a]ny additional information pertaining to the suspect's identity and any other information pertinent to the case." AppX27.

After the hypnosis session, Officer Callaway took over again. 4 EHRR 277. Ms. Barganier was asked to do additional tasks to assist in the investigation. At 12:54:56 p.m., a composite sketch that Ms. Barganier had created of the passenger was printed out at the Farmers Branch Police Department. AppX28. The sketch looks nothing like the mug shots of Charles Flores contained in the Farmers Branch Police Department file. *Compare* AppX28 *with* AppX32, AppX39, AppX40, AppX41, AppX42. The sketch does resemble the first composite sketch she had done

a few days earlier of the driver, identified as Rick Childs. *Compare* AppX19 *with* AppX28.

Neither Ms. Barganier nor any other neighbor had described either of the men seen exiting the Volkswagen Bug at the Blacks' home as noticeably fatter than the other or as Hispanic or as having short, close-cropped black hair. But on the same day that Ms. Barganier created the second composite sketch, purporting to be the passenger, Officer Callaway showed Ms. Barganier another photographic lineup, this time including a picture of Charles Flores along with five other Hispanic males with short, black hair. 36 RR 105-06; AppX30. Ms. Barganier was unable to identify anyone.

It is unclear if this was the first time she was presented with this photo array that included Flores because most of the previous Farmers Branch Police Department Photographic Lineup Forms that she signed were not paired with photo arrays. 4 EHRR 177-78.

Officer Callaway signed the Photographic Lineup Form that was given to Ms. Barganier when she was shown the photo array that includes six Hispanic males, including a photograph of Flores in the number 2 spot. His photograph is the only one of the six that does not include a white strip covering the bottom portion. The photograph of Flores is the same one that Officer Callaway identified in the Farmers

Branch Police Department records as his "most recent mug shot." AppX39.[24] That same picture was also submitted to the media and appeared in several stories in the *Dallas Morning News* as did other photographs of Flores found in the police records. AppX57 at 1626-28, 1726-29.

Over the next several months, photographs of Charles Flores, all depicting him as a very large Hispanic male with short, close-cropped, black hair, appeared in the news. *See, e.g., id.*

Ms. Barganier admitted at the time of trial that she had seen Flores's picture in the news on at least one occasion before she saw him in the courtroom during his trial. 36 RR 108; 4 EHRR 68. She further admitted that the picture she saw was similar (or the same) as the picture of Flores contained in a Farmers Branch Police Department photographic lineup. 4 EHRR 77-78; AppX30.

F. The Court's FFCL do not include the evidence of relevant events on March 23, 1999—the day that Ms. Barganier's came to court and claimed, for the first time, to be able to identify Charles Flores.

Thirteen months after observing two men get out of a Volkswagen Bug around 6:45 a.m. on January 29, 1998, Ms. Barganier came to the courthouse with her husband Robert Barganier to testify in Flores' capital murder trial. 35 RR 2; 4 EHRR

[24] Ms. Barganier acknowledged that the handwriting accompanying a copy of Flores's mug shot was the same that she had identified as Officer Callaway's handwriting. 4 EHRR 103-04. Officer Baker identified Callaway's handwriting as well. 4 EHRR 262.

110. She was called to the stand after her neighbors Michelle Babler and Nathan Taylor had testified.[25] At that point, she observed Mr. Flores in the courtroom seated at defense counsel's table. 4 EHRR 118-19.

At some point that day, before Ms. Barganier was called to the stand, but after she had seen Mr. Flores in the courtroom, she informed the prosecutors that she could now identify Charles Flores. Thereafter, ADA Jason January approached the bench and informed the trial court and defense counsel of this development in an unrecorded bench conference. The defense counsel then apprised the trial court that they intended "to object to her testimony on the grounds that her in-Court identification is tainted by the hypnotic episode that she had undergone." 36 RR 15-16;[26] 4 EHRR 38. This was the first notice that the defense had that Ms. Barganier purported to be able to identify Flores. 4 EHRR 122.

After Ms. Barganier started to testify, defense counsel asked for the jury to be excused. The prosecution then tried to counter the defense's objection to her testifying by asking Ms. Barganier questions about the hypnosis session to which she had submitted and arguing that it made no difference. The defense then objected

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[25] Neither of these witnesses identified a specific person. Nor did Mr. Barganier. 35 RR 38-39, 109; 35 RR 162-92. But Ms. Babler's testimony before the jury differed from the description found in her witness affidavit signed on January 29, 1998. AppX16 at 5.

[26] This development was explained after-the-fact when Judge Nelms put this background on the record during the Zani hearing the next morning. 36 RR 15-16.

on the record and noted that she had not previously identified Flores. The State agreed to move on to another witness until they could have a hearing in the morning outside the presence of the jury. Ms. Barganier's husband, Robert Bargainer, was then called to the stand while she waited outside. 35 RR 153-62.

G. The Court's FFCL do not include evidence of relevant events on March 24, 1999—the day the trial court conducted the *Zani* hearing and then permitted Ms. Barganier to testify.

On March 24, 1999, the *Dallas Morning News* published an article about the trial featuring Mr. Flores's picture. The article emphasized the defense's questioning of inconsistencies in the testimony of the State's witnesses. AppX57 at 1729.

A *Zani* hearing was held that morning, outside the presence of the jury. 36 RR 12. The trial judge made clear on the record that the hearing was necessary because Ms. Barganier had previously "been unable to identify Charles Don Flores as one of the two men that she saw exit a multicolored Volkswagen and go into the house of the victim on the day of the shooting." 36 RR 12-13.

The Court's FFCL do not address how the critical facts, recounted above, are relevant to the contemporary scientific understanding provided by Dr. Kovera, which led her to conclude that Ms. Barganier had only formed a vague memory of what she had observed from her window on January 29, 1999 and to conclude that this vague memory "was not capable of surviving the suggestiveness of the procedures" so as to allow for a reliable identification. 5 EHRR 119.

Likewise, the Court's FFCL do not address how these critical facts are relevant to the contemporary scientific understanding provided by Dr. Lynn, which led him to conclude that the forensic hypnosis session irrevocably tainted any memory Ms. Barganier may have had and injected a false sense of confidence in her ability to "recover" accurate memories over a year later.

V. Mr. Flores Objects to the Court's Omission of Other Significant Evidence Adduced in the 2017 Evidentiary Hearing Relevant to the Reliability of the State's Witnesses in the 1999 *Zani* Hearing.

The Court's FFCL fail to account for vast amounts of testimony and documentary evidence from the 2017 hearing that are relevant to understanding the context of Ms. Barganier's observation that police had hoped she could recover through the hypnosis session to assist in their murder investigation.

A. Relevant facts newly obtained through Jill Barganier's 2017 testimony are omitted.

Ms. Barganier testified during the evidentiary hearing in this proceeding, providing new evidence regarding the circumstances of her observation the day of her neighbor's murder and the facts during the subsequent police investigation. When her neighbor, Ms. Black, was murdered, Ms. Barganier knew that the Blacks' adult son Gary was incarcerated at the time and suspected that he was involved in drug dealing because of his "strange routine." 4 EHRR 33-34. She also suspected that his wife, Jackie Roberts, the State's main witness at trial, was similarly involved with drugs. 4 EHRR 34. She knew Jackie's ex-husband, Doug Roberts, also a

principal witness for the State, was a drug dealer and knew that he has since been shot in the face in an unsolved murder. 4 EHRR 57-58.

After Ms. Black's murder, Ms. Barganier was "scared," "not sleeping well," "couldn't stop shaking," and felt "extremely nervous" and thus wanted help to relax. 4 EHRR 158-59.

Ms. Barganier does not remember how she knew that hypnotism was something that police could do. 4 EHRR 81-82.

Ms. Barganier found the process of using the computer to make a composite sketch "very hard." 4 EHRR 156.

Before submitting to hypnosis at the police station, Ms. Barganier was not asked any questions about her mental health history, the quality of her memory, or any medications she was taking. Nor was she given any test of her hypnotizability before the hypnosis session began. 4 EHRR 86.

Ms. Barganier claimed that she did not remember meeting Officer Baker before the hypnosis session. 4 EHRR 161. But Officer Baker was the second detective on the case from the outset of the investigation, just under lead investigator Callaway. 4 EHRR 262-263. Officer Baker was involved heavily in all aspects of the investigation starting on January 29, 1998. 4 EHRR 262-266. He testified that he had spoken with Ms. Barganier before the hypnosis session. 4 EHRR 281.

Ms. Barganier had no memory of when she had first been shown a photographic lineup that included a picture of Charles Flores along with five other Hispanic males, and she had no memory of whether she had been shown those pictures multiple times. 4 EHRR 81-82. She admitted that she realized the second suspect the police were looking for was Hispanic after "they were talking about it in the news." 4 EHRR 117-18. She did not remember when she first heard the name "Charles Flores" but thinks it was when an arrest was made, which was well before she made her identification. 4 EHRR 117.

She admitted that, back in 1998, she had been afraid that someone was still out there who had not yet been identified and apprehended. 4 EHRR 99.

She agreed she was the only neighbor to identify the driver or the passenger. 4 EHRR 142-43.

Ms. Barganier admitted that she met with prosecutors Jason January and Greg Davis at some point before trial. 4 EHRR 178-79.

She admitted that the testimony she gave about "meeting eyes" with the passenger was different from statements she had made before and during the hypnosis session. She was not sure if what she had said to the jury about meeting eyes was her "imagination or not." 4 EHRR 132.

She admitted that she had repeatedly described the driver and passenger as two white males and had described the passenger's hair as long and as basically the

same as the driver's. 4 EHRR 133, 142-43. She admitted that the morning of the crime, she told law enforcement that she thought the passenger's hair was longer than the driver's and thinks that she "may have been confusing" the driver and the passenger. 4 EHRR 140. Yet no men in the photo array of six Hispanic males, including Flores, had long hair. AppX30. She further admitted that the recent mug shot of Flores used in the photo array showed him with very short hair and all photos of him that appeared in the *Dallas Morning News* depicted him with very short hair. 4 EHRR 140. Additionally, all photos of Flores found in the Farmers Branch Police Department file, including his most recent mug shot, showed him with very short hair. AppX39; AppX40; AppX41; AppX42.

Ms. Barganier, who is 4' 10" tall, admitted that she was only 100 pounds back at the time of Ms. Black's murder and so her perception of weight might have been inaccurate. 4 EHRR 175. In any event, she had repeatedly described the driver and passenger as being basically the same size; however, Rick Childs and Charles Flores were not similar looking at that time. Childs was a tall, thin white male with shoulder-length hair, and Flores was a tall, fat, Hispanic male with very short black hair. AppX20; AppX39.

Ms. Barganier expressed distress that she had learned from her son that the videotape of the hypnosis session is now "all over the Internet." 4 EHRR89.

B. Relevant facts newly obtained through Officer Serna's 2017 testimony are omitted.

Officer Serna testified during the evidentiary hearing in this matter. Officer Serna was a patrol officer with the Farmers Branch Police Department on February 4, 1998 when he conducted the hypnosis session. 4 EHRR 181. He had taken a course and been certified in "investigative and forensic hypnosis" in 1996 when he was with the Robstown Police Department. 4 EHRR 187; AppX43. He had never conducted a hypnosis session before February 4, 1998 and has never conducted any such sessions since that session with Jill Barganier. 4 EHRR 185, 240.

When Officer Serna was asked to hypnotize Ms. Barganier, the Farmers Branch Police Department did not have any written policies related to conducting hypnosis sessions; so he had to create his own form. 4 EHRR 229-30. The purpose for conducting the hypnotic interview was clear to him: "we wanted to elicit more information from her." The purpose was not just to help her relax for therapeutic reasons. 4 EHRR 230.

A crime scene log indicates that Officer Serna was present at the crime scene the day of the shooting for several hours; he then took a short break and came back for some unidentified period because he did not sign out a second time. 4 EHRR 190-91.

Officer Callaway, the lead investigator, told Officer Serna to do the hypnosis session at the police station. Officer Serna admitted that he did not suggest to

Callaway that there was any problem with conducting the session at the police station or with him conducting the hypnosis although he had been involved in the crime scene investigation. 4 EHRR 195-97.

The hypnosis session took place in the office of the lieutenant of the narcotics division, which was part of the Special Investigations Division known as "SID." SID investigators were working closely with the Criminal Investigations Divisions, known as "CID," which investigated crimes against persons. 4 EHRR 193-94. The two divisions worked together on the investigation of the Black murder from the outset. 4 EHRR 201; 4 EHRR 257-58. *See also* AppX8.

Officer Serna acknowledged that the purpose of the hypnosis session was not simply to get Ms. Barganier to relax but to get her "to where she would be able to feel comfortable talking about what it was she thought she saw." 4 EHRR 203. In other words, the goal was to enable her to remember more fully what she had seen. The assumption on his part was that the police were trying to unlock material in her mind that might be stored in memory. 4 EHRR 204.

Officer Serna acknowledged that he did not have any information about Ms. Barganier extraneous to the hypnosis session, such as information about how good her memory was, whether she had any vision problems, or whether she had any mental health issues. 4 EHRR 223. He thought this information could be relevant to

determining whether she was a suitable subject for hypnosis, but he did not feel qualified to speak to that topic. 4 EHRR 224.

Officer Serna agreed that the only value in using the "movie-theater technique" would be if it could be used to recover a true memory. 4 EHRR 205.

Officer Serna agreed that asking Ms. Barganier while she was under hypnosis about whether the passenger's hair was "neatly trimmed" when she had only described him as having long, dirty hair could be suggestive. 4 EHRR 212. He also agreed that the idea of using an imaginary remote control, as he did with Ms. Barganier, rests on the idea that the mind stores memories like a videotape, which was his belief at the time. *Id*. He also agreed that it was suggestive to say "you will remember." 4 EHRR 252.

