IN THE 195th DISTRICT COURT
DALLAS COUNTY, TEXAS

EX PARTE Charles Don Flores, APPLICANT	)	Trial Cause No. F9802133 Writ Cause No. F98-02133-N

CHARLES DON FLORES'S RESPONSE IN OPPOSITION TO THE STATE'S LATEST MOTION TO SET EXECUTION DATE

On Good Friday, April 2, 2021, the Dallas County District Attorney's Office elected to file, on the State's behalf, a Renewed Motion to Set Execution Date (Latest Execution Motion). In light of the circumstances, the State's Latest Execution Motion is ill-advised and seemingly unprecedented. This Latest Execution Motion should be summarily denied in light of pending litigation, including an Actual Innocence claim and other substantive, meritorious claims that are the subject of an 826-page subsequent writ application now pending before the Texas Court of Criminal Appeals (CCA). *See Ex parte Flores*, WR-64,654-03 (filed Feb 3, 2021 in district court, received March 1, 2021 in CCA). If the Latest Execution Motion is not summarily denied, Charles Don Flores, by and through his attorneys, asks for a hearing before the Court rules at which Mr. Flores can be present. In support of his requests, Mr. Flores respectfully shows the following:

RELEVANT BACKGROUND

On May 20, 2020, the State filed a motion seeking to set Mr. Flores's execution date for October 8, 2020. Mr. Flores filed an opposition. Among other things, Mr. Flores raised the issue that he had not yet exhausted his appellate remedies, including a petition for writ of certiorari to the Supreme Court of the United States, and described at length counsel's on-going duties to him, which were being impaired by shutdowns caused by the COVID-19 pandemic.

After a telephone conference with counsel for both parties, this Court entered an Order on July 9, 2020, announcing that the Court would hold the State's motion in abeyance until after September 30, 2020. The rationale provided for the Court's ruling was "the declared state of disaster in response to the COVID 19 pandemic." Order at 1.

On October 21, 2020, while counsel were discussing several discovery motions,[1] and without first apprising Mr. Flores's counsel, the State filed a second Motion to Set Execution Date. The date the State requested was July 22, 2021, stating that this date "allows ample time for compliance with [Texas's] 91-day rule and for the United States Supreme Court to consider and dispose of Flores's pending

[1] Those discovery motions were conveyed to the Court on October 22, 2020. One of them, although unopposed, required access to the courtroom to be able to inspect and photograph physical evidence. That inspection finally took place—but only after Mr. Flores had already filed his now-pending second subsequent state habeas application.

petition for writ of certiorari." Motion at 4.

On January 25, 2021, the Court entered an Order stating that, "due to the declared state of disaster in response to the COVID 19 pandemic the motion should be held in abeyance" until April 1, 2021. Order at 1.

After that Order was entered, two significant developments occurred.

First, Mr. Flores filed a second subsequent state habeas application on February 3, 2021. The application includes the following new claims:

- Claim I: The New Scientific Consensus in the Field of Eyewitness Identifications Renders Mrs. Barganier's In-Court Identification of Charlie Flores Not Just Unreliable But Her Previous Failure to Identify Him Is Exculpatory;

- Claim II: The State's Trace-Evidence Expert Has Disavowed His Own Testing and Trial Testimony as Unreliable; and Contemporary Standards for Forensic Labs Demonstrate that the State's Expert's Method and Test Results Do Not Reflect Basic Scientific Competency;

- Claim III: Newly Available Evidence Establishes That Mr. Flores Is Actually Innocent of the Crime for Which He Was Convicted;

- Claim IV: Long-Suppressed Evidence, in Violation of Brady v. Maryland, Reveals a Pattern of Rampant Misconduct by Those Investigating and Prosecuting the Case against Charlie Flores That Was Material to His Conviction;

- Claim V: Long-Suppressed Evidence, in Violation of Brady v. Maryland, Reveals a Pattern of Rampant Misconduct That Was Material to Obtaining a Death Sentence;

- Claim VI: Charlie Flores's Rights to a Fair Trial and to Due

Process Were Violated by the State's Knowing Use of False Testimony at the Guilt-Phase of His Trial;

- Claim VII: Charlie Flores's Rights to a Fair Trial, to Due Process, and to Be Free from Cruel and Unusual Punishment Were Violated by the State's Knowing Use of False Testimony Relevant to His Punishment;

- Claim VIII: Charlie Flores's Rights to a Fair Trial and to Due Process Were Violated by the State's Use of False Testimony, Even If Unwittingly, under *Ex Parte Chabot*;

- Claim IX: Defense Counsel Improperly Overrode Charlie Flores's Sixth Amendment Right to Maintain That He Was Innocent of Betty Black's Murder, Resulting in A Structural Error under *McCoy v. Louisiana* That Requires a New Trial; and

- Claim X: Charlie Flores's Due Process Right to a Fundamentally Fair Trial Was Violated by the State's Use of Testimony That Current Scientific Understanding Exposes as False.

