

195th DISTRICT COURT
DALLAS COUNTY, TEXAS

STATE OF TEXAS	§	Trial Cause No. F98-02133-N
	§	
v.	§	
	§	
CHARLES DON FLORES	§	Writ Cause No. W98-02133-N(B)

This is a death-penalty case.

**MOTION FOR ACCESS TO EVIDENCE
TO CONDUCT DNA TESTING**

Charles Don Flores is currently confined on Texas’s death row pursuant to the judgment of the 195th District Court, Dallas County, Texas, entered in 1999. By and through counsel, Flores files this Motion for Access to Evidence to Conduct DNA Testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure. Flores’s counsel have previously conferred with counsel for the State, represented in this case by the Dallas County District Attorney’s Office (“DA’s Office”), about seeking the DNA testing described below. The State has not yet clarified whether it opposes the relief requested in this motion.¹ In support of this motion, Flores respectfully shows the following:

¹ Dallas County’s elected District Attorney has publicly expressed a commitment to working to root out wrongful convictions and other problems with a broken criminal justice system. He has joined with the organization “Fair and Just Prosecution” to raise awareness about systemic problems with the “arbitrary and capricious” application of the death penalty in particular and has signed a statement noting that this punishment “costs taxpayers over \$1 million per death sentence, runs counter to our constitutional ban against cruel and unusual punishment and

RELIEF REQUESTED

Flores seeks a court order allowing access to physical evidence within the State's control and currently being held by either (1) the Dallas County crime lab aka the Southwestern Institute of Forensic Sciences ("SWIFS") or (2) the Farmers Branch Police Department, which conducted the original investigation of the 1998 crime for which Flores has been confined on death row since 1999.

The physical evidence in question is a piece of chewing gum found at the crime scene near the slain body of the human victim's dog. It is undisputed that an unknown male DNA profile was obtained from the gum as a result of testing the State pursued in 1999. The State represents that the gum still exists and is susceptible to further testing.

Flores is asking that either the gum extract obtained during previous testing or part of the gum itself be sent to a reputable laboratory, to be designated by his expert, Dr. Colleen Fitzpatrick of "Identifinders International." Identifinders International is a forensic genetic genealogy consulting firm that has successfully identified both murder victims and perpetrators using DNA profiles and contemporary analytical methods. Dr. Fitzpatrick is a scientist and the founder of the new field of "Forensic Genealogy." She was the first individual to use genetic

guarantees of due process and equal protection, fails as an effective deterrent, and does not reduce crime." See **Exhibit 1**.

genealogy to generate investigative leads by combining DNA analysis with genealogy, a forensic technique Dr. Fitzgerald pioneered utilizing continuously expanding databases to help solve cold cases. She solved the first cold case using this methodology in 2015. In 2018, it was used to identify the “Golden State serial killer” after decades of failure.² Dr. Fitzpatrick is the co-founder of the “DNA Doe Project,” which identifies previously unidentified bodies, and currently runs Identifinders International. *See Exhibit 2.*

Upon obtaining access, Dr. Fitzpatrick will direct that an SNP DNA profile be derived from the gum using contemporary extraction techniques, which will then be subjected to a new analytical methodology, forensic genetic genealogy, to determine whether the single source of male DNA on the gum can be identified.

Flores’s counsel with the Innocence Project of Texas has offered to bear the costs associated with the testing and analysis requested. Flores merely seeks a court order that will permit access to the gum to enable testing to adduce highly relevant information that is likely exculpatory.

² After the methodology was utilized to identify the Golden State serial killer in 2018, forensic genetic genealogy has become generally accepted. Now, in 2022, police agencies across the country are turning to forensic genetic genealogy to solve cases.

STATEMENT OF THE CASE³

I. Initial Investigation Culminated in the Use of “Investigative Hypnosis” on a Key Witness.

Betty Black was murdered in her home on Bergen Lane in Farmers Branch, Texas on January 29, 1998. She lived there with her husband, Bill Black. Their adult son Gary was then in prison for drug-dealing. It was widely known that Gary had left drug money hidden in the Blacks’ house; it was also rumored that Gary had stashed money in various cars that he collected. One person very interested in this money was Gary’s estranged common-law wife, Jackie Roberts, who lived in the same neighborhood with her mother and the two children Gary had sired. During the 4-5 weeks before Mrs. Black’s death, Jackie had been “speeding” constantly on amphetamines, running around with a drug dealer/user named Richard Childs, and leaving it to others to take care of her kids. Jackie and Childs were frequently seen in Childs’ distinctive purple-and-pink Volkswagen Bug. 35RR64; 38RR48; 34RR108, 110.

³ Citations below to “RR” refer to the Reporter’s Record of the trial, with the volume number first followed by the page number or page range. Aside from the exhibits attached to this motion, all information about the extra-record information uncovered since 2016 is found in the transcripts of the evidentiary hearing held in this Court in 2017 or in the 11-Volume Appendix supporting Flores’s second subsequent state habeas application filed in this Court on February 3, 2021.

