IN THE 195TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
OF AUSTIN, TEXAS

CAPITAL CASE

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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SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

This is a CAPITAL CASE.

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STATEMENT OF THE CASE

I. Introduction

Elizabeth "Betty" Black was killed early on the morning of January 29, 1998, while her husband was at work. (RR34.61-65) The family dog was also shot and killed. (RR34.67) No witnesses saw the murder. There was no evidence of a struggle. (RR35.212) Most importantly, no direct evidence regarding this crime has ever been tied to Flores.

Instead, in a case involving drugs, money, greed, and family, Flores was implicated based solely on conduct preceding the murder and conduct that occurred many weeks following the crime. No gun – no bullet – no money – no fingerprints – no DNA – no map – nothing, absolutely nothing directly links Flores to this crime.

Instead, as the State argued during the guilt/innocence phase of this trial, it did not need to actually prove that Flores

killed Black. The State relied on the law of parties to suggest Flores was simply connected to the crime. The State clearly appreciated the flimsy nature of any actual evidence linking Flores to this crime and relied on his alleged presence at the scene as sufficient basis of guilt of capital murder.

Flores has consistently denied that he killed Black. Flores does not deny that he bought, sold, or used drugs. Flores does not deny that he owned or, on occasion, carried a gun. Flores also does not deny that after Black was killed he engaged in conduct that is not becoming of one claiming innocence. But this shadow of guilty behavior cannot be conflated with evidence of actual guilt. Charles Flores did not kill Betty Black.

The evidence submitted at trial confirms that Ricky Childs was present at Betty Black's house the morning of January 29, 1998. Childs was directly identified by witnesses as being present that morning. Flores's identification, in contrast, is much more tenuous. The only witness that claims to have seen Flores at the Blacks' on January 29, 1998, recovered this information from a hypnotically altered memory, described in more detail below.

None of the other witnesses, neighbors, and children of neighbors who testified about their observations identified Flores.

The lack of identification casts serious doubt about Flores's participation in the crime. Thus, when his own trial counsel admitted that Flores was present at the scene, counsel stripped Flores of any opportunity to challenge his guilt of murder based on the law of parties. Counsel unilaterally decided to implicate Flores in a manner that, undoubtedly, caused the jury to interpret evidence of flight negatively. While the usual inference is that a man runs because he is guilty, it is also a truism that men run out of fear, anxiety, and numerous other reasons. Flight, standing alone, would not have been adequate to support a finding of guilt against Flores. What was needed – something to connect the dots – was, tragically, provided by Flores's own trial counsel.

Without counsel's admission of Flores's presence at the crime scene, there was ample doubt about his participation. Childs had already confessed to the crime. Childs owned the Volkswagen that was seen at the Blacks on the morning of the murder. The only gun connected to the crime was found in Childs's possession.

Childs pleaded guilty to the murder and was sentenced to 35 years in prison. He has since been released on parole and is currently out of prison.

Childs's girlfriend at the time, Jackie Roberts, is Black's daughter-in-law. Roberts went into hiding after the murder.

Roberts's attempt to hide is easily understood. One of her ex-husbands, Doug Roberts, was given, and later destroyed, a handwritten map to the Black's house. That map was found in Roberts's bag immediately following the murder. Roberts knew the Blacks' schedule because Black often babysat her children. Roberts received a monthly stipend from Gary Black – Betty Black's son and Roberts's other ex-husband – to assist with raising their two children. Gary was serving a prison sentence at the time.

Roberts also knew that Gary had hidden large amounts of money in his parents' house. Roberts had reason to believe that Gary was going to have his parents cut off the financial support that he had been providing. Jackie Roberts had motive.

Jackie Roberts, like both Flores and Childs, also used illegal street drugs. In fact, she was on probation for drugs at the time of the murder. She was buying and using drugs the night preceding the murder. Childs's purple Volkswagen, seen by several witnesses at the Blacks on the morning of the murder, was parked at Roberts's home at 5:30 a.m. on January 29, 1998. Doug Roberts testified that he saw Childs get into the Volkswagen and drive off at 6:35 a.m. Doug Roberts testified that Childs was alone at that time. Jill Bargainer testified that the murder occurred at 6:45 a.m.

Roberts testified at trial that she told Childs that the Blacks had at least $30,000.00 in cash hidden in the house. Doug Roberts recalled her stating that she knew that the money was there and that she wanted it. After the murder, Roberts went into hiding. Initially, Doug Roberts lied to the police regarding her whereabouts. Before being arrested, Roberts overdosed on pills and was taken to the hospital. There, she learned of Childs's arrest. Roberts's acts after the murder raise, at a minimum, a question of her complicity in the crime.

Yet Flores, a Hispanic male, remains the only individual convicted of capital murder for this crime. Neither Childs nor Roberts, both of whom had opportunity and motive to kill Black, have faced the same punishment as Flores. And Childs – the only person that has confessed to the crime, the only person that actual evidence ties to the crime – has already been released on parole.

II. Trial Proceedings

The State decided to try Flores for capital murder despite allowing Childs to plea to a lesser offense. Flores's trial started on March 22, 1999, and concluded on April 1, 1999, when the jury imposed a death sentence.

Jackie Roberts, Black's step-daughter, testified that she received money from her husband and Black's son, Gary Black. Because Gary was in prison at the beginning of 1998, Black gave Roberts the money. But while Gary was in prison, Roberts began having an affair with Ricky Childs. Childs provided Roberts with amphetamine. Roberts claimed that she swallowed it while Childs shot it intravenously. During this time, Black was giving Roberts

five-hundred dollars a month. But Black told Roberts that this amount would be cut to two-hundred dollars a month.

On the day before Black's murder, Roberts and Childs planned to purchase a quarter pound of amphetamine from an acquaintance. Roberts claimed that Flores joined them to drive to the purchase. Childs paid for the narcotics, who, according to Roberts, got the money from Flores. Flores weighed the narcotics and noticed they had been short-changed. Roberts saw Childs with a pistol afterward, but she did not see Flores with any firearms. The three then went to Flores trailer. At the trailer, Roberts saw Flores with a double-barrel handgun. He jokingly pointed the handgun at Roberts and convinced her to call the dealer to rectify the situation.

According to Roberts, the three drove to several places, an apartment, a home, a gas station. Childs and Flores were mad at each other and arguing. Roberts claimed that Flores said he wanted the rest the amphetamine or the amount of money that he overpaid. Roberts said she could get the money from Black's house. Childs agreed that the money was there and available.

Roberts told the jury that Childs drove the three to her mother's house at around 7:15 in the morning on January 29. Once there, she claims that Childs and Flores got into a Volkswagen and drove away. According to Jill Bargainer, the Blacks's neighbor, the murder occurred at 6:45 a.m.

Judy Haney and Terry Plunk both saw the drug deal that night. They saw Flores with Childs and Roberts in the early morning hours of January 29. Plunk testified that Roberts was acting strangely. He claimed that Flores called him, angrily protesting the light drug package.

Roberts's ex-husband, Doug Roberts, testified that he and Roberts divorced because he went to prison for a drug-related offense. He further stated that he was working in an automotive shop in the early morning hours of January 29, 1998. At around 5:30 in the morning, Doug was falling asleep at the shop, so he decided to leave and pick up his son for school. When he arrived at Roberts's house, Childs's purple Volkswagen was blocking the driveway. Doug testified that it had dark, tinted windows. Allen Weaver had borrowed the Volkswagen that day and was driving

it. Doug saw Childs get into the driver's seat of the vehicle. He could not see any passenger. Roberts and Weaver were inside Roberts's home.

Doug confirmed that Roberts, Childs, and Gary Black abused narcotics. When Roberts and Gary were married, they often fought about money. Gary knew he was going to prison for a drug offense, and he was dealing more drugs to save money for Roberts while he went to prison. He stashed that money at Black's home. Doug testified that Roberts told many people about the stash of money.

Doug also testified that he saw Childs multiple times in the three weeks before Childs murdered Black. Each time, Childs had a .380 caliber handgun – the type used to murder Black.

When Doug saw the news reports that Black had been murdered, he immediately told the police that Childs was responsible. He did not mention Flores.

When the police subsequently apprehended Childs, Childs pointed his proverbial finger toward Flores. That is the moment when the police focused on Flores – based on the word of Ricky Childs.

No gun used in the crime has ever been traced to Flores. Instead, as set forth above, there is a complete evidentiary void in relation to Flores. No physical evidence connects him to this crime. Instead, the State used weak identification testimony from a neighbor, Jill Bargainer, whose identification came during trial after having undergone hypnosis several weeks earlier, and hearsay from Homero Garcia and Jonathan Wait, drug addicts who needed help from law enforcement when making their statements.

Garcia's testimony proved unreliable as he tried to suggest that Flores had given him a gun shortly after the murder. After the State ran ballistics tests on the gun, it knew that Garcia lied because the gun did not match any weapon used in this crime. His identification, much like his false testimony implicating Flores through the gun, is unreliable and insufficient to prove Flores was present at the crime.

And Wait admitted he was addicted to cocaine after battling addictions to other substances, including methamphetamine. He claimed that Flores admitted that he was present at the murder,

shooting the dog. But he also admitted that he previously was in the Federal Witness Protection program and was an informant to get himself out of trouble. His daughter, Myra Wait, was Flores's live-in girlfriend at the time, who was concerned about her connection with every person involved in Black's murder.

The other witness, Jill Bargainer, was consistently unable to identify Flores. Bargainer easily identified Childs as the driver exiting a purple Volkswagen. In describing the other person at the scene, Bargainer indicated the other man was White (Flores is Hispanic) and thin (Flores is, and always has been, heavy if not obese). Flores does not meet her initial description.

After being unable to identify Flores, Bargainer asked to undergo hypnosis to aid in her recollection of the man she saw at the Black's house the morning of the murder. Following the hypnosis session, which is described more fully below, Bargainer was unable to identify Flores from a photographic-array line-up. In fact, it was not until trial, when Bargainer saw Flores sitting at the defense table – the only Hispanic sitting in the well of the court – that Bargainer could identify Flores as the other man at

the Black's house. Between those two dates, Bargainer saw news reports about Flores and the murder. She saw Flores picture on the news, identifying him as the defendant.

Bargainer's identification is unreliable. Without her identification, there is a reasonable probability that Flores would not have been found guilty of capital murder. Flores's trial counsel did not admit his presence at the scene – an admission Flores has always disputed – until after Bargainer claimed she saw him there. Thus, Bargainer's testimony becomes the lynchpin holding together the State's tenuous case against Flores.

Because Bargainer's testimony was admitted and Flores's own counsel stated he was present at the Black's the morning of the murder, the jury convicted Flores of capital murder.

Thereafter, trial counsel completely abandoned Flores. Trial counsel failed to undertake any meaningful investigation into Flores's life history. They presented zero witnesses during the punishment phase. They did nothing to demonstrate Flores's troubled childhood, unusual home life, and his permanent brain impairment. Trial counsel failed to act as if Flores's life was on the

line. Trial counsel failed to investigate, adduce or present any evidence that would have given the jury a reason to spare Flores's life. These failures resulted in a foregone conclusion – the jury sentenced Flores to death.

III. Postconviction History

Flores incompetent legal representation continued following the trial. With a paltry effort by appellate counsel, the Court of Criminal Appeals denied Flores' direct appeal in an unpublished opinion. *See Flores v. State*, AP-73,463 (Tex. Crim. App. 2001). The U.S. Supreme Court denied Flores' petition for writ of certiorari. *Flores v. Texas*, 535 U.S. 1039 (2002).

Then, following what can only be charitably called a comedy of errors during state habeas proceedings, the Texas Court of Criminal Appeals denied Flores' state application for a writ of habeas corpus. *Ex parte Flores*, No. WR-64,654-01, 2006 WL 2706773 (Tex. Crim. App. 2006). Four different attorneys took turns at providing representation to Flores, none of which provided services amounting to competent, or even meaningful, counsel. Judge Nelms, the trial judge overseeing the state habeas

process, injected himself into Flores' state habeas proceedings in an attempt to ensure that competent counsel was afforded Flores. Judge Nelms went so far as to threaten state habeas counsel with contempt of court for failing to even retrieve the trial record. Yet, the defiance continued, and counsel – individually and collectively – wholly failed to present a habeas writ that preserved the numerous, viable claims that are obvious even to the nascent eye. Judge Nelms could only order the record retrieved, but unfortunately, not reviewed. Flores's dubiously presented state habeas claims were denied without hearing.

When new federal habeas counsel were appointed, they began to argue that these injustices must be remedied, not with the zealousness common to claims of procedural bar, but rather, with an eye toward justice, due process, and the comfort of knowing that any system embracing capital punishment strives to ensure that those being executed have received the full panoply of rights afforded by our Constitution. Prior to the Supreme Court's rulings in *Martinez* and *Trevino*, federal habeas counsel sought to vindicate state habeas counsel's many failings. The goal has been

consistent and consistently simple: Charles Flores deserves one full and fair opportunity to prove his trial, appeal, and habeas proceedings have all been constitutionally flawed. He has yet to receive that one opportunity.