These claims are supported by numerous volumes of evidentiary proffers. On March 1, 2021, this second subsequent state habeas application was received by the CCA.

Second, Mr. Flores approached counsel for the State about the prospect of further DNA testing using currently available technology. Counsel for the State agreed that, in the interest of justice, such testing could be undertaken (as is acknowledged in the State's Latest Execution Motion). The parameters of the agreement are memorialized in a Notice Regarding Agreement on DNA Testing filed in this Court on March 26, 2021—just one week before the State's Latest Execution Motion was filed. The testing in question has not yet been completed.

Meanwhile, the COVID 19 pandemic that previously induced the Court to

delay setting an execution date has not yet ended.

Because the only circumstances that have changed since the Court entered its January 25, 2021 Order are circumstances that advise entirely *against* setting an execution date at this time, and because the State's Latest Execution Motion does not serve the interests of justice or judicial economy, Mr. Flores's files this opposition asking that the Court deny the motion summarily or after a hearing where counsel and Mr. Flores can be present.

ARGUMENT & AUTHORITIES

I. Under the Present Circumstances, Setting an Execution Date Would Be Wholly Improper.

A. Mr. Flores Has Numerous Substantive Claims Pending Before the CCA—Which Is a Statutorily Recognized Basis for *Withdrawing* an Execution Date.

Article 43.141 of the Texas Code of Criminal Procedure expressly permits a trial court to withdraw an execution date after a subsequent application for a writ of habeas corpus is filed under Article 11.071:

> The convicting court may modify or withdraw the order of the court setting a date for execution in a death penalty case if the court determines that additional proceedings are necessary on:
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> (1) a subsequent or untimely application for a writ of habeas corpus filed under Article 11.071; or
>
> (2) a motion for forensic testing of DNA evidence submitted under Chapter 64.

TEX. CODE CRIM. PROC. art. 43.141(d). Therefore, there is no legitimate rationale for

setting an execution date when a subsequent application is already pending, as is the case here.

In opposing the State's previous quest for an execution date, Mr. Flores represented to this Court that he intended to raise several new, unadjudicated constitutional claims based on both new law and new evidence. As promised, he has now filed a second subsequent state habeas application under Article 11.071, section 5(a) of the Texas Code of Criminal Procedure. *See Ex parte Flores*, WR-64,654-03.

The CCA acknowledged receipt of Mr. Flores's second subsequent state habeas application on March 1, 2021; thus, the application has been pending before that court for little more than a month. The application spans 826 pages, includes ten new distinct claims, and is supported by eleven volumes of Appendices containing evidentiary proffers. Those proffers include two new expert reports, multiple declarations/affidavits from lay witnesses, long suppressed materials from the underlying investigation, and numerous documents revealing the existence of numerous undisclosed deals given to the State's trial witnesses in exchange for agreements to testify against Mr. Flores.

Most of the new claims arise under clearly established federal constitutional law, not state law. Claim VIII, which arises under state law, relies on the same factual predicate at issue in federal law Claims VI and VII. Claims I and II rely new science

and Article 11.073 of the Texas Code of Criminal Procedure; but these claims also provide the factual predicate for the federal Due Process violation alleged in Claim X. Therefore, if none of these claims are authorized by the CCA, Mr. Flores would have the right to seek leave to pursue a successor federal habeas petition in federal court raising these newly exhausted claims.[2] Therefore, basic fairness as well as judicial economy weigh entirely in favor of this Court denying the State's request to set an execution date. Such a momentous action should not be undertaken until at least Mr. Flores's pending subsequent state habeas application has been adjudicated.

No statute or court rule dictates a deadline for the CCA to resolve Mr. Flores's new claims. The State's assertion that these claims will all be resolved before the execution date it seeks is wholly speculative. Moreover, there is no basis for placing pressure on the CCA by setting an execution date when a lengthy application, supported by voluminous evidentiary proffers, is already pending before that court. Indeed, all that setting an execution date will guarantee is that Mr. Flores must immediately file (1) a motion asking this Court to withdraw the execution date and (2) a motion with the CCA asking that it stay the execution. Thus, the State's request

[2] The filing of a subsequent state habeas application is necessary to first exhaust claims before those claims could then be presented to a federal court within the statute of limitations period (which would have run on or before May 6, 2021 but is presently tolled). *See* 28 U.S.C. § 2254(b)(1)(A). At this time, there are no pending pleadings in federal court to provide a federal judge with jurisdiction to issue a stay were an execution date to be set at this time. In Texas, the mechanism for exhausting claims in state court is Article 11.071 of the Texas Code of Criminal Procedure—and such exhaustion must occur before any claim could then be brought in federal court and only if the CCA were to deny relief.

will only translate into gratuitously adding to the workloads of two distinct courts.