One person who had previously seen that car *at Jackie's house* was the Blacks' next-door neighbor, Bob Barganier.⁴ 35RR174-178. It was unclear why Mr. Bargainer knew where the girlfriend of his neighbors' imprisoned son lived.⁵ But Mr. Barganier's wife, Jill Barganier, was one of several neighbors who observed Childs' Volkswagen pull into the Blacks' driveway around 6:45 AM, on January 29, 1998, the morning Betty Black and the family's Doberman were shot dead during an attempted robbery.

Mrs. Barganier later explained that, while she was going through her morning routine, she had heard a noise outside, looked through the mini-blinds in a window on the right side of her house and saw a car in the Blacks' driveway on the left side of her house that she claimed never to have seen before. She made this observation while getting her kids ready for school and preparing to wake up her husband. Her attention was arrested by one of the men, the car's driver, drinking out of a beer bottle.

Sunrise was recorded that day as 7:25 AM per the *Dallas Morning News*. The lights were on inside Mrs. Barganier's house but not outside; and a photograph of

⁴ Bob and Jill Barganier's last name was misspelled as "Bargainer" in the trial transcript; the correct spelling is used here.

⁵ It was also never explained to the jury that, after the crime, Bob Barganier contacted the police to tell them where Jackie, whom he assumed was a prime suspect, might be hiding.

Bergen Lane, where the Barganiers and Blacks lived, shows there were no streetlights on the block. 38RR13-19.

Around 9:30 AM, police responded to a 911 call from Mr. Black, who had come home and found his wife dead. 34RR63-67 As Farmers Branch police began to canvass the neighborhood, they found several witnesses who had seen “two white males, 25 years of age or older” getting out of a Volkswagen Bug at the Blacks’ house.

Shortly after 10:00 AM, Mrs. Barganier arrived at the scene and, according to police records, described seeing “a yellow Volkswagen bug” whose *driver* was “big, with long brown hair,” “a white male, about 30 years old and with a large build” with “a quart beer bottle in his hand when he got out of the car and that he stopped and put the bottle back into the VW before he walked up to the house.” She then described *the passenger* as “also a white male with darker hair than the driver,” and she “thought it was ‘longer.’”

At least four neighbors (Mrs. Barganier, Michele Babler, and the latter’s two minor sons) reported seeing two “white males” getting out of a Volkswagen Bug and entering the Blacks’ house through the garage. All of them went to the Farmers Branch police station the day of the murder and were shown photographic lineups of some sort. No record was kept of what they were shown, although law

enforcement must have had a suspect or suspects in mind to be able to create photo lineups. In any event, no one was able to make an identification that day.

Later that same afternoon, numerous neighbors provided handwritten “Affidavits” on police forms. Some described having seen a car pull into the Blacks’ driveway and two white males of about the same age get out. One affidavit noted that the passenger had been wearing tan coveralls; another suggested that both men had been wearing black. Police records also refer to an “Affidavit” provided by Mrs. Barganier. Although the handwritten affidavits from other neighbors are in the police file, *the one from Mrs. Barganier has never been produced*; nor has its absence ever been explained.

Later that same night, Farmers Branch PD were informed by an individual named Doug Roberts that Childs was the person who owned the purple-and-pink Volkswagen, a fact the police had already ascertained by then. But Doug also told police that he had seen Childs get into the Volkswagen around 6:30 AM after Childs had dropped Doug’s ex-wife Jackie off at her mother’s house, less than a mile from the Blacks’ house. Doug knew that Jackie and Childs had been having an affair and doing drugs together. After he learned about the murder around noon on January 29th, he spent hours with Jackie, going through a bag Childs had left in her car and destroying evidence of some kind (including a map to the Blacks’ house). Doug claimed during Flores’s trial that he tried to convince Jackie to go to the police to

get control over the narrative; but when Jackie refused, Doug dropped her at a motel then went to the police on his own, telling them that he did not know where Jackie was. In his discussions with police that night and over the next few days, he said nothing about seeing a second male—let alone a large Hispanic male with short, shaved hair—get into the Volkswagen with Childs; and he agreed that Jackie had not said anything, before her arrest several days later, about Childs being with a Hispanic male. That morning, Doug perceived Jackie as “being in a frenzy” and insisting that Childs had just “gone to get donuts.” Doug was, in any case, certain he had seen Childs and his distinctive car soon before that same car was reportedly seen pulling into the Blacks’ driveway in the same neighborhood. 34RR223-295.

Although Farmers Branch PD had a history with Childs and knew that he was holed up in his grandmother’s house in North Dallas, they did not arrest him—until several days after the murder when he attempted to drive off wearing a feeble disguise. Moreover, while the grandmother’s house was under surveillance, narcotics investigators stood by while Jackie visited Childs and delivered a bag to him (which later was found to contain an opened box of the same ammunition that had been used to kill Mrs. Black). Police allowed Jackie and Childs to meet together privately for about *four hours*, and Jackie was permitted, thereafter, to drive off.

On January 30, 1998, the day after the murder, and before anyone was arrested, the *Dallas Morning News* ran a front-page story about Mrs. Black’s murder.

