No. WR-64,654-02

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE CHARLES DON FLORES,
*Applicant*

# MOTION TO FILE AND SET FOR BRIEFING AND REQUEST FOR ORAL ARGUMENT

1. On May 19, 2016, Applicant Charles Don Flores filed a subsequent application for a writ of habeas corpus, under Articles 11.073 and 11.071 of the Texas Code of Criminal Procedure.

2. Article 11.073 was enacted in 2013 and amended in 2015 to provide a new vehicle for habeas relief based on challenges to the science the State used to obtain a criminal conviction. Mr. Flores's new-science claim arises from an in-court identification made for the first time during his trial, thirteen months after the witness had submitted to a forensic hypnosis session conducted by a police officer at the police station as part of the underlying murder investigation. *See* Subsequent Writ App. at pp. 8-12.

3. On May 27, 2016, this Court granted a stay of Mr. Flores's pending execution and remanded his Article 11.073 new-science claim to the district court for adjudication on the merits. *Ex parte Flores*, WR-64,654-02 (Tex. Crim. App. May 27, 2016).

4. At that time, no judge was presiding full-time over the 195th District Court in Dallas County due to a retirement. Following an election in November 2016, the Honorable Hector Garza assumed the bench in January 2017.

5. On October 10, 11, and 16, 2017, the district court held an evidentiary hearing in this proceeding to enable adjudication of the new-science claim. Documentary and testimonial evidence was received, including testimony from two experts who opined that hypnosis, the nature of memory, and the suggestive procedures used by law enforcement affected the reliability of eyewitness identification in this case. *See* Volumes 4-8 of the Reporter's Record generated in the evidentiary hearing (EHRR).

6. On December 18, 2017, both sides presented closing arguments and submitted proposed findings of fact and conclusions of law. *See* 7 EHRR.

7. Over nine months later, on October 3, 2018, the district court signed findings of fact and conclusions of law (FFCL) recommending that relief be denied. The district court's FFCL are virtually identical to the State's Proposed FFCL except that the district court's FFCL, in executing the cut-and-paste function, accidentally

left out numbered paragraphs (53)-(62) found on pages 23-25 of the State's proposal.[1]

8. The district court's FFCL do not include adverse credibility findings with respect to either of the two scientists, highly qualified experts in the fields of cognitive psychology and memory, who testified on Mr. Flores's behalf.

9. On October 15, 2018, Mr. Flores filed a pleading simultaneously in both the district court and this Court styled: Objections to, and Motion for Withdrawal of, Trial Court's Findings of Fact and Conclusions of Law and Recommendation That Relief Be Denied. This pleading outlines numerous errors and omissions in the district court's FFCL, including the failure to discuss most of the documentary and testimonial evidence developed during the multi-day evidentiary hearing. The evidence elided by the district court includes: (1) evidence critiquing the science that the State relied on to convince the trial court that the post-hypnotic eyewitness identification was reliable; and (2) evidence describing the changes in the science of hypnosis, memory, and eyewitness identification since the time of Mr. Flores's 1999 trial.

10. As Mr. Flores argued below, since his trial in 1999, Texas has made notable strides to try to prevent and unwind wrongful convictions by adopting

[1] The inference that this omission was an accident is supported by the fact that the numbered paragraphs in the Court's FFCL jump from (52) at the bottom of page 23 to (63) at the top of page 26 and do not include any pages numbered 24-25.

policies and enacting legislation to improve the reliability of criminal verdicts; these developments include the passage in 2013 of Senate Bill 344, which amended the Code of Criminal Procedure to add article 11.073. 7 EHRR 7-8; *see also Ex parte Robbins*, 478 S.W.3d 678, 704 (Tex. Crim. App. 2014) ("[I]n 2013, the Texas Legislature also chose accuracy over finality by enacting Article 11.073").

11. This case involves important questions of law that have yet to be taken up by this Court. The Legislature passed Article 11.073 as a response, in part, to this Court's decision in *Ex parte Robbins*, 360 S.W.3d 446 (Tex. Crim. App. 2011) ("*Robbins I*"). *See* House Research Organization, Bill Analysis, Tex. S.B. 344, 83rd Leg. R.S. at 2-3 (2013). In the five years since, however, this Court has had only limited occasion to interpret Article 11.073 in different procedural and scientific contexts. The Court's construction of this statute began in *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014 ("*Robbins II*"). *See also Ex parte Robbins*, WR-73,484-02, 2016 WL 370157 at *1 (Tex. Crim. App. 2016) (Alcala, J., concurring); *id.* at *3 (Richardson, J., concurring); *id.* at *23 (Newell, J., concurring). Since then, this Court has applied Article 11.073 to claims based on new DNA testing technology, *see, e.g., Ex parte Kussmaul*, 548 S.W. 606, 633 (Tex. Crim. App. 2018), and interpreted the statute to apply only to guilt-related new scientific evidence. *See Ex parte White*, 506 S.W.3d 39 (Tex. Crim. App. 2016). This Court, however, has not yet had the opportunity to construe Article 11.073 to eyewitness

identification testimony generally[2] or hypnosis-assisted identification specifically. *But see Tillman v. State*, 354 S.W.3d 425, 436 (Tex. Crim. App. 2011) (noting that 80% of the first 40 DNA exonerations in Texas involved eyewitnesses who were wrong).