Undersigned counsel is aware of *no Texas death-penalty case in the modern era* in which the State has sought to set an execution date when a subsequent state habeas application was already pending.[3] While it is certainly true that the CCA "routinely" resolves claims in subsequent state habeas applications that are filed ***after*** an execution date has already been set to determine whether to grant a stay of execution, the State's attempt to place an undue burden on the CCA to rush the adjudication of substantive claims of rampant constitutional violations is illogical.

The State's only proffered justification for its unprecedented request is its uninformed disdain for Mr. Flores's pending claims. The State also relies on self-serving, circular reasoning, suggesting that the pending claims should be ignored by citing (without naming) the testimony of trial witnesses that reputedly support the State's contention that Mr. Flores was properly convicted of Betty Black's murder. But the complete unreliability of the testimony to which the State alludes (and in fact every aspect of the State's guilt-phase case) is painstakingly dismantled in Mr. Flores's pending state habeas application. Thus, the State's current argument is like

[3] The Dallas DA's Office is, it seems, pushing the envelope in seeking execution dates. Last year, it filed a motion seeking to set September 2, 2021 as an execution date for Wesley Ruiz—even though his initial federal habeas review was still pending in the Fifth Circuit when the motion was filed. On October 22, 2020, Ruiz opposed the motion and requested a hearing in the 194th district court. To date—over five months later—the presiding judge has not set an execution date for Ruiz, likely because the State routinely waits until the conclusion of initial federal habeas litigation before seeking to set an execution date. *See* https://www.tdcj.texas.gov/death_row/dr_scheduled_executions.html.

a student who flagrantly cheated on an exam arguing years later against the allegation that he had cheated on the exam by suggesting that the cheating should be ignored because he received an "A" on that exam.

The pending second subsequent state habeas application is a sound basis for denying the State's Latest Execution Motion. Indeed, setting a date while such a pleading is pending would be, to the best of undersigned counsel's knowledge, unprecedented.

B. DNA Testing Is Underway.

The State similarly, and inexplicably, argues that its recent agreement to authorize new DNA testing in this case is not a basis to delay setting an execution date. The State tries to obscure the incongruity of its position by asserting that the testing (to which the parties have already agreed) would not fit the requirements of Chapter 64 of the Texas Code of Criminal Procedure.

First of all, Mr. Flores did not file a Chapter 64 motion only because the parties reached an *agreement* and State's counsel thereafter argued that such a motion would be "untimely" (*i.e.*, moot). In short, there was no need to ask the Court to order something that was already happening.

Second, the State's assertion that the dictates of Chapter 64 could not be satisfied with respect to the DNA testing that was requested is incorrect. The State's misapprehension seems to arise from a misconception of the term "exculpatory."

The wad of gum found at the crime scene, which was previously tested (producing a profile that excluded Mr. Flores and Richard Childs), has never been tested to see if it could result in a hit in the CODIS database; that process might then inculpate one of several alternative suspects that the police initially considered (white males with long hair who, unlike Mr. Flores, actually resembled the initial descriptions provided by witnesses to police investigators). The existence of those alternative suspects has long been suppressed (and, seemingly, much of the related investigation of those other suspects is still being suppressed or was, at some point, destroyed); these facts are discussed and amply supported in the pending second subsequent state habeas application. That is, merely reading Mr. Flores's pending subsequent state habeas application would readily reveal that there is indeed evidence of other likely alternative suspects. Additional DNA evidence inculpating one of these alternative suspects would plainly be ***further exculpatory of Mr. Flores***. It would be overwhelming evidence that the second man who entered the Blacks' home on January 29, 1998 with Richard Childs was *not* Charles Flores.