The article described the purple-and-pink Volkswagen Bug that the police were searching for (although they had already found Childs himself and declined to arrest him). 38RR21. That morning, Mrs. Barganier returned to the Farmers Branch police station to create a composite sketch of the driver. After Mrs. Barganier created that composite sketch using a computer program, Farmers Branch PD showed her a six-person photo lineup that included Childs' picture. She reportedly picked Childs out:



With this identification, police knew that Childs had been observed, not just in the neighborhood, but at the Blacks' house right before the crime occurred.

The next day, January 31, 1998, Mrs. Barganier returned to the Farmers Branch police station and was shown another six-person photo lineup. This one included a more recent picture of Childs who was, by then, in custody. She again picked out Childs:



After she identified Childs a second time, Mrs. Barganier was shown another photographic lineup of some kind, but no record of its contents has ever been produced.

A few nights later, the lead investigator on the Black case, Officer Callaway, and another unidentified officer went to Mrs. Barganier's home. The officers wanted her to create a second composite sketch, this time of the car's passenger—whom law enforcement had already decided was Charles Flores, absent any evidence that he had been at the scene.⁶ Mrs. Barganier would later testify that she was “just a wreck,” “very nervous,” and scared for “the safety of [her] children.” She “couldn't stop shaking” and “felt responsible” for Mrs. Black's death because she “knew these men were there, and [she] dismissed it.” 36RR290-291. She was highly motivated to help.

⁶ Flores had, by then, attempted to destroy Childs' Volkswagen, which the latter had abandoned in the “Big Tex” trailer park in Irving where Flores was then living. Flores never denied trying to get rid of Childs's conspicuous car after he learned that the police were looking for it. He also never denied that he sought to evade arrest. But he has consistently denied any role in Mrs. Black's death, which he learned of a few days after Childs had abandoned his car outside of Flores's trailer. *See Exhibit 3.*

At trial, Mrs. Barganier claimed that she had asked the police to put her under hypnosis to help her “do a good composite.” 36RR289-291. It is unclear how she knew that hypnosis was something police officers did. No records were kept of conversations between Mrs. Barganier and the officers about setting up the hypnosis session. But that same night, Officer Callaway contacted a patrol officer, Alfredo Serna, about hypnotizing Mrs. Barganier the next morning. Officer Serna had collected evidence at the crime scene and thus was involved in the Black murder investigation. He had never hypnotized anyone before, but he had received a certificate after taking a law enforcement hypnosis course two years earlier.

The morning of February 4, 1998, Mrs. Barganier met Officer Callaway at the police station for the hypnosis session. 36RR27, 31. The hypnosis session was videotaped,⁷ but no documentation reflects when Mrs. Barganier arrived, when she entered the investigator’s office, or when the camera was turned on. The camera was set up by Officer Jerry Baker, who was second in command on the Black murder investigation. Before setting up the hypnosis session, Officer Baker already knew Flores was a suspect. Additionally, the team had already obtained a recent picture of Flores and had it in a six-person photo lineup ready to show Mrs. Barganier that

⁷ The original videotape of the hypnosis session that was made part of the Clerk’s Record in 1999 was, at some point, checked out by lead prosecutor, ADA Jason January, and never returned. However, a copy was again made part of the record during the 2017 evidentiary hearing as Applicant Exhibit 26.

day.⁸ Baker sat in on the hypnosis session, mostly off camera; therefore, it is unclear if he shared any information with Officer Serna during the session. The camera focused on Mrs. Barganier and captured only a small part of Officer Serna's body, not including his face.

The videotape shows that Officer Serna conducted a very brief pre-hypnotic interview. He did not ask Mrs. Barganier about her mental state, health history, or other relevant questions. She merely described how she had looked out a window, seen a Volkswagen Bug, seen two men get out, noticed the driver's hair, noticed the driver drinking out of a beer bottle, and remembered the passenger's hair as "basically like the driver's." She also mentioned seeing the men walk off, after which she closed her mini-blinds. At one point, she confused the driver and the passenger. Officer Serna asked no follow-up questions.

During the hypnosis session itself, Officer Serna invited Mrs. Barganier to imagine many things, such as: glue on her fingers, her "very own special theater ... decorated in any way [she] like[d]," a "special leather chair," an elevator ride, a "yellow button" on an imaginary remote control, "magical letters" floating over the two men's heads, and a time-travel door she could walk through. He instructed her

⁸ During Flores's trial, Officer Baker testified falsely to the Court that he had never heard the name "Charles Flores" and did not know what he looked like before the hypnosis session. But other documents in the long-concealed police file show that this was untrue. Baker knew Flores's name, knew what he looked like, and had been involved in staking out the trailer where Flores was then living with his girlfriend Myra—all before the hypnosis session in which Baker participated.

that, when he reached the number zero, she “could just press the [imaginary] play button, this play button will take us to Thursday, January 29. It’s a very important day of significance.” He also instructed her to imagine “you’re going to be seeing a documentary, you’re going to be seeing a film of the events that occurred on that day, on that morning.” And while she was imagining this documentary, he invited her to “pan” in on each man’s face and then “[t]ry and imagine, if you will, the shape of his face, if it’s round or oval or square.”

