

No. WR-64,654-02

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE CHARLES DON FLORES,
Applicant

SUPPLEMENT TO MOTION TO FILE AND SET FOR
BRIEFING AND REQUEST FOR ORAL ARGUMENT
AND
NOTICE OF SUPPLEMENTAL AUTHORITY

Applicant Charles Flores, by counsel, respectfully submits this supplement to his previous motion to file and set for briefing and request for oral argument and notice of supplemental legal authority relevant to the above captioned matter: *Sims v. Hyatte*, 914 F.3d 1078 (7th Cir. 2019).

1. As of November 26, 2018, this Court has before it the district court's findings of fact and conclusions of law and the reporter's record related to Mr. Flores's subsequent application under Articles 11.073 and 11.071. This Court also has before it Mr. Flores's Motion to File and Set for Briefing and Oral Argument related to these claims.

2. Mr. Flores was convicted of capital murder in 1999 and sentenced to death on the basis of the testimony of just one eyewitness, Jill Barganier. Mr. Flores did not match the initial descriptions given by Ms. Barganier of a white male with dark long hair. Mr. Flores is, as he was then, an overweight Latino with very short hair. When Ms. Barganier was shown a photographic array including a photograph of Mr. Flores immediately after the hypnosis sessions, she still failed to identify him. But after being hypnotized and exposed to Mr. Flores's photograph repeatedly in the news, Ms. Barganier identified Mr. Flores, for the first time, in an inherently suggestive, in-court identification.

3. Mr. Flores's junk science claim arises from this post-hypnosis, in-court identification, 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.

4. 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).

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. 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 identical to the State's Proposed FFCL. 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.

7. On October 15, Mr. Flores filed objections to the FFCL.

8. On December 7, Mr. Flores filed a motion to file and set this case for briefing. In his Motion To File And Set For Briefing And Request For Oral Argument, Mr. Flores requested that this Court order briefing on the following legal questions raised by this case:

- 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 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?

9. This Court has not yet had an opportunity to consider the issue of forensic hypnosis in light of current scientific understanding of its potential to adversely impact the reliability of the memory of an eyewitness's observation.

10. Much has changed in the science of eyewitness identification and memory since this Court last considered the scientific validity of hypnosis-assisted witness identification thirty years ago in *Zani v. State*, 758 S.W.2d 233 (1988). *Zani* rests on two outdated premises. First, *Zani* relied on the scientific belief at that time that certain "procedural safeguards," now known as the "*Zani* factors," can 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 courts find that the totality of the circumstances suggests that the procedural safeguards were followed in a given forensic hypnosis session, then a court may decide whether an eyewitness's post-

hypnosis testimony about what she remembers is trustworthy and thus 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.”).

11. Since *Zani* was decided, the analytical edifice upon which it rests has crumbled. The leading case upon which the *Zani* approach was modeled, *State v. Hurd*, 432 A.2d 86, 95-97 (N.J. 1981), has since been overruled. In 2006, the New Jersey Supreme Court reversed *Hurd* because of intervening advances in scientific understanding. *See State v. Moore*, 902 A.2d 1212 (N.J. 2006).¹ In *Moore*, the New Jersey Supreme Court stated that it was “no longer of the view that the *Hurd* guidelines can serve as an effective control for the harmful effects of hypnosis on

¹ *Moore* was decided two years after this Court last considered the *Zani* standard in *Medrano v. State*, 127 S.W.3d 781, 787 (Tex. Crim. App. 2004).

the truth-seeking function that lies at the heart of our system of justice.” *Moore*, 902 A.2d at 1213. Citing expert testimony presented at the trial level and the “substantial body of case law” that had developed since *Hurd*, the *Moore* court acknowledged that the *Hurd* approach had, in the interim, “been challenged by the experts and rejected by the majority of courts considering the issue” due to concerns about the “inherent unreliability of hypnotically refreshed memory” and the “efficacy of the [*Hurd*] guidelines in controlling the adverse impacts of hypnosis.” *Id.* at 1227.

12. Recently, the United States Court of Appeals for the Seventh Circuit issued an opinion addressing the reliability of hypnotically induced evidence. *Sims v. Hyatte*, 914 F.3d 1078 (7th Cir. 2019). The opinion in *Sims v. Hyatte*, attached to this Notice as Exhibit A, reaffirms the more recent understanding that hypnotically influenced testimony is unreliable and has the dangerous effect of increasing an eyewitness’s confidence in an identification without increasing the accuracy of the identification.