Moreover, the CCA has granted Chapter 64 motions to obtain DNA testing in cases where the evidence against the applicant was far more extensive and credible than any evidence ever adduced against Mr. Flores. *See, e.g., Raby v. State*, No. AP-74,930 (Tex. Crim. App. June 29, 2005) (not designated for publication).[4] In *Raby*,

[4] Because the *Raby* decision was not designated for publication, it has no precedential value

the CCA authorized testing where it might merely have led to evidence that ***reduced*** Raby's culpability. *Id*., slip. op. at 8. In *Raby*, the evidence at trial showed that the perpetrator had entered the victim's home through a window and stabbed her with a knife. Witnesses placed Raby near the house at the time of the murder and stated that he had entered the house through the same window on previous occasions. Moreover, Raby signed a written statement in which he confessed to having a knife, entering the victim's home, struggling with her, and leaving her in a pool of blood. Notwithstanding the substantial evidence of Raby's guilt, the CCA granted his Chapter 64 motion for DNA testing. *Id*.; *see also*, e.g., *Routier v. State*, 273 S.W.3d 241, 257, 259 (Tex. Crim. App. 2008) (granting DNA testing because biological material from an unknown intruder might be present on several items found at crime scene).[5]

DNA testing is now recognized as a more reliable and precise method of identifying perpetrators of crimes than any other form of proof utilized by law enforcement, including confessions, jailhouse informant testimony, and eyewitness identifications. *See District Attorney's Office for Third Judicial Dist. v. Osborne*,

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but may still be cited and relied on for its persuasive value. *See* TEX. R. APP. P. 47.7 (explaining citation form for unpublished CCA opinions).

[5] The current status of Mr. Raby's habeas claims is unknown. However, he was sentenced to death in 1994—five years *before* Mr. Flores—is still in TDCJ custody, and no date for his execution has been set. Likewise, Ms. Darlie Routier, sentenced to death in Dallas County in 1997—two years *before* Mr. Flores—is still in TDCJ custody and has no execution date. *See* https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html

557 U.S. 52, 62 (2009). Indeed, DNA testing's utility in the criminal justice system is now "undisputed." *Maryland v. King*, 133 S. Ct. 1958, 1966 (2013). Moreover, technological advances since Mr. Flores's 1999 trial have dramatically increased its sensitivity. *See, e.g.*, John M. Butler, FUNDAMENTALS OF FORENSIC DNA TYPING 111 (3d ed. 2009); National Institute of Justice, *DNA Evidence: Basics of Identifying, Gathering, and Transporting* (2012).

Since 1989, there have been 365 post-conviction DNA exonerations in the United States; at least 21 of those individuals served time on death row. The number of DNA exonerations in Texas is the highest in the country.[6] The State's attempt here to short circuit and minimize the potential significance of DNA testing—to which it has agreed "in the interest of justice"—is utterly perplexing. Moreover, the State's current position is incompatible with both the spirit and letter of Chapter 64, which the Texas Legislature has amended repeatedly to ***reduce*** barriers to DNA testing.

The on-going DNA testing is a sound basis for denying the State's Latest Execution Motion.

C. The On-Going COVID Pandemic Continues to Impinge on the Work of Both Counsel and Courts, Thus Most Jurisdictions Are Not Endeavoring to Set Execution Dates.

Although Texas is in a better position vis-à-vis the global pandemic at this

[6] *See, e.g.*, https://innocenceproject.org/research-resources/ (last accessed April 3, 2021).

time than it was in January when the Court entered its last Order, the pandemic is by no means over. *See* Center for Disease Control updates, *available at* https://www.cdc.gov/coronavirus/2019-ncov/whats-new-all.html (last accessed April 4, 2021).

The Texas Department of Criminal Justice (TDCJ) has only recently reopened Texas prisons to visitation but, because of its ongoing COVID-mitigation efforts, many restrictions remain in place. Only a few legal visits are being allowed each week—and can only be scheduled on Tuesdays and Thursdays during a limited window in the morning and requires arriving an hour early and passing a COVID screening test; visits are scheduled on a first-come, first-served basis. The Polunsky Unit where Mr. Flores is housed is 223 miles away from undersigned counsel's office. Therefore, to arrive for an 8:00 AM visit, which requires reporting at the prison gates at 7:00 AM, means leaving home at approximately 3:00 AM. Counsel has only been able to have one 30-minute visit with Mr. Flores since visitation partially reopened a few weeks ago; and this was the first in-person visit counsel had has with Mr. Flores in over a year of COVID lockdown.

Client communication is a fundamental aspect of lawyering, and capital post-conviction counsel, like lawyers in other areas of the profession, have a duty to explain legal matters and developments to the extent reasonably necessary to permit a client to participate in his defense and make informed decisions about different

strategic paths. *See, e.g.,* TEX. DISCIP. R. PROF'L COND. 1.03. This is especially true in the life-and-death, capital post-conviction context, where the building of a relationship of trust and rapport through face-to-face communication is essential. *See, e.g.,* State Bar of Texas, Guidelines and Standards for Texas Capital Counsel, Guideline 12.2(B)(2).