Officer Serna confirmed that Ms. Barganier did not, at any point during the hypnosis session, describe the passenger she had seen as Hispanic, noticeably fatter than the driver, or as having short hair. 4 EHRR 222.

Officer Serna further admitted that, during the hypnosis session, he told Ms. Barganier several times that she may find she will be able to recall other things as times goes on, which likely gave her confidence in her ability to remember things better later on. 4 EHRR 223.

Officer Serna stated candidly that he did not have any experience with empirical studies about the ability to recall faces seen only in passing months after-the-fact. 2 EHRR 223.

The Farmers Branch Police Department did not have any written policies back in 1998 about creating arrays so that they were not suggestive. 4 EHRR 234. Officer Serna only later became aware of research showing a connection between wrongful convictions and eyewitness identifications. 4 EHRR 236-37. Therefore, around 2008, he began to implement new policies for the Farmers Branch Police Department. He felt that if there was a better, fairer way to present photo arrays than had been done, the department should do that. 4 EHRR 238.

The Court's FFCL include the conclusion that Officer Serna was a "credible and reliable" witness during the 2017 evidentiary hearing. *See* FFCL at p. 51 (231). Therefore, it makes little sense that Officer Serna's own testimony was ignored: about the limitations of his training; his ignorance of the relevant science regarding hypnosis and memory; his present doubts about the hypnosis session he conducted; and his concerns about problems with wrongful convictions based on eyewitness identifications arising from suggestive procedures.

C. Relevant facts newly obtained through Officer Jerry Baker's 2017 testimony are omitted.

Jerry L. Baker, an officer with the Farmers Branch Police Department, testified in this proceeding. He was second detective on the Betty Black murder

investigation. As second detective, Officer Baker supported lead detective Officer Gerry Callaway. 4 EHRR 262-63. Both Officer Baker and Officer Callaway were assigned to the Criminal Investigations Division, known as CID. 4 EHRR 257, 259. Officer Baker and Officer Callaway worked together closely in this investigation. 4 EHRR 259.

As second detective on Ms. Black's murder investigation, Officer Baker applied for search warrants. 4 EHRR 263. On January 29, 1998, he applied for a search warrant for 2965 Bergen Lane, the crime scene. AppX46. On January 31, 1998, he applied for a search warrant for 11807 High Meadow, the home of Rick Childs's grandmother where Childs had been observed during an extended stakeout. AppX47; 4 EHRR 263. Officer Baker also assisted in interviewing witnesses and identifying potential suspects. 4 EHRR 266, 268.

Officer Baker was present during the entire hypnosis session because Officer Callaway had asked him to operate the video camera. 4 EHRR 276. Officer Baker had spoken to Ms. Barganier before the hypnosis session. 4 EHRR 281. He knew that Officer Callaway had contacted Ms. Bargainer about undergoing hypnosis the night before the session. 4 EHRR 277. Officer Baker knew that Ms. Barganier would create a composite and look at photo arrays after the hypnosis session. 4 EHRR 277.

Officer Baker acknowledged that, before the hypnosis session, no witness had yet identified the passenger seen getting out of the Volkswagen Bug, and Ms. Barganier was the only witness to do so at trial. 4 EHRR 272-73.

Officer Baker admitted that the description Ms. Barganier had provided before the hypnosis session was that she had seen "two white males with shoulder-length hair." 4 EHRR 273. The plan for the day of the hypnosis session was to have Ms. Barganier attempt to create a composite sketch of the passenger and then look at photo arrays after the hypnosis session. 4 EHRR 277.

Officer Baker testified during the 1999 *Zani* hearing that he did not know what Flores looked like and had not even heard his name at the time he sat in on the hypnosis session on February 4, 1998. However, police records show that this was not true. AppX8. By January 31, 1998, two days after the murder, Officer Baker had already obtained the name "Charlie" and a description from his interview of Vanessa Stovall. AppX8 and 4 EHRR 285. Vanessa Stovall was a girlfriend of Rick Childs, Flores's co-defendant, who knew Flores before Ms. Black's murder. AppX8. While in custody along with Childs, Vanessa Stovall had told Officer Baker that "Charlie" was a large Hispanic male with short hair. 4 RR 285-86. Officer Baker knew that Charlie wore glasses. 4 EHRR 286. Officer Baker knew that Charlie lived in the Big Tex Trailer Park in Irving, Texas. 4 EHRR 286.

Officer Baker had met with Ms. Stovall more than once before the hypnosis session. The second time he saw her was the afternoon of February 3, 1998, at her trailer, where he got her to sign consent-to-search forms both for her trailer and her car. 4 EHRR 288; AppX45. Officer Callaway was present during that visit and conducted the actual search of Ms. Stovall's trailer. 4 EHRR 289. Officer Baker spoke with Ms. Stovall multiple times and they also spoke over the phone. 4 EHRR 305-08.

By at least February 3, 1998, an investigator with the SID learned that Charlie's full name was Charles Don Flores. AppX8; 4 EHRR 290. That same day, an investigator got a photograph of Mr. Flores and shared both his photo and full name with CID. AppX8; 4 RR 290-91.

CID collaborated closely with SID investigators in the investigation of Ms. Black's murder. AppX8; 44 RR 258-59. SID assisted CID in executing search warrants, speaking with witnesses, and developing suspects in this investigation. *Id*. Officer Baker admitted that it was important for the SID investigators to share information about the case with Officer Baker in their efforts to solve Ms. Black's murder as quickly as possible. 4 RR 289-90.

It is not credible that Officer Baker did not know the full name or see the photograph of the main suspect, Charles Don Flores, as soon as CID received the

information on February 3, 1998.[27] Officer Callaway knew that Charles Don Flores was a suspect. In fact, ***he showed Jill Bargainer a photographic line-up that included Flores's photograph immediately after the hypnosis session in which Baker participated***. 4 EHRR 273; AppX30. Officer Baker conceded that, as back-up investigator, he had to be prepared to step into the role of lead detective on the Black murder investigation if Officer Callaway was unavailable. 4 EHRR 265. Officer Baker also said he was familiar with the evidence in the case because Officer Callaway and others were updating him on relevant, important information regarding the case as the investigation proceeded. 4 EHRR 282. He admitted that the identity of a murder suspect was both relevant and important to solving Ms. Black's murder. 4 EHRR 266.

Furthermore, Mr. Flores adduced ***evidence that Flores's identity was known to Officer Callaway as early as January 31, 1998***. AppX9. During the evidentiary hearing in this proceeding, Officer Baker positively identified the case chronology created by Officer Callaway, which indicates that "suspect Charles Don Flores was positively identified" on January 31, 1998. AppX9; 4 EHRR 295. The case chronology is a document created by the lead investigator to summarize case

[27] By ignoring all of the contemporaneous evidence found in the police records that seriously call Officer Baker's 1999 trial testimony into question, the Court's FFCL treat his trial testimony as fact and incorrectly "concludes" that his 1999 and 2017 testimony are consistent when they are demonstrably not. *See* FFCL at pp. 48 (203)-(206).

activities based on date and time. 4 EHRR 291. There is no reason to believe it does not accurately reflect the information that Officer Callaway had on January 31, 1998. Likewise, there is no reason to believe that Officer Baker did not have access to case updates as they occurred.

Before the hypnosis session in which he participated, Officer Baker clearly knew, at a minimum, that the suspect's name was "Charlie" whom Stovall had described as a fat Hispanic male with short hair who wore glasses. AppX8. Nonetheless, Officer Baker testified during the *Zani* hearing and again in 2017 that he had no knowledge whatsoever of what the suspect looked like or what his name was when he participated in Ms. Barganier's hypnosis session. 35 RR 20-21; 4 EHRR 305.

Mr. Flores objects to this additional, unexplained omission of uncontroverted, highly relevant factual evidence relevant to assessing the reliability of the hypnosis session central to his new-science claim.

VI. Mr. Flores Objects to the Court's Adoption of the State's Advocacy Positions as "Facts" Instead of Serving as an Independent Arbiter of the Evidence.

Aside from ignoring most of the evidentiary record developed in this proceeding, the Court's FFCL, drafted by State's counsel, adopt all of the State's advocacy positions as if they were "facts." Arguments, however, are not synonymous with facts. Arguments, to be persuasive, must be based on facts. But

the failure to appreciate the categorical distinction between these two phenomena is yet another reason why the FFCL, as drafted, are not entitled to deference. *See Davila*, 530 S.W.2d at 545 (supporting proposition that fact-finding procedure is not entitled to deference if it was not "adequate for reaching reasonably correct results").

During this proceeding, the State threw six different arguments-in-the-alternative up against the wall to see what would stick. By adopting the State's Proposed FFCL uncritically and without exercising independent judgment, the Court has embraced a document in which *all* of these internally inconsistent arguments are treated as "facts," a logical impossibility. Mr. Flores objects to the State's unfounded, counter-factual arguments being adopted as "facts."

A. The Court's FFCL improperly treat as "fact" the State's argument that the testimony of its trial expert, Dr. George Mount, regarding the "science" of forensic hypnosis constitutes defensible "science" today.

The Court's FFCL implicitly endorse all of Dr. Mount's 1999 expert opinions, which were that:

- A forensic hypnotist is sufficiently independent from law enforcement if he only investigated the crime scene but did not interview witnesses. 36 RR 66.
- Having an investigator in the room who had knowledge of criminal investigation and potential suspects was not a problem. 36 RR 68.
- Using the "movie theater technique" to conduct the hypnosis was common, permissible, and appropriate. 36 RR 69-70.
- Hypnosis was something that might enable Ms. Barganier to recall what she had observed. 36 RR 70.

- Nothing in the hypnosis session suggested or cued Ms. Barganier to come to the courtroom thirteen months later and positively identify Mr. Flores. 36 RR 72-73.
- There was no significance in the passage of time between the hypnosis session and the eyewitness identification thirteen months later. 36 RR 73.
- Ms. Barganier's memory of what she had seen "was there" and something must have triggered it to surface thirteen months later. 36 RR 73.
- Hypnosis is not necessarily suggestive. 36 RR 79.
- Ms. Bargainer did not show a desire to please the hypnotist because she disagreed with him about some things. 36 RR 65.

As explained above, Dr. Lynn thoroughly debunked the legitimacy of each of these positions in light of contemporary scientific understanding. *See* 6 EHRR 83-88.

Even Dr. Mount made admissions in the 2017 hearing that are at odds with the 1999 opinions upon which the State relied during the *Zani* hearing. *See* 5 EHRR 154-161, discussed *infra*.

Additionally, Dr. Spiegel, the State's 2017 rebuttal expert, admitted that:

- Hypnosis sessions should be conducted "in an independent professional's office" as opposed to a police station where "you're under pressure to produce information." 6 EHRR 194, 266-68;
- The hypnosis video did not show everyone in the room, therefore it is impossible to tell if Ms. Barganier was being influenced by subtle clues. 6 EHRR 269;
- A key element of hypnosis is suggestibility and the suspension of critical judgment makes the subject more vulnerable to overt and subtle suggestions regarding the content of their memories. 6 EHRR 223-24;
- Word choices matter while a subject is under hypnosis. 6 EHRR 222;

- It is easier to confabulate if a person never got a good look at a person's face so as to encode a memory of it. 6 EHRR 231-32;
- An effect of hypnosis is that the subject's confidence about a recollection tends to be enhanced without increasing accuracy. 6 EHRR 232, 234.

None of these opinions can be squared with the finding that there was nothing problematic about the hypnosis session conducted on Ms. Barganier. Nor can they be squared with her subsequent claim to be able to identify Charles Flores. *See* AppX26; 6 EHRR 72-82.

Most surprisingly, the Court's FFCL include "additional findings" defending the "movie theater" hypnotic technique that Officer Serna used on Ms. Barganier and that Dr. Mount endorsed at trial as scientifically acceptable. *See* FFCL at pp. 44-45, (164)-(180). Even the State's 2017 expert, Dr. Spiegel, ultimately admitted that this technique can have the effect of encouraging the hypnosis subject to confabulate and to have a false sense of certainty that her imaginings are true. He further admitted that, as Dr. Lynn and Dr. Kovera explained, the technique is premised on the false notion that memory is stored like video tapes inside the mind. 6 EHRR 259-61; 5 EHRR 46, 55-58.

The State's (and now the Court's) argument in defense of this technique seems to be that, although the movie-theater technique may already have been seen as problematic at the time that Officer Serna used it on Ms. Barganier, it was and

remains acceptable simply because Dr. Mount vouched for it both in 1999 and again in 2017—and because police officers are still known to use the technique.

This argument/finding entirely misses the mark as to the nature of an Article 11.073 claim. Just because someone, somewhere might still find a practice to be acceptable does not mean that that opinion represents a sound, evidence-based belief; what matters is whether the applicant has competent evidence of a change in scientific understanding. *See Ex parte Robbins*, 478 S.W.3d at 695 (Johnson, J., concurring) (explaining that Article 11.073 is intended to address evidence "based on out-dated knowledge," refinements "for increased accuracy," as well as "junk science that has never been subjected to any kind of scientific investigation" and even "changes in scientific testimony by individuals" who testified at trial).

Moreover, the Court's FFCL acknowledge that Dr. Lynn, Dr. Kovera, Dr. Mount, and even Dr. Spiegel all "testified that the video recorder model of memory is inaccurate and testified that memory is reconstructive." FFCL at p. 55 (251). But the Court ignores the fact that the "movie theater" technique is based on the false premise that memory works like a video recorder. Further, the Court ignores the fact that Officer Serna, the man who conducted the hypnosis session on Ms. Barganier, admitted that the idea of using an imaginary remote control, as he did with Ms. Barganier, rests on the idea that the mind stores memories like a videotape, which was his belief at the time. 4 EHRR 205, 212.