12. This Court has recently demonstrated concern about the problems of eyewitness misidentification. In *Tillman*, for example, this Court reversed the exclusion of an eyewitness expert whose testimony was reliable and relevant and would have "increase[ed] the jurors' awareness of biasing factors in eyewitness identification." *Tillman v. State*, 354 S.W.3d at 442. *See also id.* (noting that because the identification procedure was "out of the ordinary... it was imperative that the jury be exposed to the full spectrum of possible implications resulting from that suggestiveness in order to have a full understanding of the subject."). Likewise, in *State v. Balderas*, a majority of this Court disapproved of the suggestiveness of a pretrial identification procedure. *See Balderas v. State*, 517 S.W.3d 756, 801-803 (Tex. Crim. App. 2016) (Richardson, J., concurring, joined by Meyers, Johnson, and Newell, J.J. ); *id.* at 804 (Alcala, J., dissenting).

13. This Court, has not, however, had an opportunity to consider the issue of forensic hypnosis in light of current scientific understanding of its potential to

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[2] *Cf. Ex parte Cardenas* WR-48,728-04, 2017 WL 5151571 (Tex. Crim. App. 2017) (dismissing as an abuse of the writ a subsequent application that raised a general challenge to the unreliability of eyewitness testimony).

adversely impact the reliability of the memory of an eyewitness's observation. This case affords the Court that opportunity, just as Judge Newell's prior concurrence in this matter sagely anticipated:

> As we have noted in *Tillman v. State*, eyewitness misidentification is the leading cause of wrongful convictions across the country. . . . I cannot imagine that the concerns regarding suggestive eyewitness identification evaporate when eyewitness testimony is enhanced through hypnotism.

*Ex parte Flores*, WR-64,654-02 (Tex. Crim. App. May 27, 2016 (Newell, J., concurring).

14. Since this Court last considered the validity of hypnosis-assisted witness identification thirty years ago in *Zani v. State*, 758 S.W.2d 233 (1988), much has changed in the science of witness identification and memory. *Zani* rests on two outdated premises. First, *Zani* relied on the belief at that time that certain "procedural safeguards," now known as the "*Zani* factors," could be utilized to prevent the "four-prong dangers of hypnosis" ("hypersuggestibility," "loss of critical judgment," "confabulation," and "memory cementing"). *Zani*, 758 S.W.2d at 243. Second, *Zani* rests on the premise that if the procedural safeguards were followed in a given forensic hypnosis session, an eyewitness's post-hypnosis testimony about what she remembers could be considered trustworthy, reliable, and admissible. *Id.* at 244. In *Medrano v. State*, this Court reaffirmed the *Zani* standard as "the appropriate framework to protect against the four-prong dangers of hypnosis . . . [it] minimizes

these dangers and, consequently, ensures the reliability of the testimony." 127 S.W.3d 781, 787 (Tex. Crim. App. 2004). In *Medrano*, this Court did not, however, revisit the scientific validity of hypnotically enhanced testimony or consider whether there had been any advances in scientific understanding; the Court simply considered whether the *Zani* factors would still govern the admissibility of post-hypnotic testimony outside of the *Frye*-admissibility context. *See id.* ("[O]ur opinion in *Zani* exhaustively analyzed both the dangers and solutions inherent in hypnotically enhanced testimony."). Since *Zani* was decided, however, the scientific understanding of memory and the dangers of hypnosis has evolved. This case thus presents an opportunity for this Court to reexamine the decades-old rationales underpinning *Zani* and *Medrano* in light of demonstrated advances in scientific understanding.

15. To assist the Court in determining whether Mr. Flores's new-science claim entitles him to habeas relief and to give guidance to future litigants and courts,[3] Mr. Flores respectfully asks that this Court file and set this case for additional briefing on the following discrete legal issues:

- Should the Court reconsider the rationale and holdings of *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988), and *State v. Medrano*, 127 S.W.3d 781 (Tex. Crim. App. 2004) in light of intervening changes in scientific

[3] In considering the district court's recommendation, this Court will review all questions of law and mixed questions of law and fact *de novo*. *See, e.g., Ex parte Brandley*, 781 S.W.2d 886, 887-88 (Tex. Crim. App. 1989).

understanding of forensic hypnosis, the science of memory, and eyewitness identification?

- What is the proper construction of TEX. CODE CRIM. PROC. art. 11.073(a), which states: "The article applies to relevant scientific evidence that: (1) was not available to be offered by a convicted person at the convicted person's trial; or (2) contradicts scientific evidence relied on by the state at trial"?

- What is the proper construction of TEX. CODE CRIM. PROC. art. 11.073(b)(1)(A), which states: "relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial"?