During the hypnosis session, Mrs. Barganier described what she remembered in the present tense. She kept returning to the beer bottle. Officer Serna eventually asked her to use her imaginary remote control to “fast forward” passed that scene. Mrs. Barganier again said of *the passenger’s hair* that it “looked a lot like his friend’s”—the driver’s—which she described as “*dirty, long and wavy.*” Throughout the hypnosis session, Officer Serna repeatedly said “you’re doing good” and “you’re doing fine.” Additionally, Officer Serna made numerous suggestive statements, during and immediately afterwards:

- “Is his hair short, is it **shaved**, is it **neatly cut**?” [asked about the *driver* whose hair she had already described as “dirty, long, and wavy”]
- “Does he have it **neatly cut** or is it **trimmed**?” [asked about the *passenger* whose hair she had already described as “A lot like his friend’s” and “long.”]
- “You will also remember everything that you’ve said in this session and you might find yourself being able to recall other things as time moves on.”

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

The hypnosis session yielded some new details, including a modified description of the Volkswagen. The day of the murder, Mrs. Barganier had described the car as “yellow,” but while under hypnosis she claimed to see a “pink top” and “waves” that looked “a bit purple”—which matched the description recently published in the newspaper. She also described the driver in more detail as having “dark blonde [l]ong, wavy” hair, “Blue eyes. Pretty eyes,” “Kinda young”—details consistent with Childs’ recent mug shot that she had picked out of a photo lineup. As for the passenger, she described only his hair (“a lot like his friend’s. . . . I see it to his shoulders”) and that “[h]e has brown eyes.” At the conclusion, Mrs. Barganier repeatedly asked “Did I do ok? Did I help in any way?”

Right after the hour-long hypnosis session, Officer Serna created a form. He noted the purpose for the hypnosis session: to obtain “[a]ny additional information pertaining to the suspect’s identity and any other information pertinent to the case.” He summarized his memory of the session, noting that Mrs. Barganier had described “two dirty men had exited the vehicle” and “Man B” (the passenger) “as having dark

brown or blonde shoulder length hair.” Officer Serna also claimed that Mrs. Barganier had “said that he had turned and looked at her and she saw that he had brown eyes”—yet the videotape does *not* reflect her saying anything about the passenger looking at her.

After the hypnosis session, Officer Callaway asked Mrs. Barganier to do additional tasks to assist in the investigation. First, she was asked to use a computer to create a composite sketch of the passenger, which she did:



Despite Mrs. Barganier’s previous descriptions to police and the sketch she had just created, law enforcement then showed her a six-person photo lineup featuring Hispanic males with short, shaved hair, including a recent picture of Charles Flores:



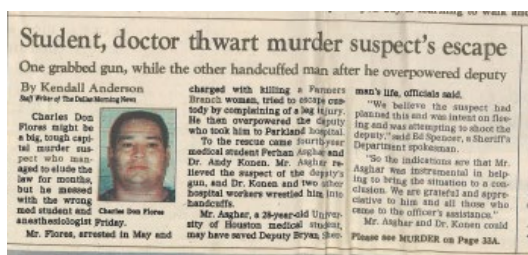
Even with the suggestive nature of Flores’s photo—with his image in the center of the top line and being the only one featuring bright clothing, a distinct background, and no white bar blocking part of the picture—*Mrs. Barganier could not pick anyone out.*

Neither Mrs. Barganier nor any other neighbor had described either of the men seen exiting the Volkswagen Bug as Hispanic or as having short, shaved hair. But Mrs. Barganier was asked repeatedly, under hypnosis, if either man had “shaved,” “neatly cut,” or “trimmed” hair. Then, after she created a composite sketch of a white male with long, dirty hair, Officer Callaway presented her with a six-person photo lineup, featuring Hispanic males, including Flores with “shaved” hair:



Since most of law enforcement's photographic lineup forms were not paired with corresponding photo lineups, it is unclear if this was the first time Mrs. Barganier was shown Flores's picture. But it is undisputed that *she failed to pick out Flores's photo*, right after being given repeated suggestions during the hypnosis session to consider whether she had seen a person with "shaved," "neatly cut," or "trimmed" hair got out of the purple-and-pink Volkswagen.

Over the next several months, Flores's photo, depicting him as a large Hispanic male with short, shaved hair, appeared in the news. The exact picture used in the photo lineup presented to Mrs. Barganier on February 4, 1998 was reproduced in several *Dallas Morning News* articles before Mrs. Barganier eventually claimed, at the eleventh hour in court, that he was the passenger she had seen getting out of Childs' Volkswagen Bug the morning of the murder. *See, e.g.:*



No records capture any further pre-trial interactions between Mrs. Barganier and law enforcement or the Dallas County DA's Office after the busy day when she was hypnotized, created a composite sketch of the passenger, and then failed to pick Flores out of a photographic lineup. But the prosecutors likely interviewed her at some point, as she was eventually subpoenaed to appear at Flores' trial.

II. Trial Began Absent Adequate Disclosures.

About three months after the murder, on May 1, 1998, Flores was apprehended in Irving, Texas and arraigned for capital murder. He had sought to evade arrest after learning from family members that a report on the radio suggested he was wanted in connection with Mrs. Black's murder. Six months after his arrest, jury selection began on January 8, 1999—less than a year after the offense. 2RR.