Despite federal habeas counsel's efforts, the findings and recommendation of the United States magistrate judge recommending Flores' federal habeas petition be denied. *Flores v. Thaler*, No. 3-07-CV-0413-M-BD, 2011 WL 11902115 (N.D. Tex. 2011). The district court's order accepting the recommendation of the magistrate judge as modified and denying Flores' application for a writ of habeas corpus can be found at *Flores v. Stephens*, No. 3:07-CV-0413-M, 2014 WL 3534989 (N.D. Tex. 2014). The district court's memorandum opinion and order denying Flores' motion to alter or amend judgment can be found at *Flores v. Stephens*, No. 3:07-CV-0413-M, 2014 WL 4661974 (N.D. Tex. 2014). The Fifth Circuit's denial of Flores' request for a Certificate of Appealability ("COA") can be found at *Flores v. Stephens*, 794 F.3d 494 (5th Cir. 2015). The Supreme Court denied Flores' writ of certiorari on January 25, 2016. *Flores v. Stephens*, 136 S. Ct. 981 (2016).

No court – state or federal – has yet evaluated the merits of the claims presented to this Court. The federal court refused to rule on the substance of Flores's mitigation claims, dismissing his case on procedural deficiency grounds. The state habeas court did not have this evidence, or these claims, due to lack of competency by prior counsel and, importantly, a significant change in the science. This procedural history is important as it demonstrates Flores's continued effort to secure only one meaningful, full and fair opportunity to have the adequacy of his capital trial and sentence evaluated.

There is not much time remaining. But this Court can – prior to execution – ensure that Flores receives his one promised opportunity to have these claims heard, and resolved, on the merits.

IV. New Evidence Discovered After Trial

A. Dr. Steven Lynn provides a highly qualified expert opinion about the advancement of scientific knowledge that discredits Bargainer's hypnotically induced eyewitness identification.

Flores consulted Dr. Steven J. Lynn, Ph.D., about Bargainer's hypnotically altered eyewitness identification. Ex. 1,

at 1. Dr. Lynn is the world's leading researcher on hypnosis and recovered memories. *See generally id.* Dr. Lynn is a Distinguished Professor of Psychology at Binghamton University, a branch of the State University of New York. Additionally, he is the Director of Binghamton University's Psychology Clinic and Laboratory of Consciousness and Cognition and the Center of Evidence-Based Therapy – the treatment division of the Laboratory of Consciousness and Cognition. And he is on the faculty of the International Institute of Psychotherapy and Applied Mental Health in Cluj-Napoca, Romania, to boot. Ex. 2, at 1.

Dr. Lynn's distinguished academic and clinic positions have allowed him to conduct extensive research on hypnosis and memory. *See* Ex. 2, at 2. He is the Editor of at least eight major psychological publications related to psychology and hypnosis. *See id.* And he has been a Guest Editor of special hypnosis-related issues of psychological journals at least eight times. *Id.* In addition to these peer-reviewed academic journals, Dr. Lynn is the Editor of *Great Myths in Psychology*, an important book that revealed common misunderstandings about science to the public. As

discussed in Dr. Lynn's affidavit, this book informed the public that memory does not work like a video recorder, a scientific principle on which the State relied to admit Bargainer's identification, in 2010. Ex. 1, at 4, 15-17.

This book has been translated into seventeen languages so far. Ex. 2, at 3. Dr. Lynn was nominated for the American Publishers Award for Professional and Scholarly Excellence in 2010 for his work on *Great Myths in Psychology*. He received an Honorable Mention for this prestigious award. *Id.* In addition to this honor, Dr. Lynn has received at least twelve other awards for his scholarly work in psychology; the overwhelming majority are for his work on hypnosis and recovered memories. *Id.* at 3-4. His publication list is long and distinguished; it highlights his impressive work in hypnosis. *Id.* at 6-34.

Multiple United States and Canadian courts have qualified Dr. Lynn as an expert in hypnosis and memory. *See id.* at 36-38. He has testified in major, high-profile cases, including *State v. Moore*, 902 A.2d 1212 (N.J. 2006), a New Jersey Supreme Court case which ultimately abolished the use of hypnotically altered

memories in all New Jersey courts; *R. v. Robert Baltovich*, which ultimately exonerated Mr. Baltovich and provided the foundation for the Supreme Court of Canada to abolish the use of hypnotically altered memories in its courts; *People v. Donna Prentice*, resulting in a hung jury (11-1 for acquittal) in a recovered-memory child-abuse case; and *Church of Scientology International v. Fishman, et al.*, No. 91-6426 HLH (TX), (C.D. Cal., 1995), which forced the Church of Scientology to dismiss its defamation suit about leaks of central church doctrine. *See id.* These samples are representative but not exhaustive.

Dr. Lynn agreed to review Bargainer's identification. After reviewing the available information, Dr. Lynn opined that new scientific understanding shows that the hypnosis techniques used on Bargainer likely caused false memories of Flores being present at Black's murder. These new developments "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." Ex. 1, at 2. Dr. Lynn ultimately concludes that "given the information

about the risks of hypnosis that has accrued since [Flores'] Zani hearing, and given the knowledge regarding hypnosis and memory available at the time, which was not addressed in the judicial proceedings, serious consideration should be given to the possibility that a miscarriage of justice was perpetrated in the case of Mr. Flores." *Id.* at 21.

The details of Dr. Lynn's expert findings are discussed below. Flores urges this Court to accept Dr. Lynn's testimony and his expert opinion to enable Flores to satisfy the 11.073 requirements necessary to receive a new trial.

B. Counsel uncovers the complete story of Flores' life that explains his post-accusation behavior and mitigates his moral culpability.

In addition to Dr. Lynn's expert opinion about the new state of scientific understanding of hypnosis and memory, counsel have finally conducted a full and proper mitigation investigation for Flores. This complete investigation shows how inadequate every attorney who has previously represented Flores truly has been.

Charles Flores was born into a mixed family. His parents, Catarino "Carter" and Lily Flores, both had children from

previous marriages. Flores has two stepbrothers from Lily's previous marriage to Elias Jojola, Antonio "Tony" and Juan "Johnny" Jojola, and two stepbrothers from Carter's previous marriage to Dolores Smith, Julian "Eddie" and Jose "Joe" Flores.

Lily and Carter fought constantly and violently in front of the children, especially during their regular heavy drinking. Carter was away from home often, claiming that his job required it. But when at home, Lily would scream at him constantly and attack him physically. When Flores was two or three years old, they had a terrible fight at Christmas. They screamed at each other before the fight turned physical. Once it turned physical, they knocked over the family's Christmas tree, and Lily struck Carter with the family's Christmas presents, breaking them. Flores saw this fight with his stepbrothers. According to Dr. Lynn's affidavit, Ex. 1, at 12, this memory was among Flores' first memories. The couples' fighting continued until 2015, when Carter was sent to a nursing home due to his failing health. Carter died on May 19, 2016.

Despite this home environment filled with heavy drinking and constantly fighting, Flores was a caring and nice toddler who looked up to his stepbrothers. He loved them and emulated them as he grew. Unfortunately, Flores' stepbrothers were horrible role models. Joe provided drugs to Flores at a shockingly young age – five years old. Joe and Johnny describe Flores huffing gasoline fumes to get high and hallucinate at that tender age.

The huffing impacted Flores more than his brothers, as is expected in a brain that is so early in the developmental process. Johnny describes one time when Flores huffed the fumes and had serious hallucinations that caused him to douse himself with gasoline. Johnny quickly intervened to prevent Flores from killing himself. This event happened when Flores was in the first grade.

Flores's drug use continued and escalated during his youth. During elementary school, Flores began smoking marijuana. When he was fourteen or fifteen years old, he graduated to cocaine. At about that time, Joe gave Flores marijuana cigarettes and told him to sell them at school. When Flores sold them all, Joe gave him more and told him to sell those as well.

Flores's emulation of his brothers did not stop with drug abuse, though. He also copied their love of cars and dirt bikes. Although seemingly less dangerous than drugs, these loves resulted in Flores sustaining multiple head injuries. At least once, Flores had a bad dirt-bike accident, landing on his head. And he also had a severe, head-on car crash, during which he struck his head. As is unfortunately common with working-class families, Flores's family decided not to take him for medical treatment, hoping that he would get better.

During Flores's elementary school years, he witnessed his family and his role models break apart. Johnny stayed in trouble, causing his parents to intervene with law enforcement. But they finally had enough when Flores was six or seven years old. The police called them and asked them to pick up Johnny from his most recent brush with the law. When they refused, the police told them that they had to get him or he would be sent to the juvenile-correction system. Carter and Lily still refused, so Johnny served years in the juvenile system.

Flores also started spending more time with some cousins in Dallas. One of those cousins repeatedly assaulted Flores sexually. As commonly seen in the justice system, Flores felt shame from this victimization and never told anyone.

When Carter's business failed, the family moved to Irving. Flores made new friends, all of whom used heavy, dangerous drugs. One of those friends was Justin "Cody" Prather, who remained friends with Flores until his arrest in this case. Prather noticed serious problems within Flores' family.

Aside from the obvious problem with Carter and Lily's violent fights, he noticed that the brothers had an unusual and unhealthy dynamic. In particular, Johnny manipulated Flores to exercise control over him. Johnny picked on Flores to alter his behavior and even severely beat him occasionally. Prather remembers one time when Johnny beat Flores so severely in the head that Flores required stitches.

Flores has reported that one of his stepbrothers sexually abused him too. Given Prather's observations, the inescapable conclusion is that Johnny is this stepbrother.

After a brief time attending high school in Irving, Flores dropped out and went to work with Carter. This job provided the money necessary for Flores to continue his drug abuse. Joe became concerned about Flores's drug abuse and urged him to stop. Unfortunately, Johnny entered the picture again. Johnny had married and had a house. Flores would go to that house and smoke marijuana with Johnny's wife. Johnny told Flores not to tell Joe. Johnny's relationship with this wife failed when Johnny caught her having an affair and tried to murder the men. He is currently imprisoned for two counts of attempted murder and three counts of kidnapping when he took his children afterward. While in prison, officials diagnosed him as bipolar and prescribed him medication to treat bipolar disorder after he attempted suicide.

Flores continued this life trajectory, moving to methamphetamine abuse and distribution. He began acting erratically and devolving to activities from his youth. Flores began dressing like a cowboy – as he did when he was a toddler – and

behaving childishly. This alarming behavior occurred right before Black's murder.

Flores's drug use left him with serious brain impairment. Dr. Richard L. Fulbright, Ph.D., evaluated Flores and determined that his brain did not fully develop or developed in an abnormal pattern. Dr. Fulbright attributes this brain abnormality to his gasoline huffing at such an early age. He considered and discounted head injuries and Attention Deficit Disorder as causes of Flores's impairments. This brain damage from early and continuous drug use caused brain damage in Flores's developing brain. This brain damage degraded Flores's ability to develop high-level cognitive abilities and the ability to regulate his behavior. Specifically, Flores has serious deficiencies in attention, short-term memory, and math skills. Without Flores's brothers giving him drugs to use before he even entered elementary school, Flores probably would have been able to regulate his behavior and use reasoning skills more effectively.

Recently, Flores was asked about his favorite memory of his family life. After reflecting, Flores smiled. He said that he

treasured his memories of sitting with his mother on the family's porch, drinking beer with her – during his teenage years. This fond memory sums up Charles Flores's life. Despite his early signs of intelligence and good nature, his brothers introduced him to serious drug use before he was old enough to go to school. When he broke away from addiction and began working with his father, another brother convinced him to start using again – only secretly this time. Charles Flores could have led a good, productive life, but his brothers' horrific influence and his parents' neglect smoldered any promise Flores had for a normal life.

This mitigation evidence has never been considered on the merits by any court. Yet this is precisely the type of mitigation evidence that (1) could have helped placed Flores's flight in perspective, and (2) would have provided the jury with the quintessential evidence used to evaluate moral culpability. This evidence should be fully considered before the State executes Flores.

CLAIMS FOR RELIEF

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

This Court should grant Flores's Article 11.073 Application because he can demonstrate, by a preponderance of the evidence, that new scientific evidence discredits the only eyewitness that placed Flores at the scene of the crime. Dr. Steven Lynn, the world's leading expert on hypnosis and memory, confirms that reliance on Jill Bargainer's hypnotically altered testimony – which he opines is flawed under new scientific knowledge – likely caused a miscarriage of justice in this case.

The State's case against Flores was based on circumstantial evidence that he was an accomplice to Black's murder – a murder to which Ricky Childs confessed. The lynchpin of the State's case against Flores was Bargainer's eyewitness identification of him after a hypnosis session that Dr. Lynn called "so fundamentally flawed that [it] raise[s] a specter of doubt not only regarding the admission of the testimony of [Bargainer], but also regarding the in-court eyewitness identification of Mr. Flores." Ex. 1, at 1.

Because Bargainer's testimony is the main circumstantial evidence used to convict Flores, its veracity and reliability are key. The attached affidavit confirms that Bargainer's testimony has since been conclusively determined as scientifically unsound. *See id.* Dr. Lynn avers that due to Bargainer's testimony, "serious consideration should be given to the possibility that a miscarriage of justice was perpetrated" in this case. *Id.* at 21.

The State rested its case against Flores on the words of undesirables – drug dealers and drug users with potential legal problems of their own. These individuals cooperated with law enforcement when they knew they could be facing a prison cell themselves. In fact, the police first suspected because Ricky Childs told them that Flores was there during Childs's post-apprehension interrogation. The State did not present physical evidence placing Flores at the murder scene. It did not present a videotaped confession, proving what Flores actually said about that morning. And it did not even present the one individual that confessed to committing the crime, Ricky Childs.