An imminent execution date while these restrictions are still in place would severely hamper the representation. This is precisely why Judge Baca in the 346th District Court recently denied a similar request to set an execution date. *See* **Exhibit A** (Order Denying State's Motion Requesting Execution Date, March 15, 2021). Indeed, the Texas Supreme Court's Emergency Order 36 is still recognizing that in-court proceedings should be postponed until June, significant evidence that the pandemic's disruptive effects will continue to be felt over the next several months.

Aside from preventing visits with an incarcerated client, the ongoing pandemic impairs the ability to conduct the kind of investigation required to prepare a meaningful clemency application. As explained further below, under Texas law clemency deadlines are expressly triggered by an execution date.

Setting an execution date now per the State's request, when Mr. Flores has a right to expect that his counsel conduct an exhaustive investigation and present all available legal claims in judicial proceedings, would be fundamentally unfair and infringe upon his due process right to pursue all avenues instantiated in federal and

state law before the State endeavors to execute him.

II. The Date the State Seeks Is Not Just Premature But Arbitrary.

The State's request for a July 22, 2021 execution date is entirely arbitrary. This is the same date the State previously requested and does not account for any of the intervening events described above. Setting a date for Mr. Flores's execution at this time will only spawn further litigation. *See* TEX. CODE CRIM. PROC. art. 43.141(d)(1).

As noted above, undersigned counsel knows of no instance where counsel for the State has obtained an execution date when a subsequent habeas application was pending.

The State's Latest Execution Motion is also at odds with the more practical stance taken by the State in similar cases at this time. For instance, the next execution in Texas is currently scheduled for April 20, 2021; but that date is to be modified after *the State* filed a motion requesting a modification of the execution date. *See* **Exhibit B**. The affected inmate is Ramiro Gonzales. The State of Texas recently agreed, during a hearing before the Honorable Steven Ables of Medina County, that the execution date should be modified in light of Mr. Gonzales's pending section 1983 civil litigation in federal court requesting that Mr. Gonzales's spiritual advisor be allowed into the execution chamber—litigation initiated only after an execution date had been set for Mr. Gonzales. That civil action is similar to other litigation, on

behalf of another death-sentenced individual (Ruben Gutierrez), that had prompted the Supreme Court of the United States to stay his execution, remand his case for discovery regarding TDCJ's policy of precluding spiritual advisors from being in the death chamber during an execution, and later remanded for a merits determination. *See Gutierrez v. Saenz*, 209 L. Ed. 2d 4, 2021 WL 231538 (Jan. 25, 2021) (ordering remand to the district court "for further and prompt consideration of the merits of petitioner's underlying claims regarding the presence of a spiritual advisor in the execution chamber").

During a recent hearing in Mr. Gonzales's case, counsel for the State of Texas noted on the record that they anticipated that the Texas Legislature may pass a pending bill this legislative session that will permit spiritual advisors in the execution chamber, which State's counsel believe will eventually moot the spiritual advisor litigation.[7] State's counsel also indicated that putting off the execution date until November (eight months from the current setting) was warranted to allow time to conduct a background check on the requested spiritual advisor.

[7] Notably, the same logic of a pending bill that could likely affect the relevant procedures could apply to Mr. Flores on two different fronts. First, Mr. Flores, who has had a relationship with the same spiritual advisor for over a decade, would have a right to pursue the same relief as Mr. Gonzales in federal court through a section 1983 suit—access to his spiritual advisor in the execution chamber—or be able to rely on the bill that the State cited as a basis for pushing off Mr. Gonzales's execution date. Second, the Texas House Corrections Committee is about to consider a bill that would modify the clemency process that Mr. Flores would have a right to pursue. The bill would require the Texas Board of Pardons and Paroles to meet in person or by telephone/video call in a capital case, which it is not currently required to do. House Bill 841 has been filed by Speaker Pro Tem Joe Moody. *See* https://capitol.texas.gov/tlodocs/87R/billtext/html/HB00841I.htm.

When Mr. Gonzales's execution date was set, he, *unlike Mr. Flores*, had no litigation pending in either state or federal court. And *unlike Mr. Flores*, Mr. Gonzales's current litigation has nothing to do with attacking the integrity of the underlying conviction. In other words, the circumstances presented here offer far more reason for the State to exercise restraint; and yet, unlike the State's counsel in Mr. Gonzales's case, the State's counsel here urges rash action in the face of significant pending challenges to the legitimacy of Mr. Flores's conviction.