When jury selection began, the State had yet to produce any discovery to the defense. 2RR88-89. While potential jurors were filling out questionnaires, the State produced, for the first time, a small volume of discovery. At that time, lead prosecutor ADA Jason January suggested he was, in that moment, providing “anything exculpatory” the State had; yet later in that same hearing, ADA January said to defense counsel: “I’m going to look through and see if there’s anything exculpatory. If there is, I’ll give it to you and then no later than cross-examination I’ll give it to you.” 2RR88-90. ADA January then promised to disclose several categories of material—if they existed; but he failed to do so. For instance, ADA January represented to the Court that he did not have any evidence of “confessions involving the Defendant,” when, by that date, the State had a statement (prepared by law enforcement) that the State ultimately relied on heavily at trial as “proof” that Flores had “confessed” to his friend Homero Garcia that he had been at the Blacks’ house and had shot the dog.

On January 19, 1999, ADA January denied having any relevant statements, although Garcia had signed a statement eight months earlier on May 18, 1998 while in FBI custody. 3RR4. Years later, it was discovered that, while Garcia was in custody, he had been told that a gun he had been caught with, in violation of the terms of his probation, was the weapon that had been used to kill Mrs. Black (which was untrue). Garcia had thereafter been promised (and given) undisclosed leniency if he testified for the State against Flores at trial.

Yet ADA January insisted “there hadn’t been any deal with” anyone. 3RR25. The Court ordered: “If any deals are made, make them known to the Defense.” *Id.* However, ADA January never made such disclosures, although overwhelming circumstantial evidence now shows that he made multiple undisclosed deals with the State’s trial witnesses to ensure their cooperation. *See, e.g., Exhibit 4; Exhibit 24.* ADA January’s disclosure failures included suppressing the fact that he had contacted SWIFS and asked it to do secret paternity testing on Jackie Roberts before trial because she thought she was pregnant as a result of her relationship with accomplice Childs:

SOUTHWESTERN
INSTITUTE OF FORENSIC SCIENCES

DATE 4 May 98 FL NUMBER 98 P0282
TIME 0900
CALLER NAME/NUMBER ADA January 11

Paternity testing requested
on Jackie Roberts fetus.
A.F. - Richard Childs

Jackie Roberts instructed to
call DNA. Give her
Jim Rizy's pager #
(214) 961-7133.

ADA January also failed to reveal his requirement that Jackie meet privately with him weekly in order to avoid having her probation revoked; and, more significantly, he ensured the State would not prosecute her for the charge of conspiracy to commit capital murder that had been filed against her soon after Betty Black's death was discovered. *See Duggan v. State*, 778 S.W.2d 465 (Tex. Crim. App. 1989) (holding that a deal between State and testifying witness can be inferred from the circumstances suggesting the existence of some understanding for leniency

and the existence of a formal agreement is not required to make the witness impeachable).

By trial, ADA January had pursued indictments, not against Jackie Roberts, but against Flores's elderly parents, Lily and Caterino Flores. The objective was to induce them to save themselves by implicating their son. The Floreses, who had never been in trouble with the law, were treated like criminals, thrown in jail, and threatened with prosecution for allegedly "hindering the apprehension of a fugitive," *i.e.*, their son. ADA January also made multiple attempts to indict Flores's girlfriend and alibi witness, Myra Wait, for the same.

Additionally, unbeknownst to the defense, ADA January had arranged for the intimidation of several other witnesses in hopes of eliciting statements to use against Flores. *See, e.g.*, **Exhibit 5**. Moreover, January induced several witnesses to testify before the Grand Jury convened in the case pending against co-defendant Childs. Those transcripts, containing significant impeachment evidence, were not produced to Flores. Those transcripts demonstrate an attempt by State actors to shift responsibility for Mrs. Black's death away from Childs and onto Flores, although ADA January had been told by more than one witness, including Jackie Roberts, that Childs had shot Mrs. Black.

III. The Presentation of Evidence Began Although the State Had No Evidence Linking Flores to the Crime Scene.

When trial began, it was uncontested that two men had entered the Blacks' house the morning of January 29, 1998, and torn up the bathroom walls in search of something (and had failed to find the \$39,000 of drug money that was hidden in the house). One of these two men had shot Mrs. Black with a .380 caliber pistol. Although the weapon was never found, a bullet and shell casing were recovered that allowed for identification of the type of weapon and ammunition that had caused Mrs. Black's death. No competent evidence was ever adduced of the source of the dog's fatal bullet wound. 36RR146-149.