The only seemingly untainted evidence the State presented to place Flores on the scene was Bargainer's hypnotically altered testimony. Bargainer was Black's neighbor. Bargainer said she saw two men enter Black's garage before the murder. When first speaking to investigators, she described the men as White and thin with long black hair.

Flores cannot, and never could have, fit this description. He is Hispanic – Mexican of Aztec and Mayan descent. He is not skinny but, rather, has always been a large man. His friends sometimes called him "Fat Charlie." Bargainer immediately identified Childs as the driver of the car carrying the two men. Before the hypnosis session, she was unable to pick Flores out of numerous photo line-ups. But for the hypnotically altered memory, Bargainer would not have been able to identify Flores.

When investigators suspected Flores was the other man Bargainer claimed to see, they asked Bargainer to come to the police station to help identify the other man. Bargainer asked to undergo hypnosis before making her identification. The police complied with her request.

During that hypnosis session, Officer Sera, the hypnotist, used a discredited hypnosis technique called the movie-theater technique. Ex. 1, at 3-4, 15-16. That technique requires the subject to imagine the memories as a movie playing on a movie screen. *Id.* at 15-16. Sera believed that memory worked like a video camera, capturing all stimuli for later retrieval. *Id.* at 16. He encouraged Bargainer to allow this video recording to play in her mind while under hypnosis.

Sera believed that this technique would be a safeguard against confabulation, inserting false memories to complete a story or picture in one's memories. *Id.* at 15. In reality, this technique is not a safeguard and actually inflates the chances of confabulation. *Id.* at 15-16 (describing how the movie-theater technique encourages confabulation because it enters one's imagination, encouraging "imagination inflation"). During the session, Sera told Bargainer to use buttons on a remote control, stop, rewind, fast forward, play, to review the memories – exactly as if those memories were playing on a video recording as he believed. *Id.* at 4.

This movie-theater technique is grounded in the video-recording model of memory, which has been thoroughly debunked. *Ibid.* Dr. Lynn opines that this technique tainted Bargainer's identification so much that it should have been excluded on that basis alone. *Id.* at 17 ("In this expert's opinion, the use of [the movie-theater] technique alone should have disqualified Ms. Bargainer's testimony and cast doubt on her in-court identification of Mr. Flores"). But Sera's errors did not end there. *Ibid.*

At the end of the hypnosis session, Sera told Bargainer that she would continue to remember details "as time goes on." *Ibid.* This post-hypnotic suggestion is exactly the type of harmful suggestion that allows the further recovery of false memories. *Id.* at 17-19 (opining that Sera "did plant a seed that may have blossomed 13 months later [when Mrs. Bargainer saw Flores at the trial table]"). This suggestion also created an atmosphere that allowed Bargainer to have such a high degree of confidence in her memories as they unfolded amidst newspaper and television stories about Flores that repeatedly showed Flores's picture.

After the hypnosis session, police showed Bargainer a photographic array that included Flores. She did not identify Flores. Then, at trial, after seeing Flores sitting at the defense table, Bargainer decided she could identify him. Consistent with current research, Bargainer's degree of confidence was incredibly, though artificially, high. *Id.* at 11-12.

The trial court conducted a *Zani* hearing. Following the hearing, the court admitted Bargainer's identification, which became the only direct evidence against Flores. In doing so, the court found that Sera had used sufficient safeguards to ensure Bargainer would not confabulate any details. It also found that Sera had not given any suggestions to Bargainer that could cause false memories. Finally, it found that Sera had not said anything that would cause Bargainer to remember false details later.

Based on new scientific knowledge, these findings were erroneous and merit a new trial.

Scientific studies since the trial have changed the state of scientific knowledge about hypnosis and recovered memories. *Id.* at 20-21. The new state of scientific knowledge firmly understands

that "hypnosis is an unreliable memory recovery technique." *Id.* at 21. At best, it has no effect on one's ability to recover memories. But in reality, hypnosis often creates false memories that change and convinces subjects to have unwarranted confidence in those false memories. Under the current state of scientific knowledge, Bargainer's identification is unreliable and would not carry any evidentiary weight. *Ibid.* As Dr. Lynn's testimony confirms, "Clearly, the techniques that were used to refresh Ms. Bargainer's memory would be eschewed today by anyone at all familiar with the extant research on hypnosis and memory." Scientific advancements demonstrate the unreliability of Bargainer's testimony.

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.

The Texas Legislature intended to allow prisoners to secure habeas relief when newly developed scientific knowledge casts doubt on the State's scientific evidence used at trial. *See* Tex. Code Crim. P. art. 11.073. To obtain relief, an applicant must show that

the new scientific knowledge was not reasonably available at the time of the applicant's trial, 11.073(a)(1), the new scientific evidence contradicts evidence on which the State relied at trial, 11.073(a)(2), and the evidence is currently admissible under the Texas Rules of Evidence, 11.073(b)(1)(B). Finally, if the new evidence had been presented at the applicant's trial, a reasonable jury would not have convicted the defendant. 11.073(b)(2). For the final prong, the applicant must only persuade by a preponderance of the evidence. *Ibid.*

Article 11.073 represents the Texas Legislature's intent to create a nationwide model to correct convictions based on science that was discredited after prisoners' trials. In 2009, the Legislature announced its desire to allow habeas applicants to secure a new trial with new scientific evidence "that *either* was not previously available at trial *or evidence that has since been discredited.*" 2009 Leg. Bill Hist. TX S.B. 1976 (emphasis added). In 2013, the Legislature passed the previous version of Article 11.073. It intended for Texas courts to "consider whether the scientific knowledge or method on which the relevant scientific

evidence is based has changed . . ." to grant habeas relief based on "relevant scientific evidence of false and discredited forensic testimony utilized at trial." 2013 Legis. Bill Hist. TX. S.B. 344.

In 2015, the Legislature amended Article 11.073 to address a Court of Criminal Appeals opinion, *Ex Parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) reh'g denied *Ex Parte Robbins*, No. WR-73,484-02, 2015 Tex. Crim. App. LEXIS 567 (Tex. Crim. App. May 13, 2015), and to strengthen applicants' ability to secure a new trial when the science used to convict them is discredited. The Legislature cited National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (Nat'l Academ. Press 2009) for its reasoning that the trial process is not an effective process to uncover the truth about scientific principles. 2015 Legis. Bill Hist. TX. S.B. 1743. This allows an additional avenue for habeas relief, an expert changing his or her opinion at trial based on new scientific understanding, to strengthen Article 11.073 in its fight against discredited science.

Flores's case falls squarely within 11.073.

In this case, the State relied on scientific evidence regarding hypnosis and memory that has since been discredited. Ex. 1, at 21. Scientific knowledge now confirms that the scientific principles on which the State relied at trial actually increase the likelihood of critical errors and wrongful convictions, casting a large shadow of doubt on Bargainer's identification of Flores. *Ibid.*

In short, 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. Scientific studies published after 1999 show that placing a subject under hypnosis, alone, can implant false memories. And the scientific community's knowledge has evolved and solidified to reject the idea that hypnosis is an effective way to recover accurate memories. The community now knows that hypnosis creates an unacceptably high number of false memories, that hypnosis does not recover forgotten memories, and that hypnosis creates an unwarranted and high degree of confidence in false memories.

In fact, jurisdictions are barring the use of hypnotically altered memories in trials – often after hearing about the scientific community's new understanding from Dr. Lynn. Because this new, settled scientific understanding would be admissible and would likely result in Flores's acquittal, Flores is entitled to habeas relief and a new trial.

Flores's case is precisely the situation envisioned by the Texas Legislature in passing Article 11.073. The science used to convict Flores has been debunked. The primary evidence used against Flores, and the only eyewitness testimony, was Bargainer's now discredited, hypnotically altered testimony. Flores has demonstrated, by a preponderance of the evidence, that without Bargainer's flawed testimony he would not have been found guilty of capital murder and sentenced to death. Article 11.073 empowers this Court to avoid a miscarriage of justice by granting this writ.

1. The scientific community's knowledge of hypnosis and memory has changed since Flores' trial and has now solidified, casting a significant shadow of doubt on Bargainer's identification.

Dr. Lynn concludes that "given the new information about the risks of hypnosis that has accrued since the Zani hearing . . . serious consideration should be given to the possibility that a miscarriage of justice was perpetrated in the case of Mr. Flores." Ex. 1, at 21.

In 1995, right before Flores's trial, the American Society of Clinical Hypnotists (ASCH) reported that hypnosis could be used without safeguards if the hypnotist did not suggest any details. *Id.* at 10. The district court relied on this scientific knowledge to admit Bargainer's identification. *See* 36 RR 117. But the scientific knowledge has changed and has abandoned that stance as erroneous.

The scientific community now knows that hypnosis can implant false memories without leading questions and suggestions even with highly emotional memories. And these hypnotically induced false memories persist even in the face of contrary information because hypnosis increases the subjects' confidence in

the induced memories. Furthermore, the community's knowledge understands that memory is highly malleable when under hypnosis, much more so than understood at the time of Flores's trial. Ex. 1, at 20-21.

Modern science now confirms that Bargainer's identification was likely the product of a false memory, altered by now-debunked techniques. This change in the science makes Bargainer's flawed testimony highly unreliable. Because Bargainer only identified Flores at trial while he was sitting at the defense table, after failing to pick him out of a photographic array and after describing him as thin and White, following now discredited hypnosis techniques, her testimony falls precisely within Article 11.073. Her testimony is unreliable and should be disregarded.

At Flores's trial, the State relied on outdated scientific knowledge regarding hypnosis and recovered memories – namely that human memory is like a video recorder and that hypnosis cannot implant false memories with suggestions – that have been discredited. The police hypnotist who hypnotized Bargainer

testified that he did so because he thought the brain was like a video recorder, explicitly adopting the video-recorder theory of memory. Then, the State's expert, Dr. George Mount disagreed with Officer Sera's belief that memory acts as a recorder, he effectively endorsed the video-recorder theory when he said the movie-theater was an acceptable hypnosis method. This endorsement "in no way reflects the great risks associated with [the video-recorder-memory theory] and therefore is difficult if not impossible to reconcile with his failure to endorse the view of memory as a multi-channeled videotape recorder." Ex. 1, at 17.

This scientific theory is absolutely wrong. The brain perceives some stimuli and remembers only some of them. Of the details that get stored in memory, some will be forgotten and never remembered. Sometimes, new information will remind the person of those forgotten memories, but that new information simply creates new memories, which often are false but always artificial. *Id.* at 5-6.

As Dr. Lynn notes, "It is fair to say that today a virtual consensus exists among cognitive psychologists and the larger

psychological community that hypnosis does not improve memory but imposes risks of false memory creation and that hypnosis further carries a risk of unwarranted confidence in memories independent of their accuracy, with attendant risks of grievous errors in eyewitness identification." *Id.* at 20.

Since Flores's trial, the scientific community's knowledge has changed in four relevant ways. First, new studies have discredited the scientific community's understanding that hypnosis does not elicit false memories. Second, new studies have demonstrated the plasticity of hypnotically induced memories. Third, new studies show that hypnosis, even without leading questions, can create false memories. Fourth, new studies show that hypnosis creates memories about highly emotional events that change over time. *Id.* at 20-21.

New scientific knowledge documents the persistence of hypnotically induced false memories even in the face of contrary information. *Id.* at 12-13. After Flores's trial, studies show that hypnotically induced memories remain even after the subject reviews scientific evidence that the memory is not correct. *Ibid.* In

these studies, researchers, including Dr. Lynn, hypnotically induced memories about events that occurred before a time when humans remember events, two years of age. *Id.* at 13. After testing whether subjects would recall these false memories, the researchers revealed scientific proof that those early childhood memories could not exist. *Ibid.* A statistically significant portion of the subjects maintained that the hypnotically induced memories were real. *Ibid.* In other words, these false memories are just like every other memory that people have.

In Flores's trial, this scientific fact explains why Bargainer so strongly believed her identification of Flores was correct. Even in the face of contrary information, namely her initial description of the passenger as White and thin – a description that could not have been Flores – Bargainer persisted in claiming absolute certainty that Flores was at Black's home that morning. *Id.* at 18. Dr. Lynn's avers that: "It is unfortunate that the triers of fact did not entertain the possibility that Ms. Bargainer's in-court identification of Mr. Flores, thirteen months after the murder, was abetted by [Sera's post-hypnotic] suggestions, and that her

confidence in her recollection, which she claimed was in excess of 100%, was engendered or greatly inflated by the implication that her memory operates like a video or movie recorder." *Ibid.* Dr. Lynn's testimony supports Flores's claim that Bargainer's identification was likely erroneous.

New scientific studies reveal the high degree of plasticity of hypnotically induced memories. In the hypnotically-induced-early-childhood-memory studies, the researchers successfully implanted false memories of events before subjects' second birthday, a time when cognitive psychologists agree that memories only begin to form. *Id.* at 12-13. The researchers were successful in implanting those memories. Some subjects formed memories from their first year of life – and clung to those memories after receiving scientific proof that they were false. *Id.* at 13. This part of the scientific studies shows that memory is highly malleable. But the scientific knowledge has changed; we now know that hypnotists can implant memories that absolutely could not have been formed. *See id.* New science significantly undermines Bargainer's identification.

This new scientific knowledge shows that hypnotists can implant false memories separately from confabulation. At trial, the district court worried about confabulation – that Bargainer would fill in gaps in her memories. While this concern is certainly well founded, it is not the only concern – contrary to the scientific knowledge in 1999. *Id.* at 20-21 ("recent developments in the field of psychological hypnosis have . . . documented the persistence of hypnotically elicited improbable or false memories, even in the face of challenging information"). Instead, hypnosis can implant completely new memories separate from any existing memories at all.