13. In *Sims*, the Seventh Circuit held that the State violated *Brady* by failing to disclose evidence that the only eyewitness to identify Mr. Sims had undergone hypnosis to enhance his memory of the incident and description of the assailant. *Id.* at 1091-92. While in *Sims* the Seventh Circuit considered the use of forensic hypnosis in the context of a *Brady* claim, it provides a useful authority for this Court

to consider in deciding the important questions surrounding the recently emerged scientific consensus on forensic hypnosis.

14. There, the complainant-eyewitness described the assailant as a black male with short hair or a shaved head, large build, possibly in his late twenties, wearing a three-quarter-length jacket, dark pants and dark combat boots. *Id.* at 1081. Before trial, the complainant identified Sims three times in photographic lineups prior to being hypnotized. *Id.* at 1091. These identifications were tentative, however, so law enforcement sought to hypnotize the complainant in an effort to eliminate equivocation from his identification of Sims. *Id.* at 1084-85. During this single hypnosis session, the complainant said that he “literally entered a dream state in which [he]... recall[ed] the shooting itself.” *Id.* at 1085. After this hypnosis session, the complainant supplied details regarding his assailant’s description that had not provided previously. *Id.*

15. Several months after being hypnotized, the complainant made an unequivocal, in-court identification of the defendant as his assailant. *Id.* at 1081-1084. At trial, the complainant testified that “his memory of the incident actually improved over time.” *Id.* at 1090. Because no physical evidence tied the defendant to the shooting, the State’s case relied almost entirely on this eyewitness identification of the defendant. *Id.* at 1089.

16. The factual circumstance of *Sims* bear striking resemblance to those found in the present case. Just as with Flores, in *Sims*, there was no physical evidence that tied *Sims* to the shooting. *Id.* The behavior of *Sims* “shortly after the shooting was suspicious... but far short of what would have been needed to convince a jury to convict.” *Id.*

17. However, unlike *Sims*, where the complaining witness made three prior identifications of the defendant before being hypnotized, *id.* at 1091, here the testifying witness, Ms. Barganier, failed to make any identification in the case prior to being hypnotized, even when given the opportunity to do so.

18. In Mr. Flores’s trial, Dr. Mount testified that Ms. Barganier’s memory improved over time, and that hypnosis enabled her to recall at trial what she could not previously. *See, e.g.*, 5 EHRR 158. After being hypnotized, she “recalled” for the first time additional details about the person she said was Mr. Flores. She “recalled”, for instance, “meeting eyes” with this person, which she said made her “real nervous.” 36 RR 286.

19. On the day of the murder, Ms. Barganier described seeing two men in a VW bug in front of the decedent’s house on the morning of the murder. She described the driver as “big, with long brown hair”, “a white male, about 30 years old and with a large build”, and the passenger, whom she later said was Mr. Flores, as “also a white male with darker hair than the driver” and also described his hair “almost black

and thought it was “longer.”” 4 EHRR 44-48. Ms. Barganier helped a sketch artist draw the passenger of this car, which pictorialized the vague description she had given: white male with long dark hair.

20. Several months later, after being hypnotized and being exposed to repeated viewings of Mr. Flores’s picture, Ms. Barganier came to court and made an in-court identification of Mr. Flores. 36 RR 294.

21. Similarly, in *Sims*, the complainant testified that his memory of the incident actually improved over time, and provided significantly more information at trial than he did at any time prior to trial. *Sims*, 914 F.3d at 1090.

22. Just with Ms. Barganier, in *Sims*, the complainant discussed in detail looking the assailant in the eyes and remembered additional details about the appearance of the assailant that he had not remembered previously. *Id.* at 1090.

23. In *Sims*, the complaint attended one session of hypnosis in which, as he testified, he “fell asleep... [and] literally entered a dream state.” *Id.* at 1085. As the complainant testified, it was “in the dream state in which I... recall[ed] the shooting itself. And during that time I had another opportunity to uh, see the person that shot me.” *Id.*

24. In the evidentiary hearing in this case, Ms. Barganier conceded that she had not mentioned “meeting eyes” with the perpetrator, or feeling fearful as a result prior to the hypnosis session. She admitted that she was not sure if what she had said to

the jury about “meeting eyes” with the perpetrator was her “imagination or not.” 4 EHRR 132.

25. Just with *Sims*, where the hypnosis made the complainant there “extremely sure” of his identification, 914 F.3d at 1086, here Ms. Barganier told the jury that she was “over 100 percent [positive]” in her post-hypnosis, in-court identification of Mr. Flores as the man she had seen on the morning of the murder. 36 RR 294.