Again, setting an execution date at this time will only spawn additional litigation because Mr. Flores would be compelled to immediately seek a modification from this court and also a stay from the CCA in light of the pending second subsequent state habeas application and the agreement to pursue DNA testing. But the setting of an execution date would also trigger other duties and thus any and all other litigation that might still be available to Mr. Flores. *See, e.g., McFarland v. Scott*, 512 U.S. 849 (1994) (explaining that indigent persons sentenced to death in state courts are entitled to "qualified legal representation in any 'postconviction proceeding' under 28 U. S. C. § 2254 or § 2255").[8]

[8] The statute of limitations that applies on claims that are only just now being exhausted in state court does not run for approximately eleven months from the entry of the CCA's judgment. *See* 28 U.S.C. 2244(b)(2), (d)(1), (d)(2). (The limitation period was tolled once Mr. Flores filed his now-pending second subsequent writ application in state court pursued to TEX. CODE CRIM. PROC. art 11.071, sec. 5(a)).The CCA has long insisted on what is known as the "two-forum rule," which required a habeas applicant to "decide which forum he [would] proceed in, because [the state courts would not] consider a petitioner's application so long as the federal courts retain[ed] jurisdiction over the same matter." *Ex parte Green*, 548 S.W.2d 914, 916 (Tex. Crim. App. 1977)

For instance, Texas provides Mr. Flores with a right to seek executive clemency, for which undersigned counsel would be responsible. *See Harbison v. Bell*, 129 S. Ct. 1481, 1485 (2009) (describing the importance of clemency and holding that that "§ 3599 authorizes federally appointed counsel to represent clients in state clemency proceedings."). Clemency is a completely different process that is about the quest for mercy, not the adjudication of legal claims. *See Herrera v. Collins*, 506 U.S. 390, 412-15 (1993) (describing the role of clemency as providing "the 'fail-safe' in our criminal justice system" with its long-standing roots in an executive's "'power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.'") (quoting 4 W. Blackstone, Commentaries).

State Bar of Texas's (SBOT's) *Guidelines and Standards for Texas Capital Counsel* describe the prevailing professional norms for a clemency representation. The duties of clemency counsel include:

> 1. Clemency counsel should be familiar with the procedures for, and permissible substantive content of, a request for clemency. Clemency

(quoted in *In re Hearn*, 376 F.3d 447, 456 (5th Cir. 2004)). Since February 11, 2004, in *Ex parte Soffar*, 143 S.W.3d 804, 806-07 (Tex. Crim. App. 2004), the CCA has followed a modified form of the rule whereby it will consider the merits of a subsequent writ only "if the federal court having jurisdiction over a parallel writ enters an order staying all of its proceedings for the applicant to return to the appropriate Texas court to exhaust his state remedies." *Id.* at 807. Therefore, former federal counsel was unable to litigate in federal court while Mr. Flores had a habeas claim pending in the state courts.

> counsel should timely contact the Texas Board of Pardons and Paroles to determine the current and present rules and regulations for seeking clemency in death penalty cases. Counsel are advised that these rules and regulations change on a regular basis, thus this immediate contact is absolutely necessary to ensure preparation and filing of proper documents that will be considered by the Board.
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> 2. Clemency counsel should conduct an investigation in accordance with Guideline 12.2.
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> 3. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.
>
> 4. Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if it is not, should seek appropriate redress.

SBOT Guideline 12.2(C).[9] The extensive duties to investigate are delineated in Guideline 12.2. These further duties are also the responsibility of undersigned counsel and include, for example, the obligation to investigate a client's complete life history, all potentially mitigating evidence, the circumstances of the underlying offense, the trial record, the post-conviction record, as well as the client's history since incarceration for the offense for which the State is seeking to execute him. *See id.* Guideline 12.2.[10]

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[9] The complete State Bar of Texas Guidelines, modeled after guidelines promulgated by the American Bar Association, are available at: https://www.texasbar.com/AM/Template.cfm?Section=Consider_a_State_Bar_Committee&Template=/CM/ContentDisplay.cfm&ContentID=28741.

[10] At trial, counsel conducted *no* mitigation investigation and presented no punishment-phase case whatsoever. This failure was not rectified in the initial writ proceeding, making the investigation required at this time that much more labor-intensive.

To conduct a reasonable clemency investigation as mandated by SBOT Guidelines and national norms requires considerable time and resources and is generally pursued only *after* all other post-conviction remedies have been exhausted and failed.[11] Moreover, the mere submission process is quite onerous. *See* 37 Tex. Admin. Code § 143.57.