Relatedly, the scientific community now understands that hypnosis can create false memories even without leading questions. At the time of Flores's trial, the scientific community believed that leading questions could alter a subject's recall of forgotten memories. *Id.* at 10 (describing the ASCH position "that hypnosis could be used with no special risks when the procedures were not accompanied by inappropriately suggestive questions"). In the absence of leading questions, however, scientists did not

believe that the process of hypnosis alone could create false memories. And in Flores's *Zani* hearing, the court was particularly interested in suggestions during the hypnosis session. 36 RR 117.

Since Flores's trial, the scientific knowledge has shifted from this focus. Scientists now understand that hypnosis can create false memories even without leading questions or suggestions. Ex. 1, at 21. Dr. Lynn testifies that Bargainer's identification is suspect because studies have "shown that the induction of hypnosis, independent of leading questions, can engender inaccurate recall." These studies show that hypnosis cannot increase memory recall and can have the opposite effect, which is something that the court did not consider at trial because the scientific knowledge had not accepted this fact. *Ibid.* This new scientific knowledge completely undercuts the science on which the State relied at trial. This new scientific knowledge directly undercuts Bargainer's identification.

The trial court appropriately worried about leading questions and suggestions during the hypnosis session, consistent

with the scientific knowledge in 1999. The science at the time allowed this approach because scientists believed that these suggestions were the only way to implant false memories. Subsequent scientific knowledge shows that the process of hypnosis often creates false memories. Thus, the district court's focus on leading questions was misplaced. Instead, it should have focused on the movie-theater technique used on Bargainer.

The mere use of the movie-theater technique can create false memories, especially when combined with Sera's post-hypnotic suggestion that Bargainer would continue to remember details. Because Bargainer viewed Dallas news reports that prominently displayed Flores's picture in connection with the murder, she likely confabulated her memory of his face and incorporated it into her inner-movie presentation, mistaking it for a true memory because Sera incorrectly told her to expect new memories to surface. *Id.* at 17-18. This confabulation increases the chances that Bargainer's hypnotically altered memory is a false memory. Because the State did not have any physical or other reliable evidence that Flores was present at the Blacks' home, this flawed

testimony enhances the chance of a miscarriage of justice in this capital case.

New scientific studies show that hypnosis can produce memories that change over time about highly emotional events. In 2005 and 2006, researchers studied subjects who had emotional responses to Princess Diana's death. Some subjects were hypnotized to augment their memories, and others just reported their memories without undergoing hypnosis. *Id.* at 9-10. The hypnotized subjects were less accurate when reporting their memories. *Ibid.* And these memories changed after the passage of eleven to twelve weeks. *Id.* at 9. This study shows that hypnosis can lower accurate recall of even highly emotional events, like a murder or robbery.

These studies explain Bargainer's changing, and contradictory, memories for a highly emotional event. When she initially viewed Flores's picture after the hypnosis, she did not identify him as the passenger. She was unable to pick him out of a photographic array, despite her ability to easily select Ricky Childs.

But like in the Princess Diana studies, Bargainer's memory changed afterward. The process of hypnosis, however, made her believe that her changing memories were accurate. Had these studies been available at the time of Flores's trial, the State and the court would have known that this memory change – from accurate descriptions to inaccurate ones based on news reports and seeing Flores at the defense table during trial – are perfectly normal and explained scientifically. Then, the court would have had the scientific evidence necessary to know that Bargainer identification had been tainted and was not reliable. Under current science, Bargainer's identification would never have been admitted. It should not be relied upon as a basis to convict – much less execute – Flores.

Flores has demonstrated that scientific knowledge about hypnosis's effect on recovered memories has changed and solidified behind theories that oppose the ones used at his trial. Under current scientific knowledge, Bargainer's testimony would not be admissible today. Without Bargainer's identification, the State's case against Flores becomes one based solely on

speculation and highly suspect circumstantial evidence. This change in scientific understanding and the critical nature of Bargainer's flawed identification warrant granting Flores a new trial under Article 11.073.

2. Without Bargainer's flawed testimony and tainted identification, the State cannot prove beyond a reasonable doubt that Flores was an accomplice to capital murder.

The State presented a weak circumstantial case against Flores. Its only eyewitness placing Flores at the scene remains Bargainer. The other evidence against Flores was primarily prior bad acts and his actions after being suspected. But, as other portions of this brief detail, these acts are likely due to Flores' brain impairment. A case based on debunked science, a flawed identification (particularly one that contradicted a previous identification of two thin, White males), and monumental speculation based on the defendant's flight is perilously problematic.

The State's "law of parties" case relied on testimony from Homero Garcia, an admitted drug abuser and liar. As detailed

above, Garcia falsely claimed that Flores gave him the murder weapon after the murder. Subsequent ballistics testing proved this claim was not true. No gun connected to this crime has ever been linked to Flores. Garcia simply wanted to get out of trouble after he was caught with a pistol, so he lied and gave false testimony about Flores. To buttress this claim, Garcia claimed that Flores admitted he was present during the murder, placing Flores in legal trouble without making him the most culpable actor. Garcia's testimony has been proven as unreliable regarding the gun. His testimony regarding Flores's presence at the crime scene is equally unreliable.

Without Bargainer's eyewitness identification, the State's evidence was suspect and would not have resulted in a conviction. No gun. No physical evidence. No confession. No DNA. No bullets. No testifying co-defendant. And no admission by counsel that Flores was present at the scene – as this statement by counsel came only after Bargainer's in-court testimony.

Garcia's dubious testimony is not enough to support a capital conviction. Only with Bargainer's corroborating identification is

there any basis to believe Flores was present at the Black's the morning of the murder. Others, like Roberts, had motive. And Childs confessed.

Bargainer's flawed testimony is literally the only glue holding together the State's tenuous circumstantial case. Without it, there is no way a Texas jury would have found Flores guilty of capital murder.

Flores need not prove, however, that the jury would have acquitted him. He only needs to show, by a preponderance of the evidence, that he would not have been convicted of capital murder. He easily surpasses this low threshold.

If the current state of scientific knowledge were available at Flores's trial, Bargainer's identification would have been excluded. It is not admissible today under the governing science. Ex. 1, at 1, 4, 17, 19-21. The State's remaining evidence may not have been sufficient to overcome a directed verdict in Flores's favor. *Cf. Johnson v. State*, 23 S.W.3d 1 (Tex. Crim. App. 2000) (holding that facially sufficient evidence will be insufficient if outweighed by contrary proof).

The State never tried to prove that Flores was the shooter or any culpability beyond "law of parties" guilt. The State's case against Flores is paltry and far less convincing than the case against Ricky Childs, the confessed killer that is now released on parole. The lack of proportionality in this case only increases the importance of the change in scientific knowledge, which minimizes the chance that Flores was present at or is responsible for Black's killing. Once Bargainer's flawed testimony is removed, the State if left with prior bad acts, explainable flight, and a drug addict's unreliable claim about Flores being at the crime scene. Flores meets the Article 11.073 standard and, therefore, warrants a new trial.

Even if this Court believes the State's evidence is sufficient to overcome a directed verdict, it certainly is not enough to prevent a new trial under Article 11.073. Flores simply has to show by a preponderance of the evidence that the outcome of his trial would have been different. Article 11.073(b)(2). The State presented no physical evidence that Flores was at the murder scene. Without Bargainer, the State presented no direct evidence

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

counsel abandoned any efforts at securing or presenting mitigating evidence to reduce Flores's moral culpability.

Yet, as the record demonstrates, there is significant mitigating evidence weighing against the imposition of the death penalty in this case.

Trial counsel's errors were compounded by ineffective assistance of counsel on initial state habeas review, as Flores's four state habeas attorneys – one of which as threatened with contempt of court for refusing even to pick up the case record – wholly failed to identify and advance the claim that trial counsel was constitutionally ineffective. Flores's state habeas proceedings precluded Flores from receiving one full and fair opportunity to present his ineffective assistance of trial counsel claims to any court. As he awaits execution, no court has yet considered the merits of his ineffective assistance of trial counsel claim.

The basis of Flores's mitigation claim are as follows:

Trial counsel failed to conduct a meaningful mitigation investigation. In fact, trial counsel failed to contact Flores's four stepbrothers or any childhood friends. Trial counsel failed to seek

out numerous witnesses Flores provided that would help tell his life story. They failed to have a proper life history performed. They failed to have a proper brain study performed, despite knowledge that Flores regularly abused drugs. They failed to bring to the jury's attention any explanation for Flores's life situation. In this regard, trial counsel failed to learn the following information that would have helped persuade a jury to award a life sentence.

Charles Flores was born into a mixed family. His parents, Catarino "Carter" and Lily Flores, both had children from previous marriages. Flores has two stepbrothers from Lily's previous marriage to Elias Jojola, Antonio "Tony" and Juan "Johnny" Jojola, and two stepbrothers from Carter's previous marriage to Dolores Smith, Julian "Eddie" and Jose "Joe" Flores.

Lily and Carter fought constantly and violently in front of the children. Carter was away from home often, claiming that his job required it. But when at home, Lily would scream at him constantly and attack him physically. When Flores was two or three years old, they had a terrible fight at Christmas. They screamed at each other before the fight turned physical. Once it

turned physical, they knocked over the family's Christmas tree, and Lily struck Carter with the family's Christmas presents, breaking them. Flores saw this fight with his stepbrothers. According to Dr. Lynn's affidavit, Ex. 1, at 12, this memory was among Flores' first memories. The couples' fighting continued until 2015, when Carter was sent to a nursing home due to his failing health.

Flores was a caring and nice toddler who looked up to his stepbrothers. He loved them and emulated them as he grew. Unfortunately, Flores' stepbrothers were horrible role models. Joe provided drugs to Flores at a shockingly young age – five years old. Joe and Johnny describe Flores huffing gasoline fumes to get high and hallucinate at that tender age.

The huffing impacted Flores more than his brothers, as is expected in a brain that is so early in the developmental process. Johnny describes one time when Flores huffed the fumes and had serious hallucinations that caused him to douse himself with gasoline. Johnny quickly intervened to prevent Flores from killing himself. This event happened when Flores was in the first grade.

Flores's drug use continued and escalated during his youth. During elementary school, Flores began smoking marijuana. When he was fourteen or fifteen years old, he graduated to cocaine. At about that time, Joe gave Flores marijuana cigarettes and told him to sell them at school. When Flores sold them all, Joe gave him more and told him to sell those as well.

Flores's emulation of his brothers did not stop with drug abuse, though. He also copied their love of cars and dirt bikes. Although seemingly less dangerous than drugs, these loves resulted in Flores sustaining multiple head injuries. At least once, Flores had a bad dirt-bike accident, landing on his head. And he also had a severe, head-on car crash, during which he struck his head. As is unfortunately common with working-class families, Flores's family decided not to take him for medical treatment.

During Flores's elementary school years, he witnessed his family and his role models break apart. Johnny stayed in trouble, causing his parents to intervene with law enforcement. But they finally had enough when Flores was six or seven years old. The police called them and asked them to pick up Johnny from his

most recent brush with the law. When they refused, the police told them that they had to get him or he would be sent to the juvenile-correction system. Carter and Lily still refused, so Johnny served years in the juvenile system.

Flores also started spending more time with some cousins in Dallas. One of those cousins repeatedly assaulted Flores sexually.

When Carter's business failed, the family moved to Irving. Flores made new friends, all of whom used heavy, dangerous drugs. One of those friends was Justin "Cody" Prather, who remained friends with Flores until his arrest in this case. Prather noticed serious problems within Flores' family.

Aside from the obvious problem with Carter and Lily's violent fights, he noticed that the brothers had an unusual and unhealthy dynamic. In particular, Johnny manipulated Flores to exercise control over him. Johnny picked on Flores to alter his behavior and even severely beat him occasionally.

After a brief time attending high school in Irving, Flores dropped out and went to work with Carter. This job provided the money necessary for Flores to continue his drug abuse. Joe started

to become concerned about Flores's drug abuse and urged him to stop. Unfortunately, Johnny entered the picture again. Johnny had married and had a house. Flores would go to that house and smoke marijuana with Johnny's wife. Johnny told Flores not to tell Joe. Johnny's relationship with this wife failed when Johnny caught her having an affair and attempted to murder the man and his wife. He is currently imprisoned for these attempted murders. While in prison, officials diagnosed him as bipolar and prescribed him medication to treat bipolar disorder after he attempted suicide.

Flores continued this life trajectory, moving to methamphetamine abuse and distribution. He began acting erratically and devolving to activities from his youth. Flores began dressing like a cowboy – as he did when he was a toddler – and behaving childishly. This alarming behavior occurred right before Black's murder.

Flores's drug use left him with serious brain impairment. Dr. Richard L. Fulbright, Ph.D., evaluated Flores and determined that his brain did not fully develop or developed in an abnormal

pattern. Dr. Fulbright attributes this brain abnormality to his gasoline huffing at such an early age. He considered and eliminated head injuries and Attention Deficit Disorder as causes of Flores's impairments. This brain damage from early and continuous drug use caused brain damage in Flores's developing brain. This brain damage degraded Flores's ability to develop high-level cognitive abilities and the ability to regulate his behavior. Specifically, Flores has serious deficiencies in attention, short-term memory, and math skills. Without Flores's brothers giving him drugs to use before he even entered elementary school, Flores probably would have been able to regulate his behavior and use reasoning skills more effectively.