Most perplexing of all, the State's expert, Dr. Spiegel offered the opinion that Dr. Mount's scientific expertise was not an issue in this proceeding. 6 EHRR 209. Dr. Mount was the State's expert at trial who provided the scientific perspective that is challenged in this proceeding; and all of the credible evidence in this proceeding established that Dr. Mount's 1999 opinions are demonstrably wrong in light of contemporary scientific understanding of memory, hypnosis, and the reliability of eyewitness identifications.

B. The Court's FFCL improperly treat as "fact" the State's argument that all scientific studies of hypnosis since 1999, undertaken by Dr. Lynn and other scientists, is "nothing new."

Incredibly, the Court's FFCL state that Mr. Flores did not show "that there is relevant scientific evidence that is presently available that was not available to be offered by Applicant at the time of his trial." FFCL at p. 34 (94). There has been a wealth of new science since 1999, about which Dr. Lynn testified, and samples of which were introduced into evidence. *See* APPENDIX A at pp 59-63; AppX5; AppX16; AppX60.

Some examples of new studies introduced during the hearing and emphasized during closing argument include:

Alvarez, C.X., & Brown, S.W., *What People Believe about Memory Despite the Research Evidence*, The General Psychologist (2002): Demonstrating that a considerable portion of the American public believes the brain permanently stores accurate records of memories

Bushnell, T., & Sinha, A., *Show Me Real Eyewitness ID Reform*, St. Louis Post Dispatch (2016): Stating that in 2014, the National Academy of Sciences released a comprehensive report on established practices, leading to consensus that science on eyewitness identification was settled

Brewer, N., & Wells, G.L., *Eyewitness Identification. Current Directions in Psychological Science*, Current Directions in Psychological Science (2011): Explaining that more research on eyewitness identification is required using emerging techniques to create a better understanding of the field

Clifasefi, S.L., Garry, M., & Loftus, E., *Setting the Record (or Video Camera) Straight on Memory: The Video Camera Model of Memory and Other Memory Myths*, Tall Tales About the Mind & Brain: Separating Fact from Fiction (2007): Presenting an overview of eyewitness memory research and challenging the persistent video-camera model of memory

Loftus, E.F., *Eyewitness Testimony in the Lockerbie Bombing Case*, Memory (2013): Explaining why, in light of current scientific understanding, the identification made of suspect in this specific case was likely false

Neuschatz, J., Lynn, S.J., Benoit, G., & Fite, R., *Hypnosis and Memory Illusions: An Investigation Using the Deese/Roediger Paradigm*, Imagination, Cognition, and Personality (2003): Finding no support for the hypnosis is an appropriate memory enhancement procedure

Scorbia, A., Mazzoni, G., Kirsch, I., *Effects of Misleading Questions and Hypnotic Memory Refreshment on Memory Reports: A Signal Detection Analysis*, International Journal of Clinical and Experimental Hypnosis (2006): Finding that, where individuals expect that hypnosis will increase the volume and accuracy of their memories, this expectation increases motivation to search for memories that can lead to imagined or vaguely recalled events

Hirst, W., Phelps, E.A., Meksin, R., Vaidya, C.J., Johnson, M.K., Mitchell, K.J., & ... Olsson, A., *A Ten-Year Follow-Up of a Study of Memory for the Attack of September 11, 2001: Flashbulb Memories and Memories for Flashbulb Events*, Journal of Experimental Psychology: General (2015): Demonstrating that even traumatic memories that have had a significant impact on one's community are vulnerable to inconsistencies over time

Lampinen, J.M., Odegard, T.N., & Bullington, J.L., *Qualities of Memories for Performed and Imagined Actions*, Applied Cognitive Psychology (2003): Finding that false memories are qualitatively different from memories of real events

Schmechel, R., et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, Jurimetrics (2006): Demonstrating that jurors generally have a tenuous grasp on how memory works, resulting in a belief that a witness on the stand is effectively narrating a video recording of events that had been captured perfectly in their memory

Sharman, S.J., & Scoboria, A., *Imagination Equally Influences False Memories of High and Low Plausibility Events*, Applied Cognitive Psychology (2009): Finding that imagining events made the experiment's subjects more confident that those events actually occurred, regardless of the plausibility of the event

Krackow, E., Lynn, S.J., & Payne, D.G., *The Death of Princess Diana: The Effects of Memory Enhancement Procedures on Flashbulb Memories*, Imagination, Cognition, and Personality (2005): Explaining results of experiments showing that recall of memory was more accurate when hypnosis was not used

Lynn, S.J., Malaktaris, A., Barnes, S., & Matthews, A., *Hypnosis and Memory in the Forensic Context*, Wiley Encyclopedia of Forensic Science (Online) (2013): Finding that hypnosis increases the sheer volume of recall, including false memories that can override real ones, as well as increasing recall confidence even when memories are false

Howe, M.L., *Memory Lessons from the Courtroom: Reflections on Being a Memory Expert on the Witness Stand*, Memory (2013): Explaining why having a memory expert at trial is paramount in cases in which eyewitness testimony is employed

Mazzoni, G., & Lynn, S.J., *The Use of Hypnosis in Eyewitness Memory: Past and Current Issues*, Handbook of Eyewitness Psychology: Volume 1: Memory for Events (2006): Finding that hypnosis did not compromise memory but did not improve memory recall either

Patihis, L., Ho, L.Y., Tingen, I.W., Lilienfeld, S.O., & Loftus, E.F., *Are the 'Memory Wars' Over? A Scientist-Practitioner Gap in Beliefs About Repressed Memory*, Psychological Science (2014): Showing that the majority of the general public stills believes that hypnosis can accurately retrieve forgotten memories

Wagstaff, G.F., *Hypnosis and the Law: Examining the Stereotypes*, Criminal Justice and Behavior (2008): Demonstrating that laypeople do not understand hypnosis, and most professionals think that hypnosis should not be used because of these popular misconceptions, ultimately recommending changing hypnosis terminology

Scorbia, A., Mazzoni, G., Kirsch, I., Milling, L.S., *Immediate and Persistent Effect of Misleading Questions and Hypnosis on Memory Reports*, Journal of Experimental Psychology (2002): Finding that hypnosis and misleading questions significantly increase memory errors, with misleading questions producing more errors than hypnosis

Simons, D.J., & Chabris, C.F., *Common (Mis)beliefs About Memory: A Replication and Comparison of Telephone and Mechnical Turk Survey Methods*, PLoS ONE (2012): Corroborating findings that a significant disparity exists between popular beliefs about memory and positions held by memory experts

Smith, S.M., Stinson, V., & Prosser, M.A., *Do They All Look Alike? An Exploration of Decision-Making Strategies in Cross-Race Facial Identifications*, Canadian Journal of Behavioural Science (2004): Discussing the variable accuracy of cross-race and same-race identifications in regards to impacting memory clarity, finding that race did impact reported clarity of respondents

Lilienfeld, S., Lynn, S.J., Ruscio, J., & Beyerstein, B., *Myth #12: Hypnosis is Useful for Retrieving Memories of Forgotten Events*, 50 Great myths of popular psychology: Shattering Widespread Myths and Misconceptions About Human Behavior: Second Edition (2010): Dispelling the common misconception that hypnosis eases the ability for people to recall forgotten events

Webert, D.R., *Are the Courts in a Trance-Approaches to the Admissibility of Hypnotically Enhanced Witness Testimony in Light of Empirical Evidence*, American Criminal Law Review (2003): Finding that there is no consensus amongst contemporary scientific data and judicial approaches to the admissibility of hypnotically enhanced testimony

Newman, A.W., & Thompson, W., *The Rise and Fall of Forensic Hypnosis in Criminal Investigation*, Journal of American Psychiatry and Law (2001): Identifying pitfalls associated with forensic hypnosis

Simons, D.J., & Chabris, C.F., *What People Believe About How Memory Works: A Representative Survey of the US Population*, PLoS ONE (2011): Finding that the majority of experiment's respondents erroneously believed memory works like a video recorder and that hypnosis is useful in helping memory recall, while 0% of memory experts believed that memory operates similarly to a video recorder and that hypnosis facilitates accurate memory recall

Lynn, S.J., Neuschatz, J., Fite, R., & Rhue, J.R., *Hypnosis and Memory: Implications for the Courtroom and Psychotherapy*, Memory, Suggestion, and the Forensic (2001): Suggesting implications of memory research on accuracy of courtroom testimony

Zhu, B., Chen, C., Loftus, E.F., He, Q., Chen, C., Lei, X., & ... Dong, Q., *Brief Exposure to Misinformation Can Lead to Long-Term False Memories*, Applied Cognitive Psychology (2012): Suggesting brief exposure to misinformation can cause a false memory to persist long-term, similarly to the persistence of true memories

See 7 EHRR 14-16.

Mr. Flores also established that the legal perspective on the reliability of post-hypnotic memory has changed significantly since 1999/2000, as reflected in *Moore v. State*, decided in 2006. *See* AppX55. As Mr. Flores argued to the Court, *Moore* reversed *Hurd*, a precursor to *Zani*, finding that, "more recent studies reaffirm[ed] and strengthen[ed] earlier understandings about how hypnosis affects both memory and attitude." *Moore*, 902 A.2d at 1213.[28]

To support its conclusion that there is "nothing new" in the field of memory, hypnosis, and eyewitness identifications, the Court purportedly relied on the

[28] Dr. Spiegel admitted that his opinion, that the risks associated with hypnotically induced testimony can be sufficiently managed, was rejected in the *Moore* case. 6 EHRR 270. Also, it was established that Dr. Spiegel's testimony in this proceeding contradicted several aspects of his previous testimony, seemingly in an effort to provide a starker contrast to Dr. Lynn, not because the opinions are supported by any empirical science. 6 EHRR 219, 253-54, 263-67.

testimony of rebuttal expert, Dr. David Spiegel. *See* FFCL at pp. 41-42; 6 EHRR 152. But as the Court's FFCL note, Dr. Spiegel is a medical doctor who "uses hypnosis clinically to treat pain, post-traumatic stress disorder, dissociative disorders, and psychosomatic disorders." FFCL at p. 41 (150); *see also* 6 EHRR 154-56,160-61. Dr. Spiegel is *not* an expert in the current scientific understanding of the relationship among memory, hypnosis, and trustworthiness of eyewitness identifications; he is not an expert in forensic hypnosis, but rather in the therapeutic/clinical use of hypnosis.

Dr. Spiegel repeatedly opined that everything that Dr. Lynn said was "not new" and was available in 1999. 6 EHRR 157, 190-91, 203. He suggested that "[n]othing has happened since [1987] that really changes the picture." 6 EHRR 167. However, Dr. Spiegel also acknowledged that he has not written or studied hypnosis and memory much; his focus has instead been on the effect of trauma on memory. 6 EHRR 158-60; 162-63. He also admitted that he was not aware of studies involving memory and cognition that show that memory degrades very rapidly after an event is observed. Nor was he aware of studies showing the risks of distortion associated with repeated questioning and recall attempts, studies that Dr. Kovera discussed at length. 6 EHRR 220, 234-35.

Dr. Spiegel's dismissive opinion about whether there has been anything new is not credible in light of the copious studies cited and described by Dr. Lynn and

Dr. Kovera. For instance, Dr. Lynn explained that, since the Flores trial, there have been numerous laboratory studies that demonstrate empirically the inflation of confidence in purported memories in hypnotized subjects. 6 EHRR 147-48; 6 EHRR 272-73; AppX60.

Dr. Spiegel's testimony also suggested a lack of awareness of some key facts about Ms. Barganier's situation both before and after the hypnosis session. For instance, he did not have command of the details of the descriptions Ms. Bargainer made of her observation before and after the hypnosis session. 6 EHRR 243, 256, 266, 268. He did not know that her trial testimony about "meeting eyes" with the passenger was different from recorded descriptions she had previously given to law enforcement, including during the hypnosis session. 6 EHRR 244-48. He did not know how the composite sketch had been done or that Ms. Barganier had found the process highly stressful. 6 EHRR 249. He also had to admit that a person cannot retrieve a memory that has not been encoded and stored in the first place. 6 EHRR 214.

In 1999, the trial court (and certainly the jury) did not have access to scientific studies about the highly suggestive procedures used to obtain Ms. Barganier's identification, most notably: hypnosis with its "imagination inflation" that creates unwarranted confidence in what can be demonstrably proven are false memories. In 2017, Dr. Lynn provided an exhibit, which was introduced into evidence, listing

numerous recent studies, reflecting noteworthy developments in this precise field. 6 EHRR 272-73; AppX60.

In short, the conclusion, that Mr. Flores adduced no "new science," contradicts the record, which is replete with competent evidence of significant advances in the form of empirical studies.

C. The Court's FFCL improperly treat as "fact" the State's argument that the relevant science was "ascertainable" at the time of trial.

The Court, in adopting the State's proposal, also adopted the conclusion that Mr. Flores's claim should be disavowed because the new science upon which he relies was ascertainable in 1999. At best, that conclusion requires an unreasonably narrow interpretation of "available" defined in the statute as "ascertainable through the exercise of reasonable diligence." TEX. CODE CRIM. PROC. art. 11.073(b)(1)(A).

The argument now embedded in the Court's FFCL is that, because Dr. Lynn had already begun publishing scholarship raising concerns about the effect of hypnosis on memory at the time of Mr. Flores's trial, that means that the new science he presented (including numerous studies conducted well after 1999) was already "available." *See* FFCL at pp 37-38. This argument is akin to suggesting that because Galileo, in the early 1600s, posited that the Earth might revolve around the Sun instead of the other way around, nothing thereafter in the field of astronomy should be deemed "new." This is not what the plain language of Article 11.073 requires. *See* TEX. CODE CRIM. PROC. art. 11.073(a) ("The article applies to relevant scientific

evidence that: (1) was not available to be offered by a convicted person at the convicted person's trial; or (2) contradicts scientific evidence relied on by the state at trial.”). That is, even if the scientific studies had been available to Mr. Flores at the time of his trial (which they were not), Mr. Flores has also presented copious evidence “contradicting the scientific evidence relied on by the state at trial”—which does not hinge on whether any such evidence was then “available.” *See id.*

Justice Johnson has aptly explained the intent of Article 11.073: “Whether ‘debunked’ or ‘refined’ for increased accuracy, changes in scientific knowledge in general, and therefore changes in scientific testimony by individuals, must be acknowledged and addressed.” *Ex parte Robbins*, 478 S.W.3d at 695.