The deadline for filing a clemency application is, in Texas, expressly tethered to an execution date. *See id.* § 143.57(b) (requiring submission "not later than the twenty-first calendar day before the day the execution is scheduled."). Setting an execution date now per the State's request, when Mr. Flores has a right to expect that undersigned counsel will conduct an exhaustive investigation and present all available legal claims in judicial proceedings, would be fundamentally unfair and infringe upon his due process right to pursue all avenues instantiated in federal and state law before the State endeavors to execute him.

Absolutely no statutory provision or other law requires the Court to set an execution at this time.[12] By contrast, all sound principles of judicial economy and

[11] There are four options under the Texas Administrative Code and the Texas Constitution for capital clemency in Texas: a 30-day reprieve request directly to the governor; a request to the Board for recommendation of commutation of sentence; a request to the Board for recommendation of reprieve from execution; and a request made by the governor to the Board to investigate a case and consider recommendation of a lesser sentence (a commutation). All but the last—the governor's request to the Board for investigation and consideration of a recommendation of commutation to a lesser sentence—must be brought by the death-row prisoner or on his behalf by counsel. Typically, in death-penalty cases, a death-sentenced prisoner will seek all three available forms of relief.

[12] Significantly, the framework that Texas's Legislature adopted to govern the setting of

fundamental fairness argue in favor of denying the State's Latest Execution Motion.

As noted above, Mr. Flores now has numerous, meritorious claims based on both new law and new evidence pending. There is nothing to be gained by setting a date now—and only costs. There is the cost of judicial inefficiency. There is also the pronounced humanitarian cost. Once an execution date is set, TDCJ policies and procedures require that a death-row inmate be transferred out of what is already extreme conditions of confinement and further segregated.[13] This process involves removing the inmate to an area of the building where only those awaiting imminent execution reside and placing him under 24/7 surveillance. There is no compelling reason to subject Mr. Flores to this additional punishment at this time after over twenty years on Texas's death row. Indeed, there is no reason to act now at all when a basis to withdraw the execution date, per state law, already exists. *See* TEX. CODE

execution dates in capital cases does *not* limit district courts' constitutional authority to exercise discretion to delay setting a date. By contrast, the statutory scheme does limit district courts' authority to withdraw or modify execution dates once set. *See* TEX. CODE CRIM. PROC. art. 43.141. Indeed, the statute does not dictate a precise timeline for scheduling an execution—except to categorically prohibit setting a date at certain times. *See id.* art. 43.141(a) & (c). Thus, the plain text of the statute promotes restraint: both in the setting of an execution date and, once a date is set, in withdrawing or modifying that date. *See id.* art. 43.141(d)(1)-(2)

[13] Since 1999, Texas has imposed mandatory solitary confinement for every individual who is sentenced to death. Solitary confinement involves residing in an individual cell on average twenty-three hours per day, with a complete prohibition on recreating or eating with other inmates. An average cell is no bigger than 8 feet by 12 feet, and contains only a sink-toilet combination, and a thirty-inch-wide steel bunk with a thin plastic mattress. Most of the cells contain a small slit, but seeing out of it requires rolling up the mattress and standing on it on top of the bunk. The overwhelmingly negative effects of this practice on inmates are well-documented. *See, e.g.,* Human Rights Clinic at the University of Texas School of Law, *Designed to Break You: Human Rights Violations on Texas' Death Row* (April 2017).

CRIM PROC. art. 43.141 (d)(1). That is, the State's premature request is only likely to engender more work arising from the immediate need to unwind that very setting. All circumstances argue in favor of denying the Latest Execution Motion at least until the second subsequent state habeas application is resolved.

CONCLUSION AND REQUEST FOR HEARING

The integrity of the criminal justice system requires that this Court deny the State's Latest Execution Motion while Mr. Flores's second subsequent state habeas application is pending and while counsel's efforts on behalf of Mr. Flores are thwarted by limitations imposed by a lingering pandemic.

The State makes no cogent argument to justify its counsel's desire for a July 2021 execution date for Mr. Flores. Mr. Flores has been on death row for over twenty years. For reasons beyond his control, he has only recently received the competent representation to which he should have been entitled from the outset. Setting an execution date now, per the State's request, would result in an execution date that is wholly arbitrary, unfair, and impractical.

The State's Latest Execution Motion should be summarily denied as contrary to the plain implications of the text of TEX. CODE CRIM. PROC. art. 43.141(d)(1) since he already has a subsequent state habeas application pending. But at the very least, Mr. Flores asks that this Court hold a hearing on the State's motion where he is present and is able to participate and consult with counsel. *See* TEX. CODE CRIM.