It was also uncontested that one of the two men who had entered the house on January 29, 1999, was Childs, an individual seemingly known to multiple law enforcement agencies in the Dallas metroplex.⁹ Investigators had been told by multiple witnesses that Childs was known to carry a .380 with him at all times; but in the State's Opening Statement, ADA January argued, absent any evidence, that the State would prove that Flores had used a .380 to shoot Mrs. Black and Childs had shot the dog using a "bigger gun," a .44 magnum found in a closet at Childs's

⁹ Childs, like Doug Roberts, had an history with the Farmers Branch narcotics investigators that was acknowledged, but not explained. 28RR192-193. After Childs was paroled in 2016 and some of his parole records were made available, it became clear that Childs' father was "Roy Childs," who had been a police officer with Irving PD, the entity that had arrested and helped interrogate Homero Garcia.

grandmother's house. ADA January made these representations knowing that, during a partially recorded custodial interview with Childs, during which law enforcement had told Childs to implicate Flores to save himself, Childs had admitted that the .44 magnum had *not* been used at the Blacks' house; moreover, multiple witnesses, including Jackie Roberts, had told ADA January before trial that *Childs* had shot Mrs. Black.

A. During trial, a mere hint of buried exculpatory evidence surfaced.

When trial started, the State had no physical evidence linking Flores to Mrs. Black's murder. The State also had no eyewitnesses (other than co-defendant Childs, who did not testify and, unbeknownst to Flores, had already been promised a deal that would eliminate multiple cases pending against him, including the capital murder charge and drug charges for which he had been out on bond when the murder occurred).

On March 23, 1999, there was brief testimony about a "big old piece of green gum" that had been found at the crime scene near the slain bodies of Betty Black and her dog. This testimony came out during the cross-examination of Farmers Branch investigator, James Stephens. Seemingly, the defense was moved to ask

about this gum because a crime scene photograph that Stephens had taken showed the fresh wad of gum lying on the bloody carpet in plain view.¹⁰

Q. (defense counsel). Now, I wanted to ask you about a piece of gum. Do you know what I'm talking about?

A. (Stephens). Yes, sir.

Q. Was there a large wad of gum lying in this area right down here by the blood around the coffee table?

A. I believe it was closer to the television than the coffee table.

Q. Okay. And did you-all seize this piece of gum?

A. Yes, sir.

Q. And was it the type of thing that, as you walked through there, it was obvious for you to see?

A. Yes, sir.

Q. I mean, it's right there, a big piece of gum right there in the middle of the floor?

A. It wasn't huge. It was --

Q. Noticeable?

A. Noticeable.

Q. It was green?

A. Yes, sir.

¹⁰ The trial record does not identify an exhibit number or reflect that the photo showing the green gum was marked or offered into evidence. Despite multiple efforts, undersigned counsel has not been able to find this photo in the DA's file.

Q. A big old piece of green gum right down there by the T.V.?

A. Yes, sir.

Q. You-all collected that and sent that to S.W.I.F.S.?

A. Yes, sir.

34RR272-73. Defense counsel did not delve further. On redirect, however, the following was revealed by counsel for the State:

Q (ADA Davis). The gum that was found there by the television in the living room, that was submitted for DNA analysis?

A (Stephens). Yes, sir.

Q. Are you aware the DNA test have shown that Charles Don Flores and Richard Childs [the two suspects] have been excluded as sources for that gum? Are you aware of that?

A. Yes, sir.

34RR274.

This examination occurred on March 23, 1999. In 2021, the State provided a laboratory report prepared by “Gene Screen,” dated March 25, 1999, *two days after* the trial testimony quoted above. *See Exhibit 6*. The report states that *a single-source male DNA profile* was obtained from the gum and Childs and Flores were excluded as the source.

At some point, Mr. Black’s DNA profile was compared to the gum, and he too was excluded.

Seemingly, the photo showing the “big old piece of green gum right down there by the T.V.” was *removed at some point from the State’s file* as undersigned counsel have not been able to find it despite multiple reviews of the file stored in the DA’s Office.¹¹

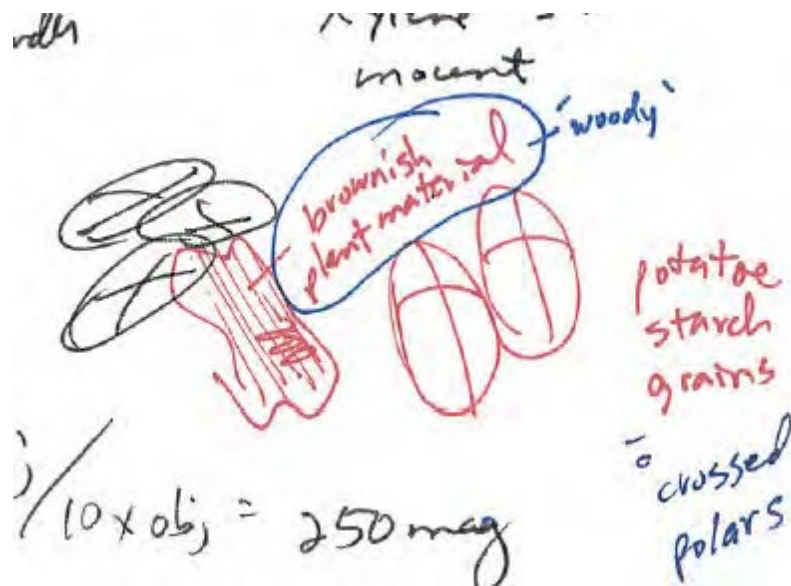
B. The State developed inculpatory evidence on the fly.