This mitigation evidence has never been considered on the merits by any court. Yet this is precisely the type of mitigation evidence that would have provided the jury with the quintessential evidence used to evaluate moral culpability. This evidence should be fully considered before the State seeks to execute Flores.

Fortunately, the United States Supreme Court, first in 2013 and again in 2015, recognized the constitutional intolerability of a situation where ineffective state habeas counsel prevents a merits consideration of ineffective assistance of trial counsel claims. In *Martinez* and *Trevino*, the Supreme Court provided a route for Texas prisoners like Flores to secure relief: permitting them to raise, for the first time in federal court, claims of ineffective assistance of trial counsel that were otherwise unexhausted due to state habeas counsel's ineffectiveness. *See Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

In addition to opening the door to federal court review, *Trevino* strongly suggests the Texas Court of Criminal Appeals should reconsider its holding that the ineffectiveness of initial state habeas counsel is not a basis upon which to bypass the procedural bar on subsequent writs. *See Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002). And because, in this case, Flores had a meritorious claim of ineffective assistance of trial counsel that was forfeited by initial state habeas counsel's collective failures, this is the ideal case in which to do so.

A. Background

1. State-court proceedings

Flores was convicted in March 1999 of capital murder and sentenced to death. *See* Tex. Pen. Code § 19.03(a). After the appointment of appellate counsel, Flores' conviction and sentence were affirmed on direct appeal to the Texas Court of Criminal Appeals. *Flores v. State*, AP-73,463 (Tex. Crim. App. 2001).

Flores's ensuing state habeas proceedings were highly problematic. Despite Flores' pro se attempts to bring viable, substantial claims before the state habeas court, his various state-appointed counsel precluded him from presenting, developing, and supporting these claims. And the state habeas judge, Judge Nelms, was on actual notice that Flores needed help to preserve his claims. Flores had written him a letter begging for help.

Flores was first appointed attorney Roy Greenwood to prepare his state writ. Greenwood, in turn, requested that Attorney Larry Mitchell assist in the preparation of the writ. Mitchell then hired a disbarred attorney, Keith Jagmin, to assist in the investigation of the writ. Flores provided these men with a

list of witnesses who could have presented mitigating evidence at the punishment phase of trial – family members and childhood friends. Flores also provided a critique of the attorneys' proposed writ, setting out in detail the factual inaccuracies in the writ and also a list of additional claims that Flores wanted to pursue. Despite Flores' repeated efforts, his habeas counsel failed to conduct a proper investigation and failed to raise genuine meritorious claims correctly. Numerous letters exchanged among counsel, the trial court, and Flores indicate that the attorneys did not conduct any investigation, instead simply throwing the claims together at the last minute.

Ultimately, Judge Nelms permitted both Mitchell and Greenwood to withdraw from the case. Thereafter, Judge Nelms allowed entry of another attorney, Steve Rosen, who failed to file anything on behalf of Flores. In fact, Judge Nelms threatened Rosen with contempt of court charges when it became obvious that Rosen wholly failed to undertake any duties in regard to Flores. Only when threatened with contempt did Rosen bother to pick up the file in this case. Thereafter, Rosen still failed to file any

documents with the court and fulfill his obligations in relation to Flores. Finally, a fourth attorney, Alex Calhoun, began assisting Flores with his state writ proceedings. At this point, there was little Calhoun could do to protect Flores' rights and ensure that all appropriate challenges were included in the state writ.

Throughout this, Flores continually informed his counsel that their collective failure to include relevant and viable legal challenges, such as ineffective assistance of counsel at trial and on appeal, would subsequently bar Flores from raising these at the federal level. Flores tried desperately to communicate to each of his attorneys that counsel's continued failures would prejudice him in his later federal proceedings. Eventually, Flores wrote to the Texas Court of Criminal Appeals in an attempt to try and secure some minimal level of legal representation. In Flores' September 10, 2000 letter to the Court, Flores informed the court that he asked his appointed counsel to investigate his contentions relating to ineffective assistance of counsel, but no investigation was ever conducted.

Flores sent Judge Nelms a similar letter, asking the judge to "please appoint me new co-counsel that is competent and willing to do their job." Flores further pleaded: "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."

No one did help. Not the Texas Court of Criminal Appeals, not Judge Nelms and not any one of Flores's four appointed state writ attorneys.

Neither court afforded Flores relief in the form of effective counsel, so unsurprisingly Flores's state application for a writ of habeas corpus, which raised ineffective assistance of trial counsel claims mostly unrelated to those now at issue, was denied on the findings of the trial court. *Ex parte Flores*, WR–64654–01, 2006 WL 2706773 (Tex. Crim. App. Sept. 20, 2006).

Had Flores been given effective state habeas counsel, some court, at some juncture, would have reviewed the merits of his mitigation claim. Instead, based largely on the impediment *Graves* currently creates, Flores could be executed without any court –

state or federal – ever assessing the merits of his ineffective assistance of trial counsel claim. Worse still, if Flores's current mitigation claims are procedurally dismissed, and this writ disregarded, no court will have ever substantively considered whether his mitigation evidence provided a basis for possibly minimizing his moral culpability. *Graves* should be reconsidered to prevent such a miscarriage of justice.

2. Federal District Court review

Represented by present counsel, Flores filed a petition in the United States District Court of the Northern District of Texas for a writ of habeas corpus under 28 U.S.C. § 2254 in 2008. Federal counsel quickly realized that state habeas counsel's performance was lacking and included in the initial federal habeas petition claims raising the right to the effective assistance of counsel during state habeas proceedings. These claims preceded both *Martinez* and *Trevino* and could not possibly have predicted the Supreme Court's crafting of an equitable rule to provide cause for procedurally defaulted claims.

Despite federal habeas counsel's attempts to preserve a claim of ineffective assistance of state habeas counsel, limited investigation was conducted due to the reality that no such legal claim yet existed at the time of filing. These claims were presented in the first petition in hopes of expanding the existing law to permit Flores's ineffective assistance of trial counsel to be evaluated. The State predictably argued that those claims were procedurally defaulted, and the magistrate judge made findings and recommendation denying relief on March 3, 2011. *Flores v. Thaler*, 3-07-CV-0413-M-BD, 2011 WL 7102282 (N.D. Tex. March 3, 2011).

As set forth above, the mitigation claim was not considered on the merits.

On August 10, 2011, Flores filed a motion asking the district court to withhold its determination until the Supreme Court announced its opinions in several pending cases, most notably *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Seven months later, but before the district court had acted on the motion, the Supreme Court announced its decision in *Martinez*. In *Martinez*, the state-

convicted Martinez argued in his federal writ application that his previous state habeas lawyer should have raised, but did not raise, a claim of ineffective assistance of trial counsel during state collateral review proceedings. 132 S. Ct. at 1314–15. Martinez added that this failure, itself amounting to ineffective assistance, was the cause of, and ought to excuse, his procedural default of the ineffective assistance of trial counsel claims. *Id.* The Supreme Court agreed, holding that a defendant's procedural default was excused where: (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding," *Id.* at 1318–19, 1320–21. The Court was explicit, however, in instructing that its holding applied only to those states where state law expressly

requires the defendant to raise a claim of ineffective assistance of trial counsel in an initial collateral review proceeding. *Ibid.*

One week later, the district court entered an order permitting Flores to supplement the briefing of his claims in light of *Martinez*. Flores filed his supplemental brief on June 6, 2012, again alleging that his state habeas counsel was ineffective for failing to argue that Flores received ineffective assistance of trial counsel because trial counsel (1) "prematurely abandoned" a *Batson* hearing, but also now because trial counsel (2) failed to investigate possible mitigation evidence and (3) failed to challenge the improperly admitted hypnosis testimony.

Before consideration of these issues, on January 15, 2013, the district court again suspended proceedings, this time until the Supreme Court issued its decision in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). The Supreme Court did so on May 28, 2013, holding that, while Texas law does not expressly require ineffective assistance of counsel claims to be raised in a collateral proceeding, Texas's procedure makes it "'virtually impossible' for appellate counsel to adequately present an ineffective assistance [of trial

counsel] claim" on direct review. *Id.* at 1915 (quoting *Robinson v. State*, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)). Accordingly, the Supreme Court found that any distinction between Arizona and Texas's procedural system was "a distinction without a difference," and, thus, *Martinez*'s holding applied:

> [A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Trevino, 133 S. Ct. at 1921 (quoting *Martinez*, 132 S. Ct. at 1320).

On June 12, 2013, the district court ordered briefing as to how that decision impacted this case, including, but not limited to, the issues of whether:

1. evidentiary development should be allowed by the district court in connection with the de novo consideration of any unexhausted claim that may fall within the exception to procedural bar created in *Martinez*; and

2. the district court should further abate these proceedings to allow the petitioner to now present any such claim to the state court in the first instance.

The court denied Flores's requests for an investigator to develop the underlying claims, however, and Flores's request to amend his petition in light of *Martinez* and *Trevino*.

On August 22, 2013, Flores filed a supplement brief arguing that *Trevino* excused the procedural default of the ineffective assistance of trial counsel claims which he had previously argued his state habeas counsel was ineffective in failing to raise. Additionally, as to whether the state court should be given first opportunity to address the merits of such claims, Flores requested the district court withhold its determination until the Fifth Circuit decided the issue on remand in *Trevino*. If the court nonetheless decided to preemptively evaluate the issue, though, Flores urged the court that the proper course of action was to stay the proceedings so that he could return to the state court for consideration in the first instance. Finally, if the court nonetheless preferred to consider in the first instance Flores's claims, Flores respectfully requested he be allowed to develop evidence supporting his claims.

Upon the magistrate's recommendation, the district court on July 17, 2014, denied Flores's request to amend his petition, then denied the petition outright, and then denied him a COA. *Flores v. Stephens*, No. 3:07-CV-0413-M, 2014 WL 3534989 (N.D. Tex. July 17, 2014). The district court, without permitting Flores to develop the record in accordance with the new test laid down in *Martinez/Trevino*, found that while federal habeas counsel presciently anticipated a new right, they had not adequately proven all that the new right required. The district court further found that Flores should have raised any and all ineffective assistance of trial counsel claims prior to *Martinez/Trevino* because nothing prevented him from presenting procedurally barred claims. As to the IAC-*Batson* claim, the court determined "it would be pointless to grant leave to amend the petition to allege this as a separate claim," because "it would appear to be insubstantial and, therefore, not come within the exception to procedural bar created in *Martinez*." *Id.* at *12. As to the IAC-mitigation and IAC-hypnosis claims, the court denied Flores' request because: (1) it determined the claims were insubstantial;

and (2) upon concluding that Flores had not raised similar claims in his original application, the court determined that the present claims thus did not relate back and were, therefore, time-barred under AEDPA. *Id.* at *13-14; *see* 28 U.S.C. § 2244(d). In sum, the court reasoned, "No good purpose would be served by allowing leave to amend at this late date." *Id.* at *13. The court further denied a COA.

Each of these dismissals was procedural. The substantive merit was not fully considered, instead relying solely on the newly established equitable formula of substantiality. The federal courts did not permit amendment or evidentiary supplementation. Instead, Flores remained locked in to his state habeas counsels' poor performance and their absence of evidence – ironically, the very challenge Flores is making when the federal court found their work was not substantial. Accordingly, the attached evidence has not been considered by any court.

Under Rule 59 of the Federal Rules of Civil Procedure, Flores, on August 14, 2014, moved the district court to amend its judgment denying his motion for leave and his petition for a writ

of habeas corpus. Flores urged the court that, to dismiss his *Batson* and *Strickland* claims as insubstantial without allowing evidentiary development to consider the likelihood of the success of the challenge, deprived Flores of *Trevino*'s equitable exception. (Mot. at 11-12). Additionally, Flores noted that, even if the latter claims did not relate back to those previously raised, it is not yet settled whether *Trevino* excuses as much. (Mot. at 14). The court denied that motion on September 19, 2014. *Flores v. Stephens*, No. 3:07-CV-0413-M, 2014 WL 4661974, at *1 (N.D. Tex. Sept. 19, 2014).

3. Fifth Circuit Review

Despite the Supreme Court's equitable commands in both *Martinez* and *Trevino*, the Fifth Circuit denied Flores's request for a COA. The request sought merely the opportunity to challenge the district court's denial of a right to amend Flores' federal habeas petition to plead, develop, and support his substantial claims under *Batson* and *Strickland* – claims abandoned by his numerous state habeas attorneys. But rather than give Flores an opportunity to demonstrate what evidence actually exists to

support his claims, the Fifth Circuit determined, without any evidence in the record, that Flores's claims relating to *Batson* and *Strickland* were insubstantial by itself filling in the evidentiary voids in favor of the State.

The Fifth Circuit, following the lead of the district court, assumed that the state trial judge performed a *Batson* hearing – including the requirement of a non-discriminatory reason for striking a Hispanic juror – without Flores ever establishing a *prima facie* case of possible discrimination. While this approach seems unusual under *Batson*, the Fifth Circuit accepted the federal district court's evidentiary conclusions without any evidentiary basis. Thus, in an opinion released July 21, 2015, the Fifth Circuit denied Flores' request for a COA authorizing him to appeal the district court's denial of his request to amend his federal habeas petition to pursue previously defaulted claims of ineffective assistance of trial counsel. *Flores v. Stephens*, 794 F.3d 494, 496 (5th Cir. 2015).