PROC. art. 11.31 ("The person on whom the writ is served shall bring before the judge the person in his custody, or under his restraint").

For each of the foregoing reasons, as well as in the interest of justice, the State's Latest Execution Motion should be DENIED.

Respectfully submitted,

/s/
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Post-Conviction Attorney for Charles Flores

CERTIFICATE OF SERVICE

The foregoing motion has been served on counsel of record for the State in this matter, Rebecca Ott Labardini, via the electronic filing system as well as on:

OFFICE OF CAPITAL AND FORENSIC WRITS
Benjamin B. Wolff, Director
benjamin.wolff@ocfw.texas.gov

/s/
Gretchen S. Sween

EXHIBIT A

IN THE 346TH DISTRICT COURT

OF EL PASO COUNTY, TEXAS

STATE OF TEXAS	§	
	§	
v.	§	**CAUSE NO 20060D05825**
	§	
FABIAN HERNANDEZ	§	

ORDER DENYING STATE'S MOTION REQUESTING EXECUTION DATE

On this date, this Court, came to consider the State's Third Motion Requesting Execution Date for Defendant Fabian Hernandez. After considering the State's Motion and the Defendant's response brief, the court hereby DENIES the State's motion without prejudice, for the reasons set forth below:

1. On April 23, 2020 the execution date was stayed by the Court of Criminal Appeals due to the COVID-19 pandemic.

2. Defendant intends to seek clemency.

3. Due to the COVID-19 pandemic, counsel was unable to meet with Mr. Hernandez because all visitation in the Texas Department of Criminal Justice (TDCJ) was suspended.

4. Due to the COVID-19 pandemic traveling to meet with Mr. Hernandez posed a significant health risk to not only counsel but anyone else that wished to travel to TDCJ.

5. According to the TDCJ website, that suspension has now been lifted starting today, March 15, 2021 and visitation has now resumed but in a limited capacity.

6. Even though TDCJ resumed visitation in a limited capacity today, there is still an unnecessary risk not only to TDCJ personnel, but to the victim's family as well as the defendant's family who will be present during the execution process.

THEREFORE, this matter will be set for a status hearing in June 2021. The specific date and time will be provided under a separate order.

SIGNED this the 15th day of March, 2021.

JUDGE PATRICIA C. BACA

EXHIBIT B

MOTION REQUESTING EXECUTION DATE MODIFICATION

Cause No. **04-02-09091-CR**

STATE OF TEXAS	§	IN THE 454TH JUDICIAL
v.	§	DISTRICT COURT OF
RAMIRO FELIX GONZALES	§	MEDINA COUNTY, TEXAS

The State of Texas, by and through the undersigned assistant district attorney, respectfully requests modification of a prior execution date setting for RAMIRO FELIX GONZALES, convicted of capital murder in the above-styled cause. *See* Tex. Code Crim. Proc. art. 43.141.

On September 6, 2006, the defendant, RAMIRO FELIX GONZALES, was sentenced to death after being convicted of capital murder in cause number **04-02-09091-CR** in the 38th District Court of Medina County, Texas.

On June 17, 2009, the Court of Criminal Appeals affirmed Gonzales's conviction. *Gonzales v. State,* No. AP-75,540 (Tex. Crim. App. June 17, 2009), and Mandate was subsequently issued on July 13, 2009. Thus, all requirements for setting an execution date have been met. *See* Tex. Code Crim. Proc. art. 43.141(a).

On September 14, 2020, this Court set an April 20, 2021, execution date for RAMIRO FELIX GONZALES. A warrant of execution issued on September 21, 2020, to effectuate this execution setting. The State now believes that the present execution date should be modified, and the warrant should be recalled.

The State, therefore, respectfully requests that the Court modify Gonzales's present execution date to the _____ day of _____, 2021. The State

has attached a proposed order and a proposed death warrant for the convenience of the Court and District Clerk.

Respectfully submitted,

MARK P. HABY
Medina County Criminal District Attorney

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Medina, Texas 78861
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Attorney for the State

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing pleading was served by placing same in the United States mail, postage prepaid, on this the _____ day of _____, 2021, addressed and electronically sent to:

Michael Gross
1524 N. Alamo Street
San Antonio, Texas 78215
email: lawofcmg@gmail.com

Office of Capital and Forensic Writs
Stephen F. Austin Building
1700 N. Congress Ave, Suite 460
Austin, Texas 78701
Via service email: service@ocfw.texas.gov

MARK P. HABY
Medina County Criminal District Attorney