Moreover, in concluding that Mr. Flores could have ascertained his new scientific evidence before 1999, the Court’s FFCL ignore the plain language of Article 11.073, which refers to the exercise of “reasonable diligence.” The Supreme Court has expressly recognized that “reasonable diligence” is not the same as “maximum feasible diligence.” *Holland v. Florida*, 560 U.S. 631, 653 (2010). Instead, the plain meaning of that term has been repeatedly construed as synonymous with “due diligence.” *See, e.g.*, *Larence v. Lynch*, 826 F.3d 198, 204 (4th Cir. 2016) (observing that 10th edition of Black’s Law Dictionary (2014) equates the two terms); *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002) (“due” and “reasonable” are the same). To act with “reasonable diligence” is to investigate the

relevant facts and circumstances sufficiently to make an informed decision. To satisfy that standard, counsel need not "exhaust every imaginable option," *Aron*, 291 F.3d at 712, or "scour the globe on the off chance something will turn up." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

The trial record in this case makes abundantly clear that Jill Barganier, the hypnotized witness, did not even claim to be able to identify Mr. Flores until over a year after the event she had observed—***when Mr. Flores was already in the middle of trial***. When defense counsel objected to her being permitted to make this eleventh-hour identification, there was a temporary stay of the trial—only long enough to hold a *Zani* hearing on the hypnosis issue the very next morning. *See* 36 RR. It is utterly unreasonable for the Court to have concluded that, under those circumstances, the exercise of "reasonable diligence" required that the defense find and obtain a rebuttal expert in the middle of a capital murder trial whom they could throw on the stand to testify about controversies regarding forensic hypnosis that were just starting to be subjected to empirical testing, conducted by the likes of Dr. Lynn in Upstate New York. "Reasonable diligence" does not imply that trial counsel had a duty in the middle of a capital murder trial to canvass appellate decisions from other jurisdictions around the country to see if they might possibly contain a reference to

some expert who could conceivably be brought in upon a moment's notice.[29] The State put on no evidence during this writ proceeding that would permit an inference that doing so would have been feasible, let alone objectively reasonable.[30]

It was the *State*'s *burden* at trial to show that the hypnosis had been proper pursuant to the scientific understanding at that time. To make that showing, the State found a local clinical psychologist, Dr. Mount, who was willing to vouch for Officer Serna's hypnosis session with Ms. Barganier. 36 RR 65-79. It is his testimony that Mr. Flores's challenges in this proceeding as junk science.

The impropriety of the Court's narrow statutory construction is illustrated by recourse to the companion cases: *Ex parte Robbins*, 360 S.W.3d 446 (Tex. Crim. App. 2011) ("*Robbins I*") and *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014 ('*Robbins II*"). These cases straddle the enactment of Article 11.073. Eight

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[29] *See, e.g., Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir 1981) (noting a lawyer preparing for a proceeding in his own jurisdiction "is normally not expected … to research [the law in] parallel jurisdictions").

[30] Additionally, this Court prevented Mr. Flores from putting on as witnesses any of the lawyers involved at trial who could have attested to whether it would have been reasonable for defense counsel in Dallas County in 1999 to obtain a continuance in the middle of a capital murder trial to secure time to research and then retain funding for a qualified expert and then been permitted to put on that expert to opine about emerging changes in the science of hypnosis, memory, and eyewitness identifications that were barely known at that time. The argument is, however, facially absurd since studies show that, up through at least 2011 and beyond, the general public, which includes lawyers, judges, and jurors, still believed that memory works like a video recorder and that hypnosis is useful in helping memory recall, even though memory experts had, by then, abandoned these ideas based on empirical research. *See, e.g.,* Simons, D.J., & Chabris, C.F., *What People Believe About How Memory Works: A Representative Survey of the US Population*, PLOS One (2011).

years after Robbins' trial, the State's pathologist stated in a letter that, based on her ensuing years of experience and review, her opinion about cause of death had shifted from "homicide" to "unknown." Members of the CCA initially debated whether one expert changing her mind could amount to "new science" sufficient to satisfy Article 11.073. The CCA ultimately concluded that that one person changing her mind was enough. *See Robbins II*.

Furthermore, while *Robbins II* was pending, the Texas Legislature amended Article 11.073 to make clear that courts could and should consider whether the change in opinion by one witness was sufficient to satisfy the burden of showing that "scientific knowledge" had changed since trial. The 2015 amendment added language permitting courts to consider "whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since [the relevant date[.]" *See* H.B. 3724, 84th Leg., Reg. Sess. (Tex. 2015, sec. 1). In other words, the amendment *expanded* the ways an applicant could satisfy the requirement of showing new scientific evidence that was not previously "ascertainable." The Court's application of Article 11.073 to the facts adduced in this proceeding fly in the face of the Legislature's intent.

D. The Court's FFCL improperly treat as "fact" the State's argument that Jill Barganier was not really hypnotized, to conclude that the hypnosis session had no bearing on her post-hypnotic eyewitness identification.

The argument that Ms. Barganier may not really have been hypnotized was first trotted out by lead prosecutor Jason January at trial during the *Zani* hearing. He, who had no discernible expertise in the fields of forensic hypnosis, memory, or the reliability of eyewitness identifications, argued that (1) "the hypnosis had little or nothing to do with her in-Court identification at all" and (2) "if it had any effect, it certainly was proper under any of the *Zani* guidelines." 36 RR 111-13.

The problem with this argument is that it is at odds with all relevant evidence adduced both at trial and during the 2017 evidentiary hearing. After the video-recorded hypnosis session, Ms. Barganier herself felt that she was "a medium" in terms of the depth of the hypnosis. AppX26. Officer Serna testified that he believed her when she said that she felt she had been hypnotized—or at least did not press to see if she was giving false information. 4 EHRR 253. Dr. Mount testified that "the subject's own belief about that is probably just as good as anybody else's." 36 RR 83. Dr. Lynn believed that she had been hypnotized based on the video and Ms. Barganier's subjective statements that she had been hypnotized. 6 EHRR 79-80; 142-43. Likewise, Dr. Spiegel felt that she had been successfully hypnotized. Indeed,

Dr. Spiegel testified that he thinks people are "spontaneously" self-hypnotizing all of the time—while playing football, watching movies, etc. 6 EHRR 221.[31]

An argument based on an alleged fact that contradicts all record evidence is not credible.

E. The Court's FFCL improperly treat as "fact" the State's argument that Ms. Barganier was only hypnotized to help her "relax," not to help her recover a memory.

Perhaps most absurdly, the Court's FFCL at pp. 57-58 (267), adopt the State's argument that Ms. Barganier "did not believe that hypnosis could help her remember more" instead she was just hoping the police could use the "hypnosis session to help her relax."

The truth should be self-evident: police in the middle of a murder investigation are not available to provide citizens with therapeutic hypnosis sessions just to help them "relax." The truth is also reflected in the videotape of the hypnosis session in which Ms. Barganier is heard repeatedly asking the police officers: "Did I do ok? . . . . Did I help in any way?" AppX26.

Officer Serna's contemporaneous record created at the time he conducted the hypnosis session makes clear that the "purpose" of the hypnosis was to obtain "Any

[31] Dr. Spiegel criticized Dr. Lynn's definition of hypnosis, which is different from Dr. Spiegel's. 6 EHRR 160. This criticism is incorporated into the Court's FFCL. *See* FFCL at p. 49. But, as Dr. Mount testified in the Zani hearing and as the CCA noted in *Zani* itself, there is a "vast divergence" about what hypnosis is and is not. 36 RR 80. Dr. Spiegel's definition is so broad that it seems to conflate "hypnosis" with any kind of meditative state.

additional information pertaining to the suspect's identity and any other information pertinent to the case." AppX27. Officer Serna acknowledged that the purpose of the hypnosis session was not simply to get Ms. Barganier to relax but "to get her to calm down and relax enough to where she would be able to feel comfortable talking about what it was she thought she saw." 4 EHRR 203. In other words, the goal was to enable her to calm down to be able to remember what she had seen. The assumption on his part was that they were trying to unlock material in her mind that might be stored in memory. 4 EHRR 204. Officer Serna was candid: "we wanted to elicit more information from her." The purpose was not just to help her relax for therapeutic reasons. 4 EHRR 230.

Officer Baker also acknowledged at the time that the police had set up the hypnosis session because Ms. Barganier "thought it [hypnosis] would help her relax and *recall things that she might have overlooked*." 36 RR 31 (emphasis added). He admitted in his 2017 testimony that the description Ms. Barganier had provided before the hypnosis session was vague: that she had seen "two white males with shoulder-length hair." 4 EHRR 273. The plan that day was to have Ms. Barganier attempt to create a composite sketch of the passenger and look at photo arrays right after the hypnosis session to see if she could provide more information. 4 EHRR 277.

Dr. Lynn reflected on the absurdity of the suggestion that the hypnosis session performed on Ms. Barganier should be treated as a nullity because she had just been trying to "relax": ***"If she wanted relaxation, the last place she should go would be the police station."*** 6 EHRR 149-50 (emphasis added).

Even Dr. Spiegel had to concede: the hypnosis video demonstrated that Ms. Bargainer wanted to be helpful to the police by providing more information. 6 EHRR 265. Dr. Spiegel's initial suggestion that Ms. Barganier, by asking the police to hypnotize her, only wanted "some relaxation" was not credible. Moreover, he subsequently conceded that she had expressed a desire to be helpful to the police by providing more information, as is evident in the videotaped hypnosis session. 6 EHRR 265; AppX26.

That the Court's FFCL adopt as "fact" the fallacious argument that the police-station-hypnosis session was conducted simply to help Ms. Barganier relax is untenable.

F. The Court's FFCL improperly treat as "fact" the State's argument that, even if new science demonstrates that Ms. Barganier's identification was hopelessly unreliable, there was sufficient "corroborating evidence."

At trial, under *Zani*, the State had the burden of proving, by clear and convincing evidence, that the hypnotically induced testimony was reliable in light of the totality of the circumstances. *Zani*, 758 S.W.2d at 242. Among the ten factors

that the trial court was supposed to consider is the "the existence of any evidence to corroborate the hypnotically-enhanced testimony." *Id.* at 244.

The State's/Court's FFCL argue that Dr. Lynn's testimony should be minimized because of his "decision not to consider any corroborating evidence." FFCL at p. 56 (256).[32] This justification for ignoring Dr. Lynn's critique of the hypnosis session is based on the Court's incorrect assertion that "there is considerable evidence in this case that corroborates Barganier's identification." FFCL at p. 56 (261).

In fact, no evidence was adduced at trial that "corroborated" the hypnotically induced testimony of Ms. Barganier. No other witness identified Charles Flores as one of the two men observed getting out of a Volkswagen outside of the Blacks' house on January 29, 1998 around 6:45 a.m. Second, the list of "corroborating evidence" that Prosecutor January rattled off during the *Zani* hearing, and which the State continues to repeat in all of its briefing, not only does not corroborate Ms. Barganier's post-hypnotic memory; it does not withstand scrutiny as circumstantial evidence of anything other than that Mr. Flores and Rick Childs were involved with a network of seedy drug dealers, who did not testify credibly or consistently. *Compare* 36 RR 111-13 *with* APPENDIX A at 126-130.

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[32] It is noteworthy that the State had to concede that Dr. Lynn is a recognized expert and researcher in the field of hypnosis. 6 EHRR 26-27. Moreover, the Court has made no adverse credibility finding.

Every aspect of the purportedly corroborating evidence listed during the *Zani* hearing can be debunked—even without recourse to external evidence. *See* 36 RR 111-113.

First, the State claimed that several witnesses who saw Flores with Childs hours before Mrs. Black's murder was "corroborating" evidence. For instance, Jaime Dodge had said he saw Flores and Childs together, saying they were going to Farmer's Branch. 36 RR 111. However, Dodge would have last seen Flores and Childs together at least 4 hours before Black's murder. 34 RR 86. The State argued that Judy Haney and Terry Plunk also saw Flores and Childs together earlier that morning. 36 RR 112. Like Dodge, Haney and Plunk would have seen Flores with Childs around 3:00-3:30 a.m., also 4 hours before the murder. 34 RR 172, 207. None of these witnesses saw Flores with Childs closer to the time of Black's murder.

Second, the State's lead witness, Jackie Roberts, claimed she last saw Flores and Childs, while riding in her El Camino, when they dropped her off at home before the murder. Roberts also claimed that Flores wanted money. 36 RR 112. Roberts, however, was not a credible witness. At the time, she was involved with Rick Childs both sexually and financially. At a minimum, Roberts was an accomplice in the attempted burglary of the Blacks' home and provided the information about drug money being stashed in the house and where the house was located. 34 RR 245-46; 38 RR 28, 117. After she learned of her mother-in-law's murder, she returned a

backpack to Childs and spent three hours with him. 36 RR 185. Jackie Roberts was also a meth addict and a daily meth user. 34 RR 110. Her allowance from the Blacks' was cut in half the day before Mrs. Black was murdered. 38 RR 138, 140. In her scenario, where Flores held her responsible and threatened her for the money from the drug deal with Plunk, Roberts was the person most in need of money. Not only did Roberts have the motive to commit a burglary of the Blacks', but once she was arrested as an accomplice in the capital murder of her mother-in-law, she had the motive to lie to save herself. 34 RR 165-166. Although she told investigators and prosecutors while in custody that she had told Childs about money hidden in the Blacks' house and had drawn him a map, at trial she lied to the jury about having drawn that map for Childs. 38 RR 204 and AppX57.