- What is the proper construction of TEX. CODE CRIM. PROC. art. 11.073(d), which states: "In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed"?

- Does the district court's recommendation below fail to account for this Court's guidance, provided in *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014 ("*Robbins II*"), regarding the legislative intent underlying Article 11.073?

## REQUEST FOR ORAL ARGUMENT

16. Additionally, Mr. Flores requests oral argument before this Court pursuant to Texas Code of Criminal Procedure Article 11.071 § 11 and Texas Rules of Appellate Procedure 39.1 and 75.1.

17. This is a case of first impression; this Court has never before applied Article 11.073 to hypnosis-assisted witness identification. This case also provides a vehicle for this Court to decide whether the advances in the scientific understanding

of forensic hypnosis, the science of memory, and eyewitness identification over the last thirty years call for a reevaluation of the outdated *Zani* precedent.

18. These issues are presented in a capital proceeding of significant consequence to both Mr. Flores and to the jurisprudence of this state. This Court's decision will provide guidance to future litigants regarding the use of forensic hypnosis and the applicability of the still-new Article 11.073 statute.

19. The decisional process of this Court will be significantly aided by oral argument. This writ proceeding involves complex issues of statutory construction, due process, judicial notice, and the accuracy of "science" presented to the trial court in 1999, pursuant to a 1988 legal precedent, regarding the ability to guard against the dangers of hypnosis that can taint memory of purported eyewitnesses to criminal activity. Oral argument will help explicate the legal issues, and contribute to a thorough and accurate decisional process. As a result, Mr. Flores respectfully requests oral argument.

## CONCLUSION AND PRAYER

For the foregoing reasons, as well as those described in his Objections to, and Motion for Withdrawal of, Trial Court's Findings of Fact and Conclusions of Law and Recommendation That Relief Be Denied, Mr. Flores respectfully asks that this Court (1) file and set this case for additional briefing from the parties on the discrete legal issues described above and thereafter (2) set this case for oral argument.

Respectfully submitted,

*/s/ Benjamin B. Wolff*

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## CERTIFICATE OF SERVICE

The foregoing has been filed electronically and served on the attorney representing the State in this matter. This certification is executed on December 7, 2018, in Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/
Benjamin B. Wolff

No. WR-64,654-02

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

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EX PARTE CHARLES DON FLORES,
*Applicant*

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# CORRECTION TO MOTION TO FILE AND SET FOR BRIEFING AND REQUEST FOR ORAL ARGUMENT; AND CORRECTION TO MR. FLORES'S OBJECTIONS TO, AND MOTION FOR WITHDRAWAL OF, TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATION THAT RELIEF BE DENIED

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1. On December 7, 2018, Applicant Charles Don Flores filed a Motion to File and Set for Briefing and Request for Oral Argument in this case.

2. In the procedural history of this motion, Mr. Flores discussed the district court's recommended findings of fact and conclusions of law (FFCL), which, Mr. Flores asserted, were "virtually identical to the State's Proposed FFCL except that the district court's FFCL, in executing the cut-and-paste function, accidentally left out numbered paragraphs (53)-(62) found on pages 23-25 of the State's proposal." *See* Motion at 2-3.

3. Likewise in his Objections to, and Motion for Withdrawal of, Trial Court's Findings of Fact and Conclusions of Law and Recommendation that Relief be Denied, Mr. Flores asserted "the only notable difference between the State's Proposed FFCL and those adopted by the court is that, whoever executed the cut-and-paste operation, inadvertently left out a page or so (without correcting the paragraph numbers to account for the omissions)." *See* Objections at 137.

4. It now appears these statements were incorrect; in fact, the district court's recommended findings are actually identical to the State's submission, a fact that the State brought to the attention of counsel this morning.

5. The district court entered an order adopting the State's proposed FFCL on October 3, 2018. On October 4, 2018, the court coordinator for the 195th District Court emailed counsel the court's FFCL. In the version of the FFCL emailed to counsel by court coordinator, paragraphs 53-62 and pages 23-25 are missing. It was this version of the district court's FFCL upon which counsel for Mr. Flores relied in preparing his Objections and Motion to File and Set.

6. Upon receipt of Mr. Flores's motion to file and set for briefing, the State alerted counsel that another version of the FFCL existed, which included the paragraphs and pages thought to have been omitted. This version was file stamped, and filed with the Clerk. Counsel, however, were never served by the Clerk with this version.

7. Counsel regrets mistakenly asserting that the district court's recommended FFCL were missing certain paragraphs and pages from the State's submission. It now appears, in fact, that on October 3, 2018, over nine months after the parties submitted proposed FFCL, the district court signed the State's submission without omitting any paragraphs or pages—or making any changes whatsoever.

Respectfully submitted,

*/s/ Benjamin B. Wolff*

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## CERTIFICATE OF SERVICE

The foregoing has been filed electronically and served on the attorney representing the State in this matter. This certification is executed on December 10, 2018, in Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

*/s/*
Benjamin B. Wolff