The State had subpoenaed Jill Barganier for trial. After seeing Flores in the courtroom at the defense table, she told the prosecutors off the record that she could *now* identify him as the passenger she had seen exiting Childs’ Volkswagen Bug the morning Mrs. Black was murdered. 36RR85-86, 92. When Mrs. Barganier was called to the stand, defense counsel formally objected to her testifying about the identification—which she was making for the first time thirteen months after her observation. The objection was based on the fact that Mrs. Barganier had been put through a hypnosis session conducted by law enforcement. The prosecution argued that the hypnosis session had made no difference but agreed to move on to another witness until they could have a hearing on the issue in the morning. 35RR161.

That night, before the hearing first thing the next morning, the State found an “expert,” George Mount, willing to testify and bless Officer Serna’s hypnosis session. Thereafter, the Court overruled the defense’s objection to Mrs. Barganier’s

¹¹ The file contains no notes from any witness interviews made by members of the DA’s Office.

eleventh-hour identification. The State then continued with its presentation in front of the jury, putting on Charles Linch, a SWIFS trace-evidence analyst. Linch had not done any testing or prepared any report before trial. Linch was called to testify the day *after* the prosecutors had expressly asked him to look for evidence of “potatoes” inside a .44 magnum revolver that had been recovered from Childs’ grandmother’s house after his arrest. The prosecutors personally delivered the gun to SWIFS months after the chain of custody had been broken. 36RR208. During Linch’s testimony, the jury did not see the hasty notes showing Linch’s “process”:



In the middle of trial, Linch came up with his “potato starch” evidence, which ADA January needed to keep the promises he had made during Opening Statements. Specifically, January needed support for his insistence that Childs had been armed with the .44 magnum, equipped with a potato “silencer” that Childs must have used to shoot the dog. That “theory” was, however, contrary to reports January had

received, including during his first meeting with Jackie Roberts, informing January that Childs had shot *Mrs. Black*.

The State also presented “confession” testimony from two heavily compromised individuals.

One was Johnny Wait, the estranged father of Flores’s girlfriend who had met Flores in January 1998 (the month that Mrs. Black was murdered). According to Wait’s trial testimony, Flores confided in him, a virtual stranger, that he had been involved in this crime but had “only shot the dog.” 37RR76, 83, 85, 93, 94. Wait told the jury a fanciful tale, not disclosed before trial, that Flores, whom Wait barely knew, had come over to his house for no apparent reason a few days after Betty Black’s murder and asked Wait to drive him to an auto parts store. 37RR82-83, 85. Wait claimed that he then confronted Flores with a news article about Betty Black’s death. 37RR82. Wait claimed that he had called the Farmers Branch PD immediately after Flores left his house and given them information about Flores’s vehicle, the license plate number, and which direction he had gone. 37RR86. If the events that Wait described had happened, it is perplexing that Flores was not apprehended and instead succeeded in driving out of the country. There is, in any event, no record that Wait ever reported that he had received this “confession.” Instead, records, produced for the first time years after trial, show that Wait was indeed eager to help law enforcement, calling repeatedly with inconsequential tips hoping to collect the

reward money being offered for information leading to Flores's arrest; but Wait had never previously claimed to have met with Flores after the murder and obtained a "confession."

The other source of a reputed "confession" was Homero Garcia, who had signed a statement during a custodial interview with the FBI after being awake for four days. The Statement represented that Flores had told Garcia that Flores had "shot the dog," although Garcia denied on the stand remembering telling the FBI most of what was in the affidavit they had typed up. 36RR229, 221. The jury was not told about the deal that ADA January had promised Garcia to refrain from prosecuting him or otherwise holding him accountable for multiple felonies. That deal is only evident if one digs into Garcia's probation file and court records created after Flores was sent to death row.

The State ended that day by calling Mrs. Barganier to the stand again. She testified that Flores was the passenger she had seen get out of the Volkswagen and pointed him out in court. 36RR283. Although she had told police the morning of the murder that she had seen "two white males" of similar built with similar long, dirty hair, at trial she testified "I'm positive" when asked if Flores was the man she had

seen that morning.¹² On the stand, Mrs. Barganier insisted that her certainty was “[o]ver 100 percent. He’s the man I saw that morning.” 36RR294.

ADA January also asked leading questions of Mrs. Barganier to obscure the significance of her failure to pick Flores out of the photo lineup right after the suggestive hypnosis session. For instance, he urged her to say that the picture she had been shown initially was “old.” Yet Mrs. Barganier had no way of knowing how old the photos of Flores were. Moreover, January knew that the photo of Flores had been taken a few months before the day it was shown to Mrs. Barganier, facts intentionally kept from the defense.¹³

Mrs. Barganier’s trial testimony was compelling and largely unassailed.¹⁴ When defense counsel later recalled her to the stand, he established only that the observation she had made, through her mini-blinds, of two men getting out of Childs’ Volkswagen in the driveway of the house next door had occurred before the sun had risen per *The Dallas Morning News*. 38RR13-19. The defense called no

¹² Flores is a Hispanic male much larger than Childs and who, unlike Childs, had always had short, shaved black hair and needed glasses to see.