Third, in the *Zani* hearing the State cited Doug Roberts' testimony that he saw Childs leave Jackie Roberts' in the Volkswagen Bug at 6:30 a.m. as "corroborating" evidence. 36 RR 112. But on his first day of testimony Doug Roberts was certain that he did not see Childs drive off at 6:15-6:30 a.m. 34 RR 277. He swore he saw Childs leave at 7:15 a.m. 34 RR 235-39, 277. More importantly, although the passenger side of the Volkswagen Bug was facing him, Doug Roberts did not see anyone in the car with Childs and never claimed to place Flores in the car. 34 RR 275-76.

<u>Fourth</u>, in the *Zani* hearing, the State said that Stovall saw Childs and Flores in another part of the metroplex "literally minutes" before they allegedly went to Bergen Lane in Farmers Branch. 36 RR 112. Yet Stovall's testimony about when she saw Childs and Flores contradicts Mrs. Barganier's timeline and was directly contradicted by both Jackie and Doug Roberts, who said Childs dropped Jackie Roberts off at her house nearly an hour later than when they would have been at Stovall's. 34 RR 154, 235-38, 277; 35 RR 70-71, 75. Her testimony cannot be "corroborating" if the testimony of Doug and Jackie Roberts' testimony is also "corroborating," as the testimony is contradictory.

<u>Fifth</u>, in the *Zani* hearing, the State also pointed to the testimony of Michelle Babler and Nathan Taylor as "corroborating" evidence. Michelle Babler's physical description of the passenger was supposedly consistent with Flores's appearance. 36 RR 112. However, at trial, thirteen months after the fact, was the first time Babler had given a description of the passenger's build to anyone. 35 RR 38-39. She also changed her description of the passenger's clothes at trial. 35 RR 39, 109. Her son Nathan Taylor saw two men with gloves. 36 RR 112. Aside from their clothing, Taylor, who could not identify Flores, and did not describe any other features of the two men. 35 RR 140.

<u>Lastly</u>, in the *Zani* hearing, the State said that Homero Garcia and Johnny Wait, Sr.'s testimony about Flores reputedly confessing to shooting the family dog

was “corroborating” evidence. 36 RR 112-13. Garcia, a meth addict, was then facing charges for unlawful possession of a firearm. He first spoke to law enforcement about this alleged confession months after-the-fact while in FBI custody and coming off a four-day meth binge. 36 RR 229, 232-33. He also dodged a subpoena and was not attached in time to be cross-examined at trial. 38 RR 68-69. Wait, meanwhile, was a habitual FBI snitch who barely knew Flores. He was also a self-professed drug user and alcoholic who took issue with the fact that Flores had married his estranged daughter. 37 RR 79, 88-89, 91-92, 95-96. These were not, in other words, individuals fairly characterized as “those close to” Flores, as the State’s/Court’s FFCL contend; during are the findings accurate that Flores told them that he participated in the offense. *See* State’s Proposed FFCL at p. 64 (300)-(301) and Court’s FFCL at p. 64 (300)-(301)

In sum, none of the evidence that the State identified as “corroborating” during the *Zani* hearing and that the Court has now labeled as “corroborating” in its FFCL was, in fact, corroborating.

Additionally, the State’s/the Court’s position regarding the “corroborating evidence” is at odds with the State’s position at trial. In closing argument, the State had made clear that it saw Jill Barganier’s testimony as the linchpin of its case by establishing Mr. Flores’s presence at the crime scene. The State distanced itself from other witnesses who had been caught in lies and instead highlighted the seemingly

credible, unbiased testimony of this next-door neighbor. *See* 39 RR 54, 55, 93, 106. With Mrs. Barganier's testimony, the lack of direct physical evidence connected Flores to the crime scene was masked, and the scales were stacked in favor of a guilty verdict. Without Mrs. Barganier's now demonstrably unreliable, post-hypnotic, in-court identification, the scales would have easily tipped the other way.

Because Judge Garza did not preside over the 1999 trial, to expose the inaccuracies of Prosecutor January's recitation to the trial court of the "corroborating" case, Mr. Flores had planned to call Mr. January and a number of his guilt-phase witnesses who testified at trial. But Mr. Flores was not allowed to do so. This Court dramatically curtailed the number of witnesses that Mr. Flores was allowed to call during the evidentiary hearing. *See* 3 EHRR 44. Calling these witnesses was necessary because presiding judge Hector Garza has only been on the bench since 2017 and thus could have no personal recollection of the 1999 trial because. *But see* TEX. CODE CRIM. PROC. art. 11.071 sec. 9(a) (permitting trial courts to use personal recollection to resolve disputed factual issues at a hearing). The Court's ruling excluding most of Mr. Flores's witnesses was, therefore, erroneous and at odds with the statutory mandate that "[e]very provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it." TEX. CODE CRIM. PROC. art. 11.04.

But even without this opportunity, Mr. Flores offered ample documentary evidence undermining confidence in what the State insists, incorrectly, can be characterized as "corroborating evidence." *See, e.g.*, AppX57.

Mr. Flores objects to the Court's decision to incorporate into the FFCL all of the State's contradictory and patently incredible advocacy arguments and treat them as "fact."

VII. Mr. Flores Objects to the Court's Due Process Violation Arising from the Decision to Adopt the State's Proposed FFCL Wholesale.

The only notable difference between the State's Proposed FFCL and those adopted by the Court is that, whoever executed the cut-and-paste operation, inadvertently left out a page or so (without correcting the paragraph numbers to account for the omissions). *Compare* State's Proposed FFCL at pp. 23-26 *to* Court's FFCL at pp. 23-26 (missing pages 24-25). In substance, the Court adopted the State's proposal without one substantive emendation or correction. But as explained above, the State's proposal is pointedly skewed to omit virtually all of the key facts, law, and new science developed during this proceeding. The Court's conclusions, therefore, overlook copious evidence that undermines the integrity of both its FFCL while ignoring the many logical flaws and outright errors in the State's proposal.

The State is a *party* to this proceeding, not the law clerk to the Court. Article 11.071 and basic fairness require the State and the trial court to work *independently* of each other. *See, e.g.,* TEX. CODE CRIM. PROC. art. 11.071, §§ (8), (9). Yet, here,

the Court adopted the State's Proposed FFCL verbatim, under circumstances strongly suggesting that the trial court abdicated its adjudicatory role.

Both the CCA and the Supreme Court of the United States are among the entities that have criticized lower courts' practice of adopting wholesale the allegations and conclusions offered by the State during capital post-conviction proceedings. *See Ex parte Reed*, 271 S.W.3d 698, 729 (Tex. Crim. App. 2008) (warning that a convicting court that does not act as a neutral arbiter and carefully scrutinize the State's proposed findings to ensure that they accurately reflect the record of a case can unnecessarily complicate the CCA's independent review); *Jefferson v. Upton*, 560 U.S. 284, 293-94 (2010) (criticizing verbatim adoption of party-authored facts under circumstances casting doubt on the court's engagement with the underlying facts and remanding for further proceedings); *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985) (discussing circumstances under which a court's adoption of party-authored findings may not deserve deference on review); *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1351–52 (N.D. Ga. Apr. 10, 2017) (arguing that "the practice of adopting verbatim findings of fact prepared by the prevailing party in the context of a death penalty case is especially troublesome, given that factfinding procedures in capital proceedings are to 'aspire to a heightened standard of reliability'" citing *Ford v. Wainwright*, 477 U.S. 399, 411 (1986)).

Likewise, the concern has been raised in high-profile appellate briefing. *See, e.g.*, Brief for The Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae Supporting Petitioner, *Wood v. Allen*, 558 U.S. 290 (2010) at 2, 13, 18–21 (arguing that deference should not be afforded to the lower court findings of fact where circumstances suggest a lack of independent judicial fact-finding); Petition for Writ of Certiorari at 3–4, 16–18, *Hamm v. Allen*, 137 S. Ct. 39 (2016) (No. 15–8753) (same).

This practice not only inordinately complicates the CCA's independent review of the record, but the practice raises serious doubts concerning the fairness of the proceedings intended to ensure that this State's most severe punishment has been lawfully assigned. *Ex parte Reed*, 271 S.W.3d at 698, 729; *see also Ex parte Simpson*, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004) (emphasizing importance of convicting court's role in habeas proceedings).

Further, this practice undermines the principle that the Texas courts are supposed to provide an impartial and independent system for review of convictions and sentences. This Court's approach to factfinding also defies the statutory instruction that "Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it." TEX. CODE CRIM. PROC. art. 11.04. The practice of adopting the State's Proposed FFCL wholesale also results in a denial of due

course of law under the United States Constitution and Article I, section 19 of the Texas Constitution, especially given that the Texas habeas statute specifically mandates protection of "the rights of the person seeking relief."

This unreliable practice is especially alarming in a case involving a claim under Article 11.073, a new statute intended to expand, not contract, access to habeas relief. Further indefensible errors arising from this Court's decision to adopt the State's Proposed FFCL without exercising independent judgment are outlined below.

VIII. Mr. Flores Objects to the Court's Misuse of the Legal Concept of Judicial Notice as a Basis to Rely on Materials That Were Not Admitted into Evidence in This or Any Other Proceeding.

Despite the long interval between the parties' presentation of Proposed FFCL in December 2017 and the entry of the Court's FFCL in October 2018, there are considerable reasons, many discussed above, to infer that the Court did not vet any aspect of the State's proposal. Yet another reason to suspect this vetting failure is that the FFCL signed by the Court include a set of purported "General Findings of Fact" regarding "judicial notice," drafted by counsel for the State, that are contrary to the very concept of judicial notice. *See* FFCL at pp. 15-16.

During the evidentiary hearing held in this proceeding, on October 10, 2017, the Court agreed "to take judicial notice of … the original writ." 4 EHRR 11. The Court did not, however, reveal any intention to rely on evidentiary proffers created

for, and filed by, the State back during the initial writ proceeding or suggest that such untested proffers would be treated as "evidence" in adjudicating any disputed fact relevant to the claim at issue in *this* proceeding. Yet in the Court's FFCL, it purports to take "judicial notice" of facially incredible affidavits signed by Mr. Flores's trial counsel back in 2001 and submitted by the State to ward off ineffective assistance of counsel (IAC) and prosecutorial misconduct claims raised in the initial writ application. FFCL at pp. 70-72, ¶¶340-345.

Taking "judicial notice" of these materials is wholly improper. Mr. Flores objects to the Court's reliance on these materials, which were never admitted into evidence by any fact-finder, never subjected to adversarial testing, and were not part of the evidence used to convict Mr. Flores and thus not relevant to the materiality of Ms. Barganier's post-hypnotic "eyewitness identification." The Court's reliance on these 2001 affidavits is objectionable because: (a) these are not the kinds of materials that can ever be a proper subject of judicial notice; (b) the CCA already rejected the State's attempt to rely on these same affidavits in this same proceeding in granting an evidentiary hearing on Mr. Flores's new-science claim; (c) the State sought and obtained an order that curtailed Mr. Flores's ability to attack these very allegations and other reputedly "corroborating evidence" that the State had relied on to obtain Mr. Flores's conviction; (d) affidavits in general are disfavored as a means to resolve disputed facts, and the 2001 affidavits specifically are not competent "evidence"

relevant to any aspect of his new-science claim; and (e) the 2001 affidavits are facially unreliable.

A. The Court's FFCL rely on a complete misuse of the concept of judicial notice.

Section 10 of Article 11.071 makes clear that the Texas Rules of Evidence apply to writ hearings. *See* TEX. CODE CRIM. PROC. art. 11.071, § 10. Taking judicial notice is an act authorized and defined by the Texas Rules of Evidence. Rule 201, styled "Judicial Notice of Adjudicative Facts," identifies the kind of facts that may be judicially noticed:

> The court may judicially notice **a fact that is not subject to reasonable dispute because it**:
>
> (1) **is generally known** within the trial court's territorial jurisdiction; **or**
>
> (2) **can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned**.

TEX. R. EVID. 201 (emphasis added).

For instance, *Griego v. State*, 345 S.W.3d 742 (Tex. App.—Amarillo 2011, no pet.) illustrates the bounds of facts susceptible to judicial notice. In *Griego*, the court took judicial notice of names and directions of a street. *Id.* at 747 n.5. In short, judicial notice of facts is proper if the facts in question "are not themselves the subject of any controversy. Such facts may be judicially noticed only if their content is not a subject to reasonable disagreement." *Watts v. State*, 99 S.W.3d 604, 610

(Tex. Crim. App. 2003) (citing Steven Goode, Olin Guy Wellborn III, M. Michael Sharlot, Texas Practice: Guide to the Texas Rules of Evidence Civil and Criminal § 201.2, at 47 (3rd. ed.1993)). The use of "judicial notice" is justified "where a fact is easily determinable with certainty from sources considered reliable," such that "it would not make good sense to require formal proof." *Holloway v State*, 666 S.W.2d 104, 108 (Tex. Crim. App. 1984).

For these reasons, courts generally take judicial notice of facts outside the record *only* to determine jurisdiction or to resolve matters ancillary to decisions that are mandated by law. *In re R.A.*, 417 S.W.3d 569, 576 (Tex. App.—El Paso 2013, no pet.). By contrast, courts properly eschew taking judicial notice of matters that go to the merits of a dispute. *SEI Bus. Sys., Inc. v. Bank One Tex., N.A.*, 803 S.W.2d 838, 841 (Tex. App.—Dallas 1991, no writ); *see also Gaston v. State*, 63 S.W.3d 893, 900 (Tex. App.—Dallas 2001, no pet.) (same); *Garza v. State*, 996 S.W.2d 276, 280 (Tex. App.—Dallas 1999, pet. refused) ("Reliance on judicial notice rather than the normal requirements of proof must be justified by a high degree of indisputability.").