26. Considering the effects of hypnosis, the Seventh Circuit called the notion that the complainant’s memory of the incident actually improved over time “puzzling.” *Sims*, 914 F.3d at 1086. It concluded that the complainant’s hypnosis, “more fundamentally... calls into question everything [the complainant] said at trial. *Id.* The Seventh Circuit also observed that because of hypnosis, the complainant “would not know what he was able to recall independent of hypnosis, nor what he was able to recall because of hypnosis, nor whether any of his testimony was true or based on a fantasy.” *Id.* at 1090.

27. In its discussion of the unreliability of hypnotically induced memory-recall and eyewitness identification, the Seventh Circuit favorably cited the research of Steven J. Lynn, Ph.D., an expert who testified at Mr. Flores’s evidentiary hearing, for the proposition that “23 studies have shown that hypnosis either increases confidence relative to a nonhypnotic group, or participants confidently report inaccurate memories of events they earlier denied occurred when they were not

hypnotized. *Id.* at 1089. *See also* Steven Jay Lynn et al., Forensic Hypnosis: The State of the Science, *in* Psychological Science in the Courtroom: Consensus and Controversy, 85 (Jennifer L. Skeem, Kevin S. Douglas, & Scott O. Lilienfeld 2009). In addition, the Seventh Circuit also cited a 2007 study demonstrating that “hypnotized witnesses find it difficult to distinguish their original memories from those brought out under hypnosis” and “tend to become more confident about their recall despite the fact that it might contain false recollections.” *Sims*, 914 F.3d at 1089.²

28. *Sims v. Hyatte* is highly relevant, persuasive supplemental authority that this Court should consider in assessing Mr. Flores’s Article 11.073 new-science claim.

29. *Sims* stands, in part, for the proposition that defense counsel at trial should have been permitted to cross examine the witness about an issue, hypnosis, that affected the witness’s reliability. *See Sims*, 914 F.3d at 1092; *see also Giglio v. United States*, 405 U.S. 150 (1972). By contrast, in Mr. Flores’s trial, the issue of hypnosis was before the jury, so confrontation was not an issue.

30. The issues before this Court relate to whether the field of memory science has evolved in its acceptance of forensic hypnosis over the last nineteen years, not to whether it would have been useful to trial counsel to have been able to cross

² It is important to note that both academic studies cited favorably by the Seventh Circuit were published after Mr. Flores filed his previous application for post-conviction relief. *See Sims*, 914 F.3d at 1089-90.

examine Ms. Barganier about having been hypnotized—because they did. However, the Seventh Circuit is clear in *Sims* about the dangers of hypnotically induced eyewitness identification: the subject becomes suggestible, the subject confabulates or fills in the details from their imagination in order to make their answer more complete, and the subject experiences “memory hardening,” which increases their confidence in both true and false memories, while not actually improving the reliability or accuracy of the memory or identification. *Id.* at 1089-90.

31. The field of memory science has been evolving in its acceptance of hypnosis throughout the 1990s and 2000s. While there were some critiques of hypnosis available to reasonably diligent attorneys at the time of Mr. Flores’s trial and first post-conviction application in 2000, it was still accepted enough within the scientific community that it was admitted into evidence.

32. As demonstrated by the voluminous evidence and expert testimony introduced in Mr. Flores’s post-conviction hearing, however: the relevant field of memory science and perspective offered by the State’s expert at trial, Dr. George Mount, has changed over the last nineteen years; and the relevant field of memory science and perspective offered by Mr. Flores in this proceeding contradicts the evidence relied on by the State at trial. Decisions like *State v. Moore*, 902 A.2d 1212 (N.J. 2006) and *Sims v. Hyatte*, 914 F.3d 1078 (7th Cir. 2019) confirm the shift in scientific consensus: hypnosis is unreliable and risky.

33. Because the scientific consensus has shifted over the last nineteen years on the science of memory and the reliability of evidence obtained through hypnosis, had this new scientific evidence been presented at trial, Ms. Barganier's in-court eyewitness identification would have been excluded as unreliable, and she would not have been permitted to testify about her post-hypnosis, in-court identification of Mr. Flores.

DATED: April 22, 2019

Respectfully submitted,

/s/ C. Lepingwell

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CERTIFICATE OF SERVICE

The foregoing has been filed electronically and served on the following parties:

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This certification is executed on April 22, 2019, in Austin, Texas.

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

/s/ C. Lepingwell
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