On October 19, 2015, Flores filed in the United States Supreme Court a petition for certiorari setting forth four questions for review:

1. Whether the district court erred in denying Flores' request to amend his federal habeas petition in light of the Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

2. Whether, in states like Texas, where state habeas is the only viable opportunity for an individual to raise and support claims of ineffective assistance of trial and appellate counsel, state habeas constitutes a "critical stage" of the criminal prosecution, thereby creating a constitutional right to counsel.

3. Whether the death penalty as currently enforced in Texas—with an unpredictable variance between Texas state and federal courts in applying *Martinez* and *Trevino*—violates due process.

4. Whether the death penalty is facially unconstitutional.

On January 25, 2016, the Court denied Flores' petition.

B. This Court should consider Flores's ineffective assistance of trial counsel claim for failure to investigate and present mitigating evidence.

Flores recognizes that, ordinarily this Court may not consider the merits of a subsequent application for a writ of habeas corpus, and that the governing statute only permits exceptions in three limited scenarios. TEX. CODE CRIM. PROC. art. 11.071 § 5(a).

For multiple reasons, though, this Court should consider this subsequent application. Indeed, the State has urged the same, and in *Trevino*'s wake, five judges on the Texas Court of Criminal Appeals have expressed just such willingness. Only because of unique factual circumstances in those cases have the five judges not contemporaneously held as much, but this case provides an ideal vehicle to reach a consensus.

1. The Court of Criminal Appeals should permit an equitable exception to address *Trevino*'s watershed change in the law

First, Flores's claim should be considered under the guise of an equitable exception. In *Ex parte Soffar*, 143 S.W.3d 804 (Tex.

Crim. App. 2004), the Court of Criminal Appeals was confronted with a "problematic situation... when the Supreme Court announce[d] a 'watershed' procedural or substantive change in the law which applie[d] retroactively to all cases, even those on collateral review." *Id.* at 806. The Court held that "judicially created doctrines may, and sometimes should, be modified when they no longer serve the jurisprudential interests for which they were originally crafted." *Id.* at 807.

In *Soffar*, the Court altered a thirty-year-old "judicially created policy based on comity"–the two-forum rule–in response to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Failure to do otherwise would have permitted prisoners already in federal court when *Atkins* was decided to litigate their claims without first giving the Texas courts an opportunity to pass on whether they should be exempt from execution. 28 U.S.C. § 2254(b)(1)(B)(ii) (excusing the exhaustion requirement in the absence of an effective state-court process); *see also Carter v. Estelle*, 677 F.2d 427, 449–50 (5th Cir. 1982) (litigants need not

exhaust their claims when there is no available state-court review). *Trevino* presents a similar scenario.

By allowing federal review of ineffectiveness claims never presented to the state courts, the *Trevino* Court altered more than two decades of settled expectations about the balance between state and federal interests in postconviction review of state court convictions. The Solicitor General has suggested that the Court of Criminal Appeals could carve out its own equitable exception to the state-law bar on subsequent writs, as it has done in several previous cases, to permit consideration of these defaulted claims. Such an exception would permit the Court of Criminal Appeals to consider a claim of ineffective assistance of habeas counsel as a gateway to considering an otherwise-forfeited claim of ineffective assistance of trial counsel.

Before the United States Supreme Court, the Texas Solicitor General explained:

> When the CCA issued its procedural-default ruling [in Trevino's case] in 2005, it had no reason to doubt the adequacy of the state-law ground supporting its denial of Trevino's habeas application. If this Court changes the rule now, *equity demands at a minimum that the CCA have an opportunity to reevaluate its procedural*

> *ruling and adjudicate Trevino's* Wiggins *claim on the merits.*

(emphasis added). As further noted by the State in its brief in *Trevino*, "Texas courts... have a proven track record of hearing once-defaulted claims on the merits under appropriate circumstances." (*Trevino* Respondent's Brief at 59) (citing, *e.g., Ex parte Medina*, 361 S.W.3d 633, 642-43 (Tex. Crim. App. 2011)); *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000)). "Texas has established robust procedures for postconviction review," and "[f]orcing claimants like [Flores] to return to state court, and thereby allowing the CCA to adjudicate those claims on the merits, would dilute the strong medicine of granting habeas review on long-defaulted claims." (*Trevino* Respondent's Brief at 54, 59-60) (citing *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)).

Additionally, in the wake of *Trevino*, the State wasted no time in further urging the federal courts to permit its courts to have the first crack at any potentially meritorious trial ineffectiveness claim. One week after *Trevino*, in court-requested briefing in *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012) – "the

leading case in [the Fifth] Circuit regarding the inapplicability of *Martinez* to Texas's prisoners" – the State asserted its interest in its courts performing the initial review of ineffectiveness claims not previously raised. The State argued that, if the Fifth Circuit had "any doubt about the merits of Ibarra's IATC claim, it should not... allow Ibarra to continue litigating in federal court without first forcing him to give the state courts what AEDPA demands – namely, a fair opportunity to adjudicate his IATC claim on the merits." (*See* The Director's Supplemental Briefing Respecting the Petition for Rehearing En Banc at 4, *Ibarra v. Thaler*, No. 11-70031 (5th Cir. June 4, 2013)). As urged by the State, its courts "should have an opportunity to consider whether to adjudicate Ibarra's IATC claim on the merits now that the decades-old procedural basis for its disposition no longer may be adequate to support its judgment." *Id.* at 5.

Moreover, the State advocated that Texas courts must be the first to assess the effectiveness of state habeas counsel: "And to the extent Ibarra wants to use the alleged ineffectiveness of his state habeas counsel ('IASHC') as 'cause' to excuse the default of

his IATC claim, he also must exhaust that IASHC claim." *Id.* at 4 (citing *Edwards v. Flores*, 529 U.S. 446 (2000)). Even though staying the federal proceedings to allow a petitioner to exhaust any remaining state-court remedies would further delay resolution of the federal proceedings, the State explicitly prioritized its interest in state courts conducting the initial review of both habeas and trial counsel's effectiveness ahead of its finality interest:

> as between forcing Ibarra to exhaust [his trial and habeas ineffectiveness issues in state court] and allowing him to complain in federal court about his State-appointed trial lawyer, his state-court trial, his State-appointed state-habeas lawyer, and his four state habeas proceedings – all without giving the State a proper opportunity to adjudicate his claim – exhaustion plainly is the lesser of two evils.

Id. at 5. As described by the State, "*Trevino* invited the [the State of Texas] to proffer solutions that best reflect the goals of the Antiterrorism and Effective Death Penalty Act, principles of comity and federalism, and decades' worth of procedural-default and exhaustion-doctrine precedents."

The State's briefing in *Trevino*, and in what it hopes will be the leading post-*Trevino* Fifth Circuit case, urged that Texas's

interests will be best served if the Court of Criminal Appeals assumes responsibility for reviewing in the first instance whether state habeas counsel was ineffective with respect to a trial ineffectiveness claim and, if so, whether trial counsel was ineffective. Flores and the State simply could not agree more.

2. *Graves* was incorrectly decided

Even if the Court of Criminal Appeals were to decline to find an equitable exception, it should consider Flores's substantial claims by concluding, as five of its judges have, that *Ex parte Graves* should be reconsidered in light of *Trevino*. In *Graves*, the Court of Criminal Appeals held that an applicant could not claim constitutionally ineffective assistance of habeas counsel to excuse a procedural default – in contrast to the Supreme Court's *Trevino* holding permitting a federal district court to hear an otherwise-forfeited claim of ineffective assistance of trial counsel where initial habeas counsel was ineffective in failing to raise the claim. *Graves*, 70 S.W.3d at 116-17. In *Trevino*'s wake, however, Judge Alcala, joined by Judge Johnson and sympathized with in principle by Judge Meyers, noted in *McCarthy* that four of the

premises for the decision in *Graves* no longer apply after *Trevino*. *Ex parte McCarthy*, No. WR-50,360-04, 2013 WL 3283148, at *5 (Tex. Crim. App. June 24, 2013) (Alcala, J., dissenting) (citing *Graves*, 70 S.W.3d at 117–18). First, *Trevino* specifically rejected *Graves*'s underlying premise that the absence of a constitutional right to counsel necessarily means that Flores may not challenge the effectiveness of habeas counsel's representation. *Id.* Even "[u]nderstanding that the Supreme Court did not change its position that there is no federal constitutional right to habeas counsel, it appears that *Trevino* did carve out a procedural exception for federal courts that will, in effect, permit consideration of what would otherwise be procedurally defaulted claims of ineffective assistance of trial counsel." *Id.*

Second, and similarly, the Court of Criminal Appeals "should reconsider *Graves*'s underlying principle that an applicant may never challenge the effectiveness of habeas counsel [on the basis that] habeas proceedings are limited to complaints about the trial proceedings." *Id.* at 7.

Most important, though, is that, in light of *Trevino*, the Court of Criminal Appeals should reconsider *Graves*'s underlying rationale that the State's interest in the finality of convictions weighs against permitting consideration of subsequent writs:

> Unless this Court revises its current approach, federal courts will now have the opportunity to decide a vast number of ineffective-assistance claims de novo, without any prior consideration of those claims in state court. The State's interest in the finality of convictions would be better served by permitting state courts to address these ineffective-assistance claims on the merits. This would restore normal procedural-default rules in federal court, as well as reinstate the normally deferential standard of review that federal courts apply to post-conviction claims previously adjudicated on the merits in state court.

Id. Finally, *Graves* relied on *Coleman v. Thompson* as a basis to limit the Court of Criminal Appeals' consideration of subsequent writs, but that decision was modified by the Supreme Court's holding in *Martinez* that a "'narrow exception' should 'modify the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default.'" *Trevino*, 133 S. Ct. at 1917 (quoting *Martinez*, 132 S. Ct. at 1315).

Since that time, Judge Yeary, joined by Judge Newell, also concluded that *Graves* should be revisited. *Ex parte Alvarez*, 468 S.W.3d 543, 545 (Tex. Crim. App. 2015) (Yeary, J., dissenting). This brings the sum total to five. Judges Alcala, Johnson, Meyers, Yeary, and Newell have all recognized that, in light of *Trevino*, *Graves* should be reconsidered and modified to permit that specific claim approved by the Supreme Court. This is the perfect case in which to do so.

i. Flores received ineffective assistance of trial counsel during his capital proceedings.

a. Strickland standard for ineffective assistance

It is well established that a criminal defendant has a Sixth Amendment right to effective assistance of counsel at every critical stage of the proceedings against him. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). This right extends to state prisoners through the Fourteenth Amendment. *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961). The proper standard for attorney performance is that of reasonably effective assistance.

To determine whether to grant relief for ineffective

assistance of counsel, Texas courts apply the Supreme Court's standard in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Ex parte Martinez*, 330 S.W.3d 891, 900 (Tex. Crim. App. 2011); *Hernandez v. State*, 726 S.W.2d 53, 55–56 (Tex. Crim. App. 1986). *Strickland* requires Flores to establish two components by a preponderance of the evidence: (1) deficient performance of trial counsel; and (2) harm resulting from that deficiency that is sufficient to undermine the confidence in the outcome of the trial. *Strickland*, 466 U.S. at 687.

Under *Strickland*'s first prong, Flores must show that his attorney's performance was deficient, meaning that it "fell below an objective standard of reasonableness" under prevailing professional norms and according to the necessity of the case. *Id.* at 687–88; *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) (asking "whether counsel's advice was within the range of competence demanded of attorneys in criminal cases"). Flores must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. The reviewing court must then

determine whether counsel's assistance was outside the range of professionally competent assistance, "considering all the circumstances." *Id.* at 688–89. Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Flores "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quotations omitted).

As to the second *Strickland* prong, Flores must demonstrate that, but for counsel's errors, there is a "reasonable probability" of a different outcome at trial. *Id.* at 692–94. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. It is not an outcome-determinative test, and a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome to establish prejudice. *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). "[*Strickland*] specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered." *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002). Moreover, "the touchstone of an ineffective-assistance claim is the fairness of

the adversary proceeding." *Lockhart v. Fretwell*, 506 U.S. 364 (1993).

In accordance with this principle, a reviewing court's adjudication of an ineffective-assistance claim should ultimately focus on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. A reviewing court "should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 696. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

b. Counsel's failure to investigate, collect and present readily available mitigating evidence

Flores's trial counsel conducted virtually no mitigation investigation. They did not contact family members or follow obvious red flags regarding brain impairment. According to the

attorneys' files, they had Flores examined by Dr. Crowder of the Southwestern School of Medicine in Dallas. Dr. Crowder, who was trained in psychology, was not a mitigation investigator. He evaluated Flores and determined that he was a sociopath. This finding is undermined, if not repudiated, by Dr. Fulbright's subsequent evaluation. As set forth above, and in greater detail below, Dr. Fulbright found that Flores's years of huffing gasoline and drug abuse resulted in significant brain impairment. This impairment should have served as the centerpiece of Flores's mitigation defense. But, because trial counsel did not uncover it, it has never been considered by any court or tribunal. Brain impairment is quintessential mitigation evidence that juries use in determining moral culpability.

State habeas counsel (of the many listed above) did not conduct any mitigation investigation, hire a mitigation expert or raise a mitigation claim. Federal habeas counsel attempted a mitigation investigation but was thwarted by the lack of funding. Since the original application for relief – and despite funding limitations – federal habeas counsel has nonetheless uncovered

significant evidence of brain impairment coupled with a troubled childhood that a jury would consider important in weighing the mitigating evidence.