Courts can take judicial notice of only two types of information. First, a court can take judicial notice of "generally-known" facts (Rule 201b(1)). For instance, Rule 201b(1) permits taking judicial notice that the earth is not flat, a fact generally known by persons of average intelligence and knowledge. Second, if more precision

were necessary under the facts of a particular case, Rule 201b(2) permits taking judicial notice that the earth is not exactly round, but rather an oblate spheroid, a fact not generally known, but nevertheless capable of accurate and ready determination by resort to reliable sources. *See, e.g., Bender v. State*, 739 S.W.2d 409, 412-13 (Tex. App.—Houston [Dist. 14th] 1987, writ ref'd) (permitting judicial notice of the fact that Houston is in Harris County and that an "MBank" was located at a particular intersection in Houston); *see also Drake v. Holstead*, 757 S.W.2d 909, 910-11 (Tex. App.—Beaumont 1988, no writ) (finding trial court erred in refusing to take judicial notice of calculations of rates of speed when supplied with mathematical computations to support it).

It was appropriate for the Court to take judicial notice of the facts that: (1) Mr. Flores filed an initial writ application; (2) it was resolved without a hearing; and (3) the relief requested was denied by the trial court and the CCA. None of those facts are subject to reasonable dispute. Therefore, taking judicial notice of those adjudicative facts is proper because it entails taking notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* TEX. R. EVID. 201b(2).

For this Court to take judicial notice in this subsequent writ proceeding of anything beyond the procedural facts suggested by the public filings in the initial writ proceeding is contrary to the Rules of Evidence. That is, the 2001 trial counsel

affidavits, which were attached to a pleading, but never subjected to adversarial testing or admitted into evidence during a hearing, are not a proper tool, via judicial notice, to adjudicate any facts in dispute—especially in this proceeding.[33]

It is well-established law that affidavits or other statements made in another proceeding are not susceptible to judicial notice. This is because statements, even if sworn to, may be subject to varying interpretations. Therefore, "they are not the kind of 'adjudicative facts' covered by rule 201, and are not subject to judicial note." *Stowe v. State*, 745 S.W.2d 568, 570 (Tex. App.—Houston [1st Dist.] 1988, no pet.). For instance, in *Garza v. State*, the CCA expressly held that the trial court could not take judicial notice of testimony from a co-defendant's separate trial, stating that: "assertions made by an individual, even under oath, are not the type of facts that are capable of accurate and ready determination by a source whose accuracy cannot reasonably be questioned." *Id.* at 279-80 (citing *Stowe v. State* favorably).

B. Previously, the CCA rebuffed the State's improper attempts to exploit the substance of these same untested affidavits in this proceeding, yet the Court's FFCL now purports to take "judicial notice" of them.

In *this* proceeding, the State already demonstrated its proclivity to invite the courts, in considering Mr. Flores subsequent writ application, to rely on materials

[33] This proceeding has a distinct docket number and only exists because the CCA concluded that applicant had satisfied the mandates of Section 5 of Article 11.071, which did not apply in the original writ proceeding.

that are beyond the bounds of judicial notice and were never before the original trier of fact and thus are not relevant to the present proceeding. For instance, in both its Motion to Dismiss the instant Article 11.073 writ application, which the CCA denied, and then again in its Original Answer to the current writ application, the State asked the CCA and this Court to consider affidavits signed by Mr. Flores's appointed trial counsel, which the State had obtained and attached to its Answer as a means to oppose IAC and prosecutorial misconduct claims in his original writ application filed back in 2001. *See* Motion to Dismiss at footnote 12; State's Original Answer at footnote 13.[34]

The 2001 affidavits have nothing to do with the present claim about the reliability of Ms. Barganier's post-hypnotic, in-court identification in light of contemporary scientific understanding. The affidavits were prepared to defend against, *inter alia*, allegations that Mr. Flores's trial counsel had gone rogue and abandoned him during closing arguments when lead counsel decided to concede, in the wake of Ms. Barganier's testimony, that Mr. Flores may have been present at the crime scene but did not shoot Ms. Black. Even if the problems with the credibility of those affidavits were not legion, affidavits cannot properly be judicially noticed. Most certainly, these affidavits were not proper support for the State's current position that, even without Ms. Barganier's testimony, Mr. Flores would have been

[34] These two footnotes in the State's two pleadings are identical.

convicted. These affidavits were never before the jury. Indeed, they did not come into existence until two years after Mr. Flores's trial.

The 2001 affidavits are replete with contested facts that are not akin to mathematic formulas or whether a particular street address is found in Dallas County, the kind of facts that can be properly judicial noticed. Therefore, the Court's reliance on the substance of these affidavits as a basis for recommending that Mr. Flores's current claim be rejected is wholly improper.

The CCA previously saw through the State's attempt to buttress its argument against Mr. Flores's current claim (and against his motion to stay his execution) by relying on the untested, self-serving trial counsel affidavits. The CCA rejected the State's arguments in remanding his new-science claim that it would be unconstitutional to execute him where the State had relied on the hypnotically induced, in-court identification of Ms. Barganier, which contemporary science would reject as wholly unreliable. Yet the State revisited that identical argument in its Original Answer and again in asking the Court to make findings of fact and conclusions of law by taking "judicial notice" of the substance of untrustworthy affidavits that are decidedly amenable to reasonable dispute.

The Court, by adopting wholesale the State's Proposed FFCL, has adopted this fundamental misapprehension of law and improper application of law to facts. *See, e.g.*, *Garza*, 996 S.W.2d at 279-80 ("assertions made by an individual, even

under oath, are not the type of facts that are capable of accurate and ready determination by a source whose accuracy cannot reasonably be questioned"); *accord United States v. Lopez-Solis*, 447 F.3d 1201, 1210 (9th Cir. 2006) (holding "[d]ocuments such as a police affidavit establishing probable cause or a pre-sentencing report, which 'require[the court] to make factual determinations that were not necessarily made in the prior criminal proceeding,' are not judicially noticeable").

The Court should have rejected the State's renewed efforts to bootstrap the 2001 affidavits into evidence under the guise of "judicial notice" when these suspect affidavits were never admitted into evidence in this (or any other) proceeding.

C. The State sought and obtained an order that curtailed Mr. Flores's ability to attack the purportedly "corroborating evidence" that was used to obtain his conviction and to impeach the affiants the State relied on to thwart his previous quest for habeas relief.

The Court's purported reliance on "judicial notice" as a basis to invoke the 2001 affidavits as "evidence" in the current proceeding is also improper in light of other rulings in this matter. Mr. Flores sought to call as witnesses counsel who had participated in defending and trying the case against him: Jason January, Greg Davis, Brad Lollar, and Doug Parks. 3 EHRR 8-17. Mr. Flores was, however, denied the opportunity to do so. But now, by adopting the State's Proposed FFCL, the Court purports to have relied on "corroborating evidence," created *ex post facto*, which is

contested—but where Mr. Flores never had an opportunity to engage in a contest. Doing so under the auspices of "judicial notice" is a grave misuse of the concept.

The State succeeded in curtailing Mr. Flores's ability to challenge the integrity of much of the corroborating evidence that was used against him at trial.[35] Yet, at the same time, the State sought to go even further. It sought to marshal witnesses whom the State hoped might provide "new" corroborating evidence of guilt. For instance, the State placed Mr. Flores's co-defendant, Mr. Childs,[36] on its witness list. But Mr. Childs had not testified in Mr. Flores's 1999 trial. Instead, the State, knowing he was out on parole, sought his aid in coming up with "new evidence" never before the jury. Luckily, neither Mr. Childs, who reportedly refused to cooperate with the State's agenda, nor this Court permitted that disingenuous move.[37]

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[35] The State filed a motion asking the Court to strike most of the names from Mr. Flores's witness list, arguing that they did not have information relevant to the claim at issue in this proceeding. *See* "State's Motion to Exclude the Testimony of Witnesses Not Relevant to this Proceeding." The Court granted the motion and further limited Mr. Flores to calling four fact witnesses and two experts—and expressly precluded him to call any of the lawyers who had submitted affidavits to support the State's previous efforts to oppose Mr. Flores's quest for habeas relief. 3 EHRR 8-17.

[36] After Mr. Flores's trial, Rick Childs obtained a plea deal from the State, was reindicted for a lesser offense, signed a confession stating that he had shot and killed Ms. Black, and was then sentenced to 35 years. He served part of his sentence and is now out on parole. These procedural facts are part of the public record and thus are amenable to being judicially noticed.

[37] The Court recognized at the time that what is good for the goose is good for the gander and struck names from the State's witness list, for instance, Rick Childs, who had never testified at Mr. Flores's trial and thus could not have any knowledge relevant to the claim that is at issue in

The only evidence of "corroboration" that is relevant to adjudicating the claim at issue in *this* proceeding is evidence that was in front of the fact-finder at the time of trial. That is, in deciding whether, by a preponderance of evidence, Mr. Flores would have been convicted even without the untrustworthy eyewitness identification testimony of Ms. Barganier, the only relevant evidence is evidence of guilt admitted during trial. *See* TEX. CODE CRIM. PROC. art. 11.073 (the court may grant a convicted person relief on an application for a writ of habeas corpus if, inter alia, it "finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted").

The Court's FFCL, adopted entirely from the State's proposal, attempt to prop up the State's weak circumstantial case at trial by rewarding the State's post-conviction gamesmanship, flagrantly disregarding the Rules of Evidence, and abusing the concept of judicial notice.

D. Affidavits in general are disfavored as a means to resolve disputed facts, and the 2001 affidavits are not competent "evidence" relevant to any disputed fact in this proceeding.

In the initial writ proceeding, there was never a written motion, or any proceeding in which an oral motion could have been made, to introduce evidentiary proffers as evidence consistent with the Rules of Evidence. No legal rule or case law

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this proceeding. Yet now, with its FFCL, the Court is allowing the State to backdoor evidence that the Court prevented the applicant from testing in open court.

justifies applying the Rules of Evidence during a hearing but ignoring the rules where an applicant was deprived of any hearing at all.[38] Moreover, the evidentiary proffers attached to the State's original answer in the initial writ proceeding do not constitute settled fact "not subject to reasonable dispute" and thus are not within the scope of materials that can be judicially noticed. TEX. R. EVID. 201.

As a general rule, affidavits are a disfavored method for a trial judge to resolve controverted factual issues involving credibility determinations. *See Manzi v. State*, 88 S.W.3d 240, 255 (Tex. Crim. App. 2002) (Cochran, J., concurring) ("Trial judges who are confronted with contradictory affidavits, each reciting a plausible version of the events, ought to convene an evidentiary hearing to see and hear the witnesses and then make a factual decision based on an evaluation of their credibility."). *See also id.* at 250 (Womack, J., concurring) ("That the statute authorizes a court to make

[38] A hearing in the criminal post-conviction context may be less formal than a trial. *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (Powell, J., concurring). But a "hearing" at least requires that there be a formal process for admitting, objecting to, and challenging the substance of evidence offered by a party. *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("The hearing must be 'at a meaningful time *and in a meaningful manner*.") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added)). Due process also requires that the parties be given notice that a hearing is occurring, notice as to which disputes the hearing is intended to resolve, and an opportunity to confront adverse witnesses or evidence offered against a party. *See id.* at 267-68 ("rudimentary due process" requires "an effective opportunity" to present one's case, including "by confronting adverse witnesses"). *Cf.* 28 U.S.C. § 2246 ("On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."). None of those basic steps occurred in the original writ proceeding before the trial court entered findings and conclusions purportedly based on the State's evidentiary proffers. Mr. Flores's state habeas counsel attached no evidentiary proffers on his behalf and most of the claims raised were not even cognizable in state habeas. In short, the whole proceeding was devoid of due process.

decisions on affidavits does not mean it can make decisions of every kind on affidavit. The statute can be construed to allow some issues to be decided by written evidence when credibility determinations are not involved.”).

In the post-conviction context where an IAC claim is alleged, affidavits from trial counsel merit special skepticism because counsel often occupy a position adverse to their former client when such affidavits are executed. *See* American Bar Association Formal Opinion 10-456 July 14, 2010, *Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim*.[39] This circumstance creates ethical problems that must be monitored. *See id.*; *see also Christeson v. Roper*, 135 S. Ct. 891, 894-95 (2015) (recognizing the importance of policing conflicts of interest that can arise in capital post-conviction representation).

Moreover, as adverse witnesses, trial counsel in post-conviction proceedings are interested parties. The Texas Rules of Civil Procedure state that affidavits from an interested party may establish a fact for summary judgment purposes only if the evidence is “clear, positive and direct, otherwise credible, and free from contradictions and inconsistencies, and could have been readily controverted.” *See* TEX. R. CIV. PROC. 166a(c) (setting out the standard for summary judgment proof

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[39] *Available at* https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_456.authcheckdam.pdf.

based on "uncontroverted testimonial evidence of an interested witness"). *See also Charles v. State*, 146 S.W.3d 204, 210 (Tex. Crim. App. 2004). The phrase "could have been controverted" from Rule 166a(c) means "the testimony at issue is of a nature which can be effectively countered by opposing evidence." *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989).

Trial counsel's 2001 affidavits were self-serving, containing information intended to justify their deficiencies, and placed the affiants in a position adverse to their former client, Mr. Flores. Trial counsel's affidavits, moreover, contain identical language and thus are clearly the product of a collaborative effort, rendering them yet more unreliable. Back in 2001, the trial court could not have credited these affidavits, as they were not evidence. Moreover, the affiants were never subjected to cross-examination, nor was Mr. Flores otherwise allowed to challenge their credibility. Without offering any explanation for finding the 2001 affidavits of these self-interested witnesses credible, or conducting any critical analysis of their credibility, the trial court in 2018, by adopting the State's Proposed FFCL wholesale, has treated this incompetent "evidence" as apodictic "fact" susceptible to judicial notice. Worse still, the Court has found this incompetent evidence, which is irrelevant to any aspect of Mr. Flores's new-science claim, a basis for an adverse recommendation.

E. The 2001 Affidavits Are Facially Unreliable.

The 2001 affidavits from Mr. Flores's trial counsel were proffered by the State to rebut allegations of IAC and prosecutorial misconduct. That the State took the trouble to obtain these affidavits is interesting, considering that Mr. Flores had, at the time, been essentially abandoned by his counsel who had failed to develop or support his claims with any extra-record evidence of any kind.[40] More specifically, the objective of the 2001 affidavits was, *inter alia*, to rebut allegations that trial counsel had been ineffective in conceding, during closing argument in the guilt/innocence phase, that Mr. Flores may have been present at the crime scene but had not shot Ms. Black.

There is no conceivable basis whereby such a "concession" could be deemed a "reasonable trial strategy" and thus a defense to the IAC claim. A decision cannot be a reasonable trial "strategy" if it is based on a misapprehension of the relevant law. *Cf. Harrington v. Richter*, 131 S. Ct. 770, 690-91 (2011) (explaining that a decision can only be deemed a "reasonable strategic decision" if made after a thorough investigation of law and facts relevant to plausible options); *Baldwin v. Maggio*, 704 F.2d 1325, 1332 (5th Cir. 1983) ("Essential to the rendition of constitutionally adequate assistance in either phase is a reasonably substantial,

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[40] It is the habeas applicant, not the State, who bears the entire burden of proof in a writ proceeding. *See, e.g.*, *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000).

independent investigation into the circumstances and the law from which potential defenses may be derived.").

Under the law of parties, upon which the State relied at trial, the decision to concede Mr. Flores's presence at the crime scene was tantamount to a concession to capital murder. Moreover, trial counsel had utterly no plan to present a mitigation case, so there could have been no argument that they were trying to "gain credibility" with the jury in the wake of Ms. Barganier's testimony in hopes that the jury might consider a sentence less than death. Defense counsel put on *no* mitigation witnesses of any kind during the punishment phase. *See* 40 RR 140-142. Therefore, counsel's inexplicable decision to concede guilt could not reasonably be deemed "strategic;" counsel's self-serving affidavits were instead created to mask the lack of any coherent strategy, which is, nevertheless evident by comparing defense counsel's closing argument and the jury charge.

Because there was no evidentiary hearing in the initial writ proceeding,[41] and because Mr. Flores was prevented from calling these lawyers as witnesses in this

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[41] Because of the ineffective representation that Mr. Flores received during his initial state habeas proceeding, he did not even know that his trial counsel had filed affidavits in support of the State until years later when he was facing an execution date. At that time, he had no means to rebut the assertions in those affidavits. Although his current counsel had planned to call his former counsel and the attorneys who had prosecuted the case against him as witnesses in this proceeding, the State objected and the Court sustained those objections—even though the State has asked the Court to take "judicial notice" of these untested affidavits. That is, Mr. Flores was never afforded the opportunity to confront these witnesses regarding the representation that Mr. Flores received at trial or about whether the prosecution engaged in misconduct.

proceeding, one can only surmise from the context why Mr. Flores's trial lawyers had been willing to eschew the duty of loyalty they owed him and instead link arms with the State against him. Because there was no hearing, those self-serving affidavits were never subjected to adversarial testing, and counsel were never cross-examined about the unreliability of their statements. Had they been cross-examined—then or now—the habeas record might reflect that those affidavits bear an uncanny resemblance to affidavits signed by counsel who had represented the State against Mr. Flores. The State's/Court's FFCL do not mention that prosecutors Jason January and Greg Davis also signed affidavits to support the State's opposition to Mr. Flores's initial writ application. The face of the affidavits demonstrates that they too are patently self-serving and were all seemingly written by the same individual who wrote the affidavits for defense counsel.

For instance, in language that appears to have been penned by the same hand, three[42] of the attorneys attested that: (1) they did not know that one of the State's experts at trial, Charles Linch, had been involuntarily committed to a psychiatric unit not long before Mr. Flores's trial; and (2) besides, the testimony of Mr. Linch, a trace evidence analyst with Southwestern Institute of Forensic Sciences, had not been

[42] Like the others, the affidavit of Brad Lollar, Mr. Flores's lead trial counsel, states that "The testimony of Charles Linch was not unanticipated and was not crucial to the State's case" but does not clarify whether Lollar knew about Linch's psychiatric history at the time of trial.

"crucial" to the State's case against Mr. Flores.[43] That is, prosecutors Jason January and Greg Davis had signed affidavits to support the State's opposition to Mr. Flores's initial writ application that had much in common with affidavits executed by Mr. Flores's former trial counsel.[44] Compare, for instance, these virtually identical passages found in the affidavits signed by defense counsel Doug Parks and prosecutors Jason January and Greg Davis:

Affiant	**Quote**
Doug Parks, defense counsel	"I am also aware that, in his application for writ of habeas corpus, Mr. Flores accuses the State of suppressing evidence regarding Charles Linch's mental history, specifically, treatment for depression and alcoholism. I did not have any knowledge that Mr. Linch suffered from either condition, nor did I know he had been hospitalized until long after Mr. Flores' trial. Mr. Linch's testimony was not one crucial to the State's case against Mr. Flores." ¶2

[43] The State had failed to disclose to Mr. Flores in 1999 that Linch had been involuntarily committed to a psychiatric unit in 1994 and that, despite having been declared a danger to himself or others, and despite having been prescribed powerful anti-depressive drugs, he had been temporarily released so that he could testify as an expert in another capital murder trial. Because Mr. Flores's initial state habeas counsel did not submit any evidentiary proffers or obtain a hearing during which evidence of any kind could be admitted, this claim was summarily rejected without these witnesses testifying about what they knew about Charles Linch when the State made a mid-trial decision to put Linch on the stand to testify about "potato starch" Linch purportedly found inside a gun found at Childs' grandmother's house that DA Davis brought to Linch the day before Linch testified. 36 RR 208-216.

[44] By that time, April 2001, Mr. January had left the Dallas County DA's Office after a dispute over alleged misrepresentations regarding the reason for his absences during another capital trial. *See*, *e.g.*, C. Siderius, "Tuned Out," Dallas Observer (Jan. 18, 2001), available at http://www.dallasobserver.com/news/tuned-out-6392788. But soon after his departure, he had been willing to sign an affidavit to help the State defend against a claim of prosecutorial misconduct raised by Mr. Flores. In this proceeding, Mr. Flores sought discovery from the State about the circumstances of Mr. January's departure, but those efforts were stymied *See* 3 EHRR 8-17.

Jason January, prosecutor	"I am also aware that, in his application for writ of habeas corpus, Mr. Flores accuses the State of suppressing evidence regarding Charles Linch's medical history, specifically, treatment for depression and alcoholism. I did not have any knowledge that Mr. Linch was hospitalized for such treatment. The first indication I had of these alleged conditions was over a year after Mr. Flores' conviction. His testimony did not go directly to Mr. Flores' guilt." ¶5
Greg Davis, prosecutor	"I am aware that Mr. Flores has filed an application for writ of habeas corpus alleging that the State suppressed evidence regarding Charles Linch's mental history, specifically, treatment for depression and alcoholism." ¶5 "At the time of Mr. Flores' trial, I had no knowledge that Mr. Linch had ever suffered from depression or alcoholism or that he had ever been hospitalized for either condition. I first learned of these matters approximately a year after Mr. Flores' conviction." ¶6

Perplexingly, the State argued in 2001 that Charles Linch's testimony at Mr. Flores's trial was "not crucial;" yet in the Proposed FFCL that the State drafted and that the Court has now adopted, Linch's highly suspect testimony is highlighted as an example of "corroborating evidence" that justifies ignoring the problems with Ms. Barganier's post-hypnotic, in-court identification. *Compare State's* Proposed FFCL at p. 66 (312) *with* Court's FFCL at p. 66 (312) (obscuring Linch's identity as the source of the eleventh-hour potato starch "evidence").

Yet another reason to doubt the credibility of the affidavits of defense counsel is that they contain contradictory stories about the reason for the decision to concede

Mr. Flores's presence at the crime scene. That decision was made after Ms. Barganier was permitted to testify about her identification of Mr. Flores and occurred during guilt-phase closing arguments. *See* 39 RR 82-87. After stating that the State's case was "based upon liars," counsel then argued that, even if Flores was at the scene, he was not the shooter. But this concession was a concession to capital murder under the law of parties—as the State seized upon in its final closing argument. 39 RR 95 (Prosecutor January emphasizing "The defendant's guilty whether he's a party or whether he's the shooter. We've been over that.") Therefore, there could never have been a valid "strategic" reason for this decision on the part of defense counsel so as to counter the allegations of their deficient performance at trial.[45]

In 2017, the State actively resisted Mr. Flores's attempts to put these witnesses on the stand during this proceeding and the Court granted the State's request. For the Court to now embrace the State's misappropriation of the 2001 affidavits, under the guise of "judicial notice," is not only profoundly unfair, it constitutes a significant error of law to which Mr. Flores objects. The exercise is no more than a smokescreen to mask the rampant problems, exposed by contemporary science, with

[45] Additionally, this unauthorized concession was a clear a in violation of the constitutional principle recently revisited in *McCoy v. Louisiana*, 584 U.S. ___ (2018).

Ms. Barganier's post-hypnotic identification and the non-existent "corroboration" for that identification.

CONCLUSION & PRAYER

Mr. Flores respectfully asks that this Court consider the objections presented here; withdraw its Order dated October 3, 2018 (Order), which includes Findings of Fact and Conclusions of Law (FFCL above) and contains a recommendation that habeas corpus relief be denied; enter revised Findings of Fact and Conclusions of Law correcting the significant mistakes of fact and law enumerated below; and recommend relief in the form of a new trial.

Alternatively, if this Court fails to revisit its unreliable FFCL, when this matter is transferred to the CCA for a *de novo* review, Mr. Flores urges the CCA to find and conclude that he has satisfied all aspects of his burden under Article 11.073 of the Texas Code of Criminal Procedure, proving that the scientific evidence the State relied on at trial was wrong and/or there is new relevant scientific evidence which could not have been ascertained through the exercise of reasonable diligence in 1999 or 2000 and which, had it been introduced at trial, would likely have led jurors to harbor reasonable doubt about his guilt.

Mr. Flores further prays that he be granted post-conviction habeas corpus relief from his capital murder conviction, that the judgment in Cause No. F98-02133-N be set aside, and that he be remanded to the custody of the Sheriff of Dallas County to answer the charges in the indictment.

Respectfully submitted,

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Post-Conviction Attorneys for Charles Don Flores

CERTIFICATE OF SERVICE

The foregoing has been filed electronically and served on the attorney representing the State in this matter. This certification is executed on October 15, 2018, in Austin, Texas. This filing is also being efiled with the Court of Criminal Appeals.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Gretchen S. Sween
Gretchen S. Sween

CODE OF CRIMINAL PROCEDURE

TITLE 1. CODE OF CRIMINAL PROCEDURE

CHAPTER 11. HABEAS CORPUS

Art. 11.071. PROCEDURE IN DEATH PENALTY CASE

Sec. 1. APPLICATION TO DEATH PENALTY CASE. Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. REPRESENTATION BY COUNSEL. (a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section,

the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., R.S., Ch. 781, Sec. 11, eff. January 1, 2010.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.

Sec. 2A. STATE REIMBURSEMENT; COUNTY OBLIGATION. (a) The state shall reimburse a county for compensation of counsel

under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed $25,000. Compensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed $25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of $25,000.

Sec. 3. INVESTIGATION OF GROUNDS FOR APPLICATION. (a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Sec. 4. FILING OF APPLICATION. (a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b)

constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Sec. 4A. UNTIMELY APPLICATION; APPLICATION NOT FILED. (a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel's presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

Sec. 5. SUBSEQUENT APPLICATION. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Sec. 6. ISSUANCE OF WRIT. (a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code, if the office of capital and forensic writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under Section 78.054, Government Code.

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

(1) make an appropriate notation that a writ of habeas corpus was issued;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

Sec. 7. ANSWER TO APPLICATION. (a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

(b) Matters alleged in the application not admitted by the state are deemed denied.

Sec. 8. FINDINGS OF FACT WITHOUT EVIDENTIARY HEARING. (a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues

material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

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

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

Sec. 9. HEARING. (a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

(1) the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

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

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

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

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

Sec. 10. RULES OF EVIDENCE. The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. REVIEW BY COURT OF CRIMINAL APPEALS. The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

[][]

Art. 11.073. PROCEDURE RELATED TO CERTAIN SCIENTIFIC EVIDENCE.

(a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by a convicted person at the convicted person's trial; or

(2) contradicts scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

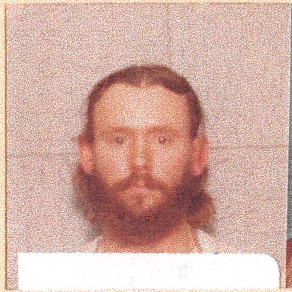
(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(c) For purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since:

(1) the applicable trial date or dates, for a determination made with respect to an original application; or

(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.