In 2008, Dr. Richard Fulbright conducted a neuropsychological evaluation of Flores. Specifically, Dr. Fulbright performed cognitive testing to see if years of substance abuse, exacerbated by two concussions suffered as a child, impacted Flores's cognitive functioning. The evaluation, which is attached as an exhibit, concluded that, even after ten years of incarceration, permanent brain damage was apparent, that the brain damage was the result of years of substance abuse and that, as a result of the damage, Flores had diminished judgment, impulsivity, and impaired higher cognitive functioning. These impairments manifest themselves in attention and memory deficits as well as deficits in reasoning, judgment, and behavior.

Dr. Fulbright's conclusions are corroborated by affidavits acquired from Flores' family and friends, which are attached.

i. History of substance abuse

Flores began abusing drugs and alcohol at an early age, including marijuana and cocaine. His older stepbrothers also taught him to huff gasoline. According to Juan Jojola, Flores's stepbrother, Flores began abusing drugs and huffing gasoline as early as the first grade. Flores would abuse drugs to the point that he would pass out. Jojola remembered on one occasion when Flores, after huffing gasoline, hallucinated to the point that he doused himself with the gasoline.

By the time he was a teenager, substance abuse had overtaken his life. When Flores moved from Midland to Irving at the beginning of high school, he was abusing drugs, including cocaine, methamphetamine, and alcohol on a daily basis. Methamphetamine use contributed to his paranoia which he would attempt to counteract by ingesting marijuana and alcohol. Further, methamphetamine abuse resulted in uncontrollable rages. According to the state's witnesses at trial, Flores appeared to be in a state of rage on the evening of the murder. According to Lily Flores, Flores's mother, the parents were aware of the

substance abuse issue and the abuse by his older siblings, discussed below, but chose not to intervene.

ii. Developmental History

According to the affidavits of Flores's stepbrothers and his mother, both parents drank and fought from the time of Flores' birth. One of his brothers recalled that one Christmas Lily physically attacked Carter with the Christmas tree and broke all the Christmas gifts on him.

Arguments and physical fights in the family were quite common. Further, each of Flores's older siblings spent time in the penitentiary for felony convictions. His older brother, Tony, was involved in a shooting, convicted of capital murder, and served twenty-eight years before recently being paroled. Brother Johnny was convicted of two counts of capital murder and three counts of kidnapping. He is currently in prison. Another brother, Eddie, died after striking his head when thrown from a moving van during a drug deal gone wrong. Brother Joe was repeatedly incarcerated for driving while intoxicated. He is in prison now for

yet another one. Joe was responsible Flores's first incarceration. One evening while Flores was riding with Joe, Joe stopped at a convenience store and shoplifted some beer. When the manager attacked Joe, Flores intervened, was charged with robbery, and was sent to TDC.

Finally, each of the witnesses attests to the physical abuse Flores suffered as a child. Prather, a close friend of Flores, witnessed that Flores was the victim of perpetual verbal and physical abuse by his older siblings. The brothers taught him to use drugs, baited him into physical fights, and attempted to exercise control over him in an unnatural fashion. According to Johnny, they did this to make him tough. Prather witnessed Flores' older brother, Johnny, beat him to the point where Flores required stitches. Flores's father, Carter, worked all the time and was largely unavailable to supervise Flores. According to Flores's stepbrothers Johnny and Joe, Carter would be gone for long stretches of time.

The sentencing jury should have learned that Flores's siblings were violent and abusive toward Flores, abused drugs,

helped get Flores addicted to drugs, and have all ultimately spent time in custody for criminal activities. This toxic familial environment was created by the constant lack of parental or adult supervision, and parental refusal to intervene in known drug and violence issues among the siblings. The fact that each of Flores's siblings has served time in prison for serious criminal offenses underscores his inappropriate familial upbringing. Flores could not escape a childhood where the parental void was filled with drugs and violence.

iii. Impulsivity

All these factors coalesce to explain Flores's troubled life. As stated above, there is no physical evidence tying Flores to the murder of Betty Black. The co-defendant, Ricky Childs, although convicted of the same offense, was allowed to plead to a 35-year sentence and is currently on parole and out of prison. Prosecutors decided to charge Flores with capital murder because of his impulsive behaviors after being accused of the murder. Burning a car in public on the side of a road, running off to Mexico, returning home while intoxicated, and fighting with the police are all

indicative of paranoia, impulsive behavior, and reduced cognitive abilities.

Flores' mother testified in her affidavit that these erratic behaviors stretch back to Flores's youth. Another witness, Justin Prather, testified that he noticed that Flores had begun acting exceedingly erratic shortly before Black's murder, dressing like a cowboy and listening to Mexican music – behaviors which Lily testified Flores had not engaged in since he was a small child. This is further proof that Flores's brain impairment impacted his life in ways that should have been presented to a jury.

Brain impairment is a common, if not quintessential, mitigation issue that should have been investigated, preserved, and presented to the sentencing jury. Trial counsel's failure to present evidence of Flores' serious brain impairment precluded their ability to place his flight and other unusual events in a proper context. Had the jury heard Dr. Fulbright's evidence of significant brain impairment, coupled with his explanation of impulse control, there is a reasonable probability that Flores –

who is not connected to this crime by any physical evidence – would have received a sentence less than death.

iv. Degenerative Behavior

The regressive effect drug abuse had on Flores's life is readily apparent. Flores's family and friends all noted that in his younger days Flores was congenial and easy to get along with. He had an interest in working on and riding motorcycles with his father and older stepbrothers. By the time Flores dropped out of high school, however, his family and friends noted his inability to control his drug usage. He was no longer described as congenial and easy going, and he had no other interests except for drugs.

In fact, his older brother, Juan Jojola, a drug abuser himself, tried unsuccessfully to moderate Flores's drug usage. Flores remained unable to engage in healthy relationships and continuously chose peers, male and female, who were drug abusers. The drug use, which resulted in attention deficits and impaired reasoning, caused Flores to fail his high school classes and drop out in the tenth grade. While using drugs, Flores would

become argumentative and combative. Clearly, his drug abuse had reduced his cognitive abilities to the point where Flores could not help himself.

Dr. Fulbright's testimony would have been crucial to both explaining the issues relating to Flores's flight and post-arrest behavior as well as his moral culpability for sentencing purposes. The failure to obtain accurate medical evidence regarding Flores's serious brain impairment prejudiced Flores in his trial. Had Dr. Fulbright testified, there is a reasonable probability that the jury would have either found Flores not guilty or given a sentence of less than death. Dr. Fulbright's testimony was critical and its omission fatal.

c. Lack of Investigation

None of Flores's previous attorneys contacted any of these witnesses, whose affidavits are now attached. Had they been contacted, each would have provided the compelling mitigation testimony set out above. Further, Dr. Fulbright's report and the witnesses' affidavits establish a clear need for a more extensive mitigation investigation.

To date, Flores' current counsel have been unable to acquire the necessary funding, much less the permission of the courts, to further develop this claim. Under clearly established law, the severe developmental issues in Flores's life should be weighed against the imposition of a death penalty. At a minimum, some tribunal should finally consider the merits of Flores's mitigation claims rather than procedurally dispense with the evidence. Before any person is executed, substantial mitigating evidence that was available at the time of trial – but never presented due to trial counsel's ineffective failure to investigate and present it – should be evaluated on the merits.

As the Supreme Court has reminded, "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Flores's trial counsel's "investigation" is the complete opposite of that identified in *Burger*, one where trial counsel "did interview all potential witnesses who had been called to his attention." *Id.* at 794-95. Counsel's failings amount to constitutionally ineffective assistance of counsel.

d. Prejudice

Flores's attorneys called no witnesses during the punishment phase. Zero. They also failed to place Flores's troubled life story; his lifelong drug use beginning at age 5, and his subsequent brain impairment in a context that would have shed light on his moral culpability for this crime. Because the state never proved, and never sought to prove, that Flores actually killed Betty Black, the jury would have had abundant reason to spare his life.

Had the jury heard about Flores's upbringing, childhood drug use, and brain impairment, it would have been presented with a vastly different picture than the State's depiction of a violent, remorseless, inhuman monster. Because Flores's attorneys did little to challenge the State's narrative, the jury was left with no real options. But, had trial counsel presented the mitigating evidence set forth above and called the witnesses that have testified via affidavit, there is a reasonable probability that Flores would have received a life sentence.

Due solely to trial counsel's failure to present a mitigation case, the jury believed Flores to be morally culpable or morally void. In truth, as the evidence above demonstrates, Flores is a tragic product of his environment and has frequently acted out impulsively due to sustained brain impairment. Juries generally appreciate the distinction between those who choose to act volitionally and those whose actions are a result of brain impairment. The latter receive mercy. The former receive death.

Strickland requires that Flores demonstrate there is a reasonable probability that had this mitigation evidence been admitted he would have received a life sentence. A reasonable probability is one that undermines confidence in the outcome. How can any Court have confidence in the penalty phase of a capital trial where no witnesses are called to tell a person's life story despite numerous witnesses being ready, able, and available to place that person's actions in context?

On the side of a life sentence would have been the complete lack of any physical evidence tying Flores to the crime, the only eyewitness describing a completely different-looking man before

undergoing memory-altering hypnosis, his lengthy drug abuse history, his familial criminal history, and his severe brain impairment. On the State's side would have been explainable flight, Flores's potential mere presence, and no physical evidence proving Flores killed anyone. And while all mitigation evidence presents a double-edged sword, in this case, trial counsel never even investigated Flores's true life history to prepare for battle.

Moral culpability is the key component in capital sentencing. Trial counsel withheld from the jury, due to their failure to investigate, powerful mitigating evidence that could have explained Flores's flight and impulsive behavior. The jury could have easily learned the why behind Flores's seemingly inexplicable post-crime actions. The reason they did not is simple. Trial counsel never looked. They never called a witness. And importantly, they failed to investigate obvious and easily identifiable witnesses who were willing to cooperate. In short, they failed their client.

Charles Flores did not receive a fair trial. His counsel failed to present a punishment case that could have spared his life,

especially with the weak circumstantial case against him. The Sixth Amendment requires more. Flores has demonstrated that had trial counsel presented his life story and attendant mitigation evidence, there is a reasonable probability that he would have received a life sentence.

3. Medina

There is another basis on which Flores's subsequent application should be considered. The Court of Criminal Appeals has "not hesitated to relieve death row applicants of initial state habeas attorneys who have deliberately shirked their duty." *Ex parte Alvarez*, 468 S.W.3d 543 (Tex. Crim. App. 2015) (Yeary, J., concurring). "When initial state habeas counsel files a purported application for writ of habeas corpus that deliberately fails to state facts entitling the applicant to relief, such a document, [the Court] said in *Medina*, 361 S.W.3d at 640, 'is not a proper 'application' for a writ of habeas corpus.'" *Id.* Accordingly, in *Medina* the Court considered a subsequent writ application "without regarding it as a subsequent writ application, on authority of Article 11.71, Section 4A(a), which permits this Court to appoint new counsel

when initial state habeas counsel, though 'competent' when appointed, 'fails to file an application before the filing date' prescribed by statute." *Id.* (quoting *Medina*, 361 S.W.3d at 643). The Court justified its decision:

> Applicant, because of his counsel's intentional refusal to plead specific facts that might support habeas-corpus relief, has not had his "one full and fair opportunity to present his constitutional or jurisdictional claims in accordance with the procedures of [Article 11.071]." Not full because he is entitled to one bite at the apple, i.e., one application, and the document filed was not a proper writ application. Not fair because applicant's opportunity, through no fault of his own, was intentionally subverted by his habeas counsel.

Medina, 361 S.W.3d at 642.

Judge Yeary, concurring in *Alvarez*, was absolutely correct that *Medina*'s "attempt at a limiting principle" does not withstand scrutiny:

> How is it objectively less fair to a capital habeas applicant that he has been deprived of his one full and fair opportunity at comprehensive habeas review by the incompetency—as opposed to the deliberate gamesmanship—of his initial state habeas counsel? Either way, he suffers "through no fault of his own." *Id.* at 642. Whether a document pleads sufficient specific facts so as to constitute a "writ application" in contemplation of Article 11.071 cannot reasonably be made to turn on the good faith of the attorney who

> prepared it—it is either sufficiently well drawn or it is not. Such a document cannot be regarded as a writ application when competent counsel perniciously omits sufficiently specific facts but not a writ application when the facts are left out because of competent counsel's plainly incompetent representation.

Alvarez, 468 S.W.3d at 550-51.

Flores's case is no different. He has not yet had that one full and fair opportunity to present his constitutional claims of ineffective assistance of counsel. This failing is through no fault of his own. His letters to the Court of Criminal Appeals and Judge Nelms make this clear. Accordingly, if nothing else, Flores respectfully requests this Court to treat this filing as his initial 11.071 application.

4. 5(a)(3)

There is one final basis on which this Court should consider this application. A court may consider its merits of a subsequent habeas application and grant relief if the application contains sufficient specific facts establishing that 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. TEX. CRIM. PROC. CODE art. 11.071 § 5(a)(3). And here, only by counsel's ineffectiveness in failing to present ample mitigating evidence (a violation of the Sixth Amendment right to counsel) could a rational juror have found that Flores deserved to be executed. *See Ex parte Rocha*, No. WR-52,515-04, 2008 WL 5245553, at *1 (Tex. Crim. App. Dec. 17, 2008) (recognizing, but rejecting, a subsequent application for a writ of habeas corpus presenting under § 5(a)(3) a claim of ineffective assistance of counsel for failing to investigate, discover, and present significant mitigation evidence at his trial). Furthermore, this important evidence combined with Dr. Lynn's testimony eliminating Bargainer's identification would leave considerable doubt about whether the jury could have convicted Flores of anything – including capital murder – or sentenced him to death.