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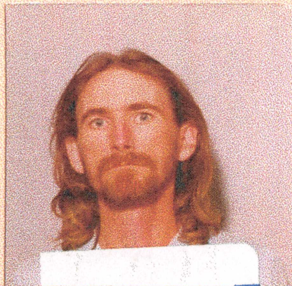

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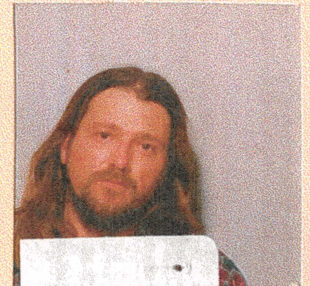

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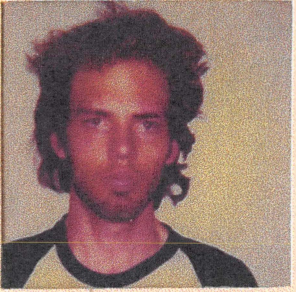

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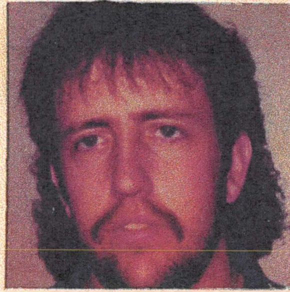

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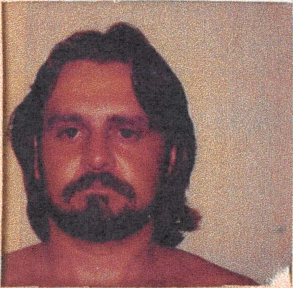

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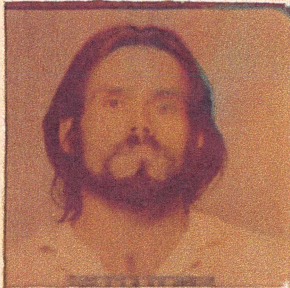

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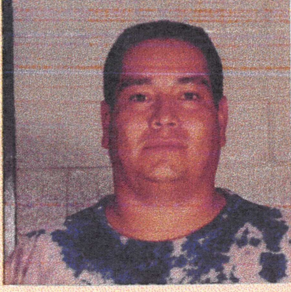

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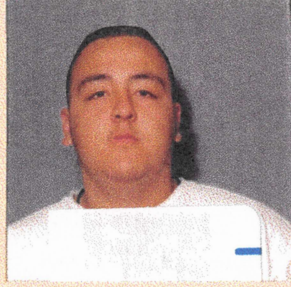

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IN THE 195TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
OF AUSTIN, TEXAS

<u>CAPITAL CASE</u>

FILED
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EX PARTE	§	Trial Cause No. F9802133
	§	
CHARLES DON FLORES,	§	Court of Criminal Appeals No. ____________
	§	
Applicant.	§	

CHALLENGE OF CERTAIN SCIENTIFIC EVIDENCE UNDER TEX. CODE CRIM. P. ART. 11.073 AND SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS UNDER TEX. CODE CRIM. P. ART. 11.071 §5

(Mr. Flores's Execution Date is June 2, 2016.)

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TABLE OF CONTENTS

STATEMENT OF THE CASE 7

I. Introduction 7

II. Trial Proceedings 12

III. Post-Conviction History 19

IV. New Evidence Discovered After Trial 22

A. Dr. Steven Lynn provides a highly qualified expert opinion about the advancement of scientific knowledge that discredits Bargainer's hypnotically induced eyewitness identification. . 22

B. Counsel uncovers the complete story of Flores' life that explains his post-accusation behavior and mitigates his moral culpability. 26

CLAIMS FOR RELIEF 34

I. Flores is entitled to relief because new scientific knowledge discredits the testimony of the only eyewitness to the crime.... 34

A. Article 11.073 requires a new trial because, without the State's use of Bargainer's flawed hypnotically induced testimony, Flores would not have been convicted.................. 40

B. The State's reliance on now-debunked science violates Flores' constitutional rights to be free from cruel-and-unusual punishment, equal protection under state laws, and due process.. 60

II. Mr. Flores was denied the effective assistance of trial counsel when trial counsel failed to investigate or produce any mitigating evidence on Flores's behalf during the sentencing proceedings. 63

A. Background 72

B. This Court should consider Flores's ineffective assistance of trial counsel claim for failure to investigate and present mitigating evidence.. 87

C. Reviewing Flores' claims won't open the floodgates 116

D. Conclusion 118

III. Dallas County continues to evidence racial bias in its prosecution and punishment of capital cases. Texas's capital-punishment statutes are unconstitutional as applied to Flores, a Hispanic, because they arbitrarily allowed the white male principal to be released on parole even before the less culpable Hispanic accomplice is scheduled to be executed. Such disparity in sentencing, with race at the forefront, is constitutionally impermissible 119

A. As applied to Flores, Texas' capital scheme is unconstitutional because it allows an unjustifiable racial disparity 121

IV. As applied to Flores, the Law of Parties is unconstitutional because it allowed an unjustifiable disparity between the more-culpable principal and less-culpable accomplice 124

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 88, 126
Carter v. Estelle, 677 F.2d 427, 449–50 (5th Cir. 1982) 88
Church of Scientology International v. Fishman, et al., No. 91-6426 HLH (TX), (C.D. Cal., 1995) 25
Coker v. Georgia, 433 U.S. 584, 593-97 (1977) 126
Dowling v. United States, 492 U.S. 342, 352-53 (1990) 61
Edwards v. Flores, 529 U.S. 446 (2000) 92
Estelle v. McGuire, 502 U.S. 62, 68-70 (1991) 61
Ex parte Alvarez, 468 S.W.3d 543, 545 (Tex. Crim. App. 2015) (Yeary, J., dissenting) 96, 113, 115
Ex parte Flores, No. WR-64,654-01, 2006 WL 2706773 (Tex. Crim. App. 2006) 19
Ex parte Graves, 70 S.W.3d 103 (Tex. Crim. App. 2002). 71, 116
Ex parte Martinez, 330 S.W.3d 891, 900 (Tex. Crim. App. 2011) . 97
Ex parte McCarthy, No. WR-50,360-04, 2013 WL 3283148, at *5 (Tex. Crim. App. June 24, 2013) (Alcala, J., dissenting) 94
Ex parte McPherson, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000) 90
Ex parte Medina, 361 S.W.3d 633, 642-43 (Tex. Crim. App. 2011) 90, 113, 114
Ex parte Morrow, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) ... 97
Ex Parte Robbins, 478 S.W.3d 678 (Tex. Crim. App. 2014) 42
Ex parte Rocha, No. WR-52,515-04, 2008 WL 5245553, at *1 (Tex. Crim. App. Dec. 17, 2008) 116
Ex parte Soffar, 143 S.W.3d 804 (Tex. Crim. App. 2004) 88
Ferguson v. Georgia, 365 U.S. 570, 596 (1961) 96
Flores v. State, AP-73,463 (Tex. Crim. App. 2001) 72
Flores v. Stephens, 136 S. Ct. 981 (2016) 21
Flores v. Stephens, 794 F.3d 494 (5th Cir. 2015) 21
Flores v. Stephens, No. 3:07-CV-0413-M, 2014 WL 3534989 (N.D. Tex. 2014) 21
Flores v. Thaler, 3-07-CV-0413-M-BD, 2011 WL 7102282 (N.D. Tex. March 3, 2011) 77
Ford v. Wainwright, 477 U.S. 399 (1986) 126
Furman v. Georgia, 408 U.S. 238 (1972) 125

Geminez v. Ochoa, No. 14-55681, 2016 U.S. App. LEXIS 8511, *18 (9th Cir. May 9, 2016).. 61
Getsy v. Mitchell, 495 F. 3d 294, 305 (6th Cir. 2007)................. 125
Green v. State, 374 S.W.3d 434, 447 (Tex. Crim. App. 2012),..... 118
Gregg v. Georgia, 428 U.S. 153, 188 (1976)................................. 126
Hall v. Florida, 134 S. Ct. 1986, 1996-98 (2014)........................ 127
Harris v. Reed, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting) 90
Hernandez v. State, 726 S.W.2d 53, 55–56 (Tex. Crim. App. 1986). 97
Ibarra v. Thaler, 687 F.3d 222 (5th Cir. 2012)............................... 90
Ibarra v. Thaler, No. 11-70031 (5th Cir. June 4, 2013)................ 91
Kealohapauole v. Shimoda, 800 F.2d 1463, 1465-66 (9th Cir. 1986) 61
Kennedy v. Louisiana, 554 U.S. 407, 419 (2008)........................ 126
Lee v. Houtzdale SCI, 798 F.3d 159, 162 (3d Cir. 2015)............... 61
Lockhart v. Fretwell, 506 U.S. 364 (1993)..................................... 99
Martinez v. Ryan, 132 S. Ct. 1309 (2012).......................... 77, 79, 86
McKinney v. Rees, 993 F.2d 1378, 1385 (9th Cir. 1993)................ 61
Nix v. Whiteside, 475 U.S. 157, 175 (1986) 98
Powell v. Alabama, 287 U.S. 45, 69 (1932) 96
Robinson v. State, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000) 80
Roper v. Simmons, 543 U.S. 551, 568 (2005) 124, 126
Saffle v. Parks, 494 U.S. 484, 492-93 (1990) 124
State v. Moore, 902 A.2d 1212 (N.J. 2006) 24
Trevino v. Thaler, 133 S. Ct. 1911 (2013)............................... 86, 95
Woodford v. Visciotti, 537 U.S. 19, 22 (2002) 98

Statutes

28 U.S.C. § 2244(b)(2)(B)(ii).. 61
28 U.S.C. § 2244(d) 83
28 U.S.C. § 2254(b)(1)(B)(ii).. 88
Tex. Code Crim. P. art. 11.073 40
Tex. Code Crim. Proc. art. 11.071 § 5(a) 87
Tex. Crim. Proc. Code art. 11.071 § 5(a)(3) 116
Tex. Crim. Proc. Code art. 37.071 63

Other Authorities

2009 Leg. Bill Hist. TX S.B. 1976 41
2013 Legis. Bill Hist. TX. S.B. 344 42
2015 Legis. Bill Hist. TX. S.B. 1743 42
81st Leg., R.S., Ch. 781 (S.B. 1091) 117
Strengthening Forensic Science in the United States: A Path Forward (Nat'l Academ. Press 2009) 42

Constitutional Provisions

Tex. Const. art §§ 13, 19, 29 128
Tex. Const. art. §§ 19, 29 121
Tex. Const. art. I §§ 3(a), 13, 19, 29 125
U.S. Const. amend. XIV 121

that Flores was close to the Blacks's home when the murder occurred. The jury would have only had the word of the drug addicts with motives to lie.

This evidence is not enough to convict a man of capital murder. Flores has shown, by a preponderance of the evidence, that the outcome of his trial would have been different had Bargainer's identification been excluded – as existing science dictates it should have been. Under this lower standard of proof – not that of beyond reasonable doubt – Flores is entitled to habeas relief and a new trial.

B. The State's reliance on now-debunked science violates Flores' constitutional rights to be free from cruel-and-unusual punishment, equal protection under state laws, and due process.

As discussed above, the State relied on science that has since been debunked to secure Flores's capital conviction. This fact makes Flores's capital conviction and death sentence violate his constitutional rights to only be convicted with competent evidence and not to be convicted based on flawed science.

As the Ninth Circuit recognized on May 9, 2016, "courts have long considered arguments that the introduction of faulty evidence violates a petitioner's due process right to a fundamentally fair trial – even if that evidence does not specifically qualify as 'false testimony.'" *Geminez v. Ochoa*, No. 14-55681, 2016 U.S. App. LEXIS 8511, *18 (9th Cir. May 9, 2016) (citing *Estelle v. McGuire*, 502 U.S. 62, 68-70 (1991); *Dowling v. United States*, 492 U.S. 342, 352-53 (1990); *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993); *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465-66 (9th Cir. 1986)). The Ninth Circuit joined the Third Circuit, *Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015), "in recognizing that habeas petitioners can allege a constitutional violation from the introduction of flawed expert testimony at trial if they show that the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'" *Geminez*, 2016 U.S. App. LEXIS at *21 (quoting *Lee*, 798 F.3d at 162). The court, of course, viewed this standard under 28 U.S.C. § 2244(b)(2)(B)(ii), the federal successor petition statute. This Court, however, views this

Application under Article 11.071 § 5 in addition to its analysis under Article 11.073.

Texas Code of Criminal Procedure Article 11.071 § 5 allows Texas prisoners to apply for habeas relief in a successor application if, *inter alia*, the applicant can show by a preponderance of the evidence that no jury would have convicted him but for a violation of the United States Constitution. *Id.* §5(a)(2). This burden of proof is identical to the one required for relief under Article 11.073. *Compare* Article 11.073(b)(2) *with* Article 11.071 § 5(a)(2). Because the use of flawed forensic science violates Flores federal due-process rights, the State's use of Bargainer's hypnotically tainted eyewitness identification is a violation of the United States Constitution. So for the reasons discussed above, Flores has met Texas' successor standard and deserves state habeas relief.

Furthermore, Article 11.071 § 5 allows Texas prisoners to apply for successor habeas relief if the applicant can show by clear and convincing evidence that no jury would have sentenced him to death but for a violation of the United States Constitution. Article

11.071 § 5(a)(3). Although this burden of proof is slightly higher than in Article 11.073, the discussion above shows that the State's evidence at trial was circumstantial and based on the words of drug addicts with legal problems. Without Bargainer's tainted identification, a reasonable jury would not have found that Flores was present at the murder scene. It would not have found that Flores was morally culpable enough to deserve execution. Therefore, Flores is entitled to state habeas relief.

II. Mr. Flores was denied the effective assistance of trial counsel when trial counsel failed to investigate or produce any mitigating evidence on Flores's behalf during the sentencing proceedings.

Flores was sentenced to die because his trial attorneys failed to present evidence that mitigates against the imposition of the death penalty. *See* Tex. Crim. Proc. Code art. 37.071. Trial counsel failed to undertake any meaningful mitigation investigation. Then, once sentencing began, trial counsel failed to call any witnesses during the sentencing proceedings in an effort to spare Flores' life. Trial counsel called no one. Despite increased emphasis on the role of mitigation in capital cases, Flores's trial