C. Reviewing Flores' claims will not open the floodgates

Under any of these alternatives, the Court would not create "a perpetual motion machine" for the generation of "endless and repetitious writs." *Graves*, 70 S.W.3d at 114–15. Much of what

happened to Flores cannot occur again due to Legislative corrections, including the creation of the Office of Capital and Forensic Writs. *See* 81st Leg., R.S., Ch. 781 (S.B. 1091). Senate Bill 1091's legislative history contained in the Bill Analysis explains:

> Extensive studies, research by the Texas State Bar, and investigative news reports have revealed pervasive flaws in the quality of legal representation for indigent defendants in the state habeas system. For example, a review of the state habeas cases decided between 1995 and 2002 revealed that one out of three death row inmates face execution without having their case properly investigated by a competent attorney.

Because Flores's state habeas was filed between this critical period noted by the Texas Legislature, and due to the egregious failings of his state habeas counsel documented by numerous letters between Flores, counsel, and Judge Nelms, it is unlikely that similar claims will occur. In fact, this Court could limit any potential relief to state habeas cases arising between 1995 and 2002, the period during which the Texas Legislature identified as most acutely deficient.

As noted by Judge Yeary, even if the Court of Criminal Appeals was "flooded" with first subsequent applications alleging that initial habeas counsel was ineffective, "it is likely that most of

these will fail to establish a substantial claim that both initial state habeas counsel and trial counsel were ineffective." *Alvarez*, 468 S.W.3d at 552 (Yeary, J., dissenting). "In that event, this Court can simply dismiss them as abusive under Article 11.71, Section 5." *Id.* The Court of Criminal Appeals "need treat only those relatively few subsequent applications that do present a prima facie case for ineffectiveness of both initial state habeas counsel and trial counsel as initial state habeas writs." *Id.*

D. Conclusion

The Court of Criminal Appeals "has no responsibility more awesome than its duty to say what the law is with respect to the implementation of capital punishment." *Green v. State*, 374 S.W.3d 434, 447 (Tex. Crim. App. 2012), reh'g denied (Aug. 22, 2012) (Price, J., dissenting). It should do just that and excuse the procedural default of claims of ineffective assistance of trial counsel due to the ineffectiveness of initial state habeas counsel, and allow evidentiary development of this mitigation claim. Then, as to the merits of Flores's claim, Flores respectfully requests the district court find that his trial counsel and his original state

habeas counsel were profoundly ineffective, directly resulting in Flores' death sentence.

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.

Flores, a Hispanic, sits on death watch, days away from his execution, while the White triggerman in this murder, Ricky Childs, is now out of prison on parole, in a rehabilitation facility. The evidence presented at trial demonstrates Childs killed Black. The State did not try to prove that Flores killed Black, only that he was present at the scene.

Instead, Flores was convicted as an accomplice under Texas' Law of Parties, Texas Penal Code § 7.02(a). Trial prosecutor Jason January recently spoke with the media and summarized the disparity in this case and the problematic implicit bias that sealed Flores's fate:

> 'Flores had a lifelong history of criminal and violent activity, and if you've ever seen [sic] Charles Dickens – Scrooge and all that stuff, you kind of wear your own chain,' he added. [Ricky] Childs, however, had a similarly long criminal history as Flores, including burglary and possession and distribution of meth, according to state records.
>
> But January said that he wasn't concerned with the wide difference in sentencing that Flores and Childs received.
>
> 'If you talk to the jury, they didn't much care whether [Flores] pulled the trigger or not, he was participating fully and wholeheartedly in the crime,' January said. 'And in Texas, you're just as guilty as the triggerman. You can't escape responsibility in a criminal endeavor just because you didn't pull the trigger.'

Casey Tolan, *Meth, hypnosis, and murder: An incredible true story of race and punishment on Texas' death row*, Fusion (May 10, 2016, 11:04 AM), http://fusion.net/story/299350/charles-flores-texas-death-row-execution/.

The jury may not have cared, but the Constitution does. Disparity in sentencing is unconstitutional under the Equal Protection Clause. And, in this case, the State is comfortable allowing one person – the triggerman – to be released on parole before the other person – a racial minority – is to be killed for the crime that the other person committed. Both men have lengthy

criminal records. But only one faces execution. The other, a White male, has already been released from prison after serving roughly half of a 35-year sentence. Such racial disparity is constitutionally unacceptable and cannot be tolerated.

A. As applied to Flores, Texas' capital scheme is unconstitutional because it allows an unjustifiable racial disparity.

The State cannot allow racial bias to influence its decision to seek the death penalty. U.S. Const. amend. XIV; Tex. Const. art. §§ 19, 29. Although generalized statistics that are not specific to a prosecutor's jurisdiction are insufficient to plead racial prejudice, statistics that support particular prosecutor's statements are.

In Flores's case, the lead prosecutor saw Flores as more dangerous than Childs. Mr. January's recent media statement shows that he views Flores's past criminal conduct as more dangerous than Childs' even though the reporter quickly noticed that both men's criminal histories are similar. Casey Tolan, *Meth, hypnosis, and murder: An incredible true story of race and punishment on Texas' death row*, Fusion (May 10, 2016, 11:04

AM), http://fusion.net/story/299350/charles-flores-texas-death-row-execution/.

The only real difference between the two men is the color of their skin based on racial heritage. Even if the Court believes that Mr. January did not intentionally view the two men differently due to race, the inescapable conclusion is that Mr. January's implied bias led to the massive sentencing disparity.

One person was murdered. Two people were accused of the crime. One person, a White person, was allowed to plead to a 35-year sentence and has since been released from prison on parole. Importantly, the White individual was the triggerman. He was the only person with physical evidence tying him to the crime. He is more culpable of the two.

In contrast, the racial minority has no physical evidence connecting him to the crime. He has consistently denied killing Black. He is only implicated by his alleged presence at the scene – for which the State is willing to execute him while his White co-defendant walks about on parole.

The White man is on parole. The Hispanic man faces

execution. One crime. Two disparate sentences.

To buttress this glaring racial disparity, the Dallas District Attorney's Office has a history of seeking death sentences for minorities at a disproportionally higher rate than Whites. Since 1973, Dallas County has sent 104 people to death row. Of those men, thirty-eight have been White, forty-nine have been Black, and seventeen have been Hispanic. So 36.5% have been White, 47.1% have been Black, and 16.3% have been Hispanic. Given that Dallas County has always had a majority White population, this statistic is telling. And it is further troubling when coupled with the startling fact that Dallas County has sent no White person to death row for killing a minority person.

Betty Black, the victim, is White. Ricky Childs, the triggerman, is White. He was given a 35-year sentence.

Flores, a Hispanic, was given death. Race, more than any other factor, explains this difference.

When combining Mr. January's statements with the consistent racial disparity in Dallas County death sentences, Flores states a cognizable claim of constitutionally impermissible

racial motivations in death sentencing. And because Flores is a Hispanic man and his more-culpable White co-defendant has been released from prison, his death sentence is unconstitutional and must be vacated.

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.

Texas law allows an accomplice to be convicted of capital murder and sentenced to death. In this regard, Texas stands in the minority while most other death-penalty states reserve the ultimate punishment for the "triggerman." Therefore, Texas does not require that a death sentence for a specific individual be proportional to that person's culpability for the crime committed. *See Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders [ ] whose extreme culpability makes them 'the most deserving of execution.'"); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) ("[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender."); *Saffle v. Parks*, 494 U.S. 484, 492-93 (1990) ("It is

no doubt constitutionally permissible, if not constitutionally required, for the State to insist that 'the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant.'") (citations omitted). *See also Getsy v. Mitchell,* 495 F. 3d 294, 305 (6th Cir. 2007) ("Proportionality as defined by the Supreme Court evaluates a particular defendant's culpability for his crime in relation to the punishment that he has received.") Because Texas law allows an accomplice to be sentenced to death and the triggerman to receive a sentence that allows release on parole before that execution, Texas law violates the Eighth and Fourteenth Amendments in this narrow class of prisoners. *See also* Tex. Const. art. I §§ 3(a), 13, 19, 29.

In 1972, the Supreme Court invalidated existing death-penalty statutes because they produced arbitrary results. *Furman v. Georgia,* 408 U.S. 238 (1972). Justice Stewart likened the imposition of the death sentence to being struck by lightning: "For, of all people convicted of [capital murder], many just as reprehensible as these, the[se] petitioners are among a

capriciously selected random handful upon which the sentence of death has in fact been imposed." *Id.* at 309-10 (Stewart, J., concurring). In response, state legislatures drafted statutes that limited charging discretion and provided guided discretion in sentencing determinations. These new statutes were designed to ensure that only the worst of the worst would receive death penalties. When the Supreme Court determined that those statutes passed constitutional muster, it declared that capital punishment would be unconstitutional if it were "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

Afterward, the Supreme Court continued to narrow the classes of people eligible for the death penalty, continuing to ensure that only the worst of the worst would receive the ultimate sentence. *See, e.g., Coker v. Georgia,* 433 U.S. 584, 593-97 (1977) (plurality opinion) (rapist of an adult victim); *Ford v. Wainwright,* 477 U.S. 399 (1986) (insane people); *Atkins,* 536 U.S. at 319-20 (individuals with intellectual disabilities); *Roper,* 543 U.S. at 568-75 (juveniles); *Kennedy v. Louisiana,* 554 U.S. 407, 419 (2008)

(rapist of an adult victim); *Hall v. Florida*, 134 S. Ct. 1986, 1996-98 (2014) (striking down an unscientific cut-off for IQ scores testing intellectual disabilities).

The common thread in all of these capital decisions is the Supreme Court's refusal to uphold a death sentence for those offenders not sufficiently morally culpable as a result of their unique personal characteristics and in relation to a murderous act. A justice system that permits the triggerman to be freed on parole within twenty years of a murder while the allegedly present co-defendant, who was never found to have actively participated in the killing, receives death is upside down in the worst way. Lightning struck Flores while a confessed killer, Childs, now walks the streets of Texas.

Texas' Law of Parties, under these narrow circumstances, violates the Supreme Court's basic death-penalty jurisprudence. The Texas statute requires accomplices to be treated as principles, including for sentencing purposes. So an accomplice to capital murder is eligible for the death penalty even if the triggerman gets sentenced to thirty-five years and is released on parole before

the alleged accomplice's execution. This incongruity sets the Eighth and Fourteenth Amendments on their heads.

If two individuals equally planned a murder, both are morally blameworthy and eligible for the maximum sentence. But when the State treats the principal with leniency while executing a significantly less-culpable accomplice, it creates an arbitrary result that returns to the pre-*Furman* days of unbridled prosecutorial discretion resulting in the freakishly unbalanced imposition of the death sentence that cannot withstand constitutional scrutiny.

The Eighth and Fourteenth Amendments do not allow the imposition of the death penalty when people with higher moral culpability receive shockingly disparate sentences. *See also* Tex. Const. art §§ 13, 19, 29. This circumstance is an arbitrary-and-capricious imposition of the death penalty, exactly like the Supreme Court invalidated in *Furman* and warned about in *Gregg*.

The fact that the triggerman in this case is out on parole even before the alleged accomplice is executed for his mere

presence at the scene underscores the unconstitutional nature of Texas's sentencing statutes. This Court should rule that the statute is unconstitutional as applied to Flores and ensure proportionality in sentencing.

PRAYER FOR RELIEF

Accordingly, Charles Flores respectfully requests this Honorable Court:

1) Grant his 11.073 Motion and provide Flores a new trial; or
2) Grant his authorization to proceed with his federal constitutional claims relating to the State using now-discredited science at his trial, or, in the alternative,
3) Grant Flores a new trial based on ineffective assistance of trial counsel either:
   a. by clarifying or overruling *Ex Parte Graves*, or,
   b. by assessing his claim under an equitable exception to 11.071's subsequent writ provisions; or, in the alternative,
4) Strike Flores's death sentence because Dallas County's decision to prosecute the less culpable Flores, a Hispanic male, for capital murder while allowing the White male triggerman to plead to a lesser charge and receive a 35-year prison sentence – for which he is now out on parole – violates the Fourteenth Amendment Equal Protection Clause; or, in the alternative,
5) Strike Flores' death sentence because the Texas sentencing statutes permitting an accomplice to be sentenced to death while the

triggerman is given the opportunity to plead to a 35-year prison sentence, and be released on parole after serving half that time, violates Due Process.

6) Stay Flores's execution and appoint undersigned counsel so that these issues may be more fully briefed and argued before this Court.

Respectfully submitted,

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ART. 11.14(5) OATH

I, Bruce Anton, affirm that I represent Applicant Charles Don Flores. I further affirm that I have discussed this case with Mr. Flores and investigated the facts contained in this Application. I prepared and reviewed this Application, and to my knowledge, all facts and allegations in this Application are true.

Bruce Anton

SUBSCRIBED AND SWORN TO BEFORE ME on this 19th day of May 2016.

Notary Public

NOTARY PUBLIC STATE OF TEXAS
Linda Kay Jackson
My Commission Expires
10/09/2018