¹³ The photo of Flores that Barganier was shown was his “most recent mug shot,” about two months old, per Officer Callaway’s handwritten note in the police file that was not disclosed at trial. That same file shows that Farmers Branch PD had obtained this “most recent mug shot” from the Irving PD before February 4, 1998, the day of the hypnosis session when Mrs. Barganier was shown Flores’s photo.

¹⁴ During cross-examination, defense counsel did not ask Mrs. Barganier about how her description of the car’s passenger had changed radically since the day of the murder. Nor was she cross-examined about the hypnosis session or about her first failed attempt to pick Flores out of a photo lineup.

experts, thus no one explained to the jury either the significance of the hypnosis session Mrs. Barganier had been put through or the circumstances that made it highly unlikely that she had encoded *any* detailed memory of the passenger the morning of her observation. *See, by contrast, Exhibit 7; Exhibit 8.*

In its Closing Arguments, the State downplayed the testimony of several of its own witnesses who had been caught in lies, instead highlighting the testimony of Mrs. Barganier, the next-door neighbor who, unlike most of the State's witnesses, did not have a history of drug use and entanglements with law enforcement. 39RR54, 55, 93, 106.

During the defense's Closing, without obtaining Flores's consent, defense counsel inexplicably conceded that Flores had been present at the scene but had not shot Mrs. Black. 39RR68-85. This concession could have served no defensive purpose because it was a concession of guilt to capital murder under the law of parties, one of the State's theories in the jury charge.¹⁵ Defense counsel also invited the jury to find his client "guilty of murder; find him guilty of whatever you want, but it's not capital murder." 39RR86.

The jury returned a guilty verdict. 39RR113. The State's punishment-phase presentation began immediately afterwards.

¹⁵ Defense counsel did not make any objection to the jury charge on the record at trial.

The next day, during a break in the State’s case, defense counsel stated, outside the jury’s presence, that the defense had planned to call Flores’s parents and Myra Wait as witnesses but were not going to do so because they were still either under indictment or threat of indictment. 40RR139-140. On April 1, 1999, the defense rested without putting on any punishment-phase witnesses. 41RR25.

Moments before the jury returned with its punishment-phase verdict, ADA January marked two exhibits and said: “The State would like to offer State’s Exhibit R100 and R101, which are copies of some of the discovery given to Defense prior to trial.” 41RR99. When asked if the defense objected, defense counsel made clear that he would need to review the material first. ADA January’s response was: “Yeah, if the Defense has any objection to that, they don’t have some of that, let us know. I’m representing to the Court that’s what I gave them.” *Id.* But before the defense had a chance to review the materials, the jury was brought in to announce its punishment verdict; Flores was then sentenced to death. 41RR100-102. The discovery that defense counsel received, after the trial was essentially over, was still patently incomplete—a fact only evident years later when more of the partial police file was finally produced. A great deal of evidence has still never been produced—such as notes from *any* witness interviews conducted by the prosecution and Mrs. Barganier’s initial “Affidavit” provided to police the day of the murder.

After Flores was sentenced and sent to death row, Childs pled guilty, signed a judicial confession to shooting Mrs. Black, and obtained an astonishingly generous plea deal for 30 years, served 15 years, and was paroled in 2016.

IV. Flores’s Case Was Reopened for a Limited Purpose on the Verge of His Scheduled Execution.

In 2016, a facially incomplete, “permanently” (and heavily) redacted set of materials from the Farmers Branch PD file was finally produced to Flores’s counsel for the first time.¹⁶ This production, nearly two decades after trial, demonstrated that the materials that ADA January had characterized on the record as being “everything” that had been produced to the defense during trial was a small fraction of the materials that the Farmers Branch PD had gathered while investigating Betty Black’s murder. Among those previously withheld materials are indications that law enforcement initially identified, but did not disclose, other suspects. *See Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012) (Dallas County wrongful conviction where newly discovered evidence of undisclosed police reports identifying other possible suspects supported actual innocence claim); *Ex parte Wyatt*, 2012 WL 1647004 (Tex. Crim. App. 2012) (Dallas County wrongful conviction where old file was reopened and showed that State had withheld police report that supported defendant’s long-standing claim that he had been misidentified).

¹⁶ The entirety of the police file that was produced was introduced into evidence during a hearing before this Court in 2017 as Applicant’s Exhibit 57.

Only *after* Flores’s execution was stayed, and thanks to the intervention of an employee with the Dallas Conviction Integrity Unit (“CIU”) was Flores able to obtain files from SWIFS that had long been withheld. Those files include Charles Linch’s notes, which eventually enabled him to recall the case and the circumstances of his mid-trial “testing,” which he has now rejected as scientifically unsound.

Exhibit 9.

Flores’s new legal team also started to unearth a vast amount of evidence showing that undisclosed deals had been given to several of the State’s highly incentivized trial witnesses, the circumstantial evidence of which was hidden in probation files, undisclosed records in the DA’s Office, and the court dockets of other, unrelated cases.

While new evidence was emerging, Flores prepared for, and participated in, an evidentiary hearing in this Court. That hearing focused on the legitimacy of the “investigative hypnosis” that had been performed on Mrs. Barganier and the relationship between that event and her claim, thirteen months later, to suddenly be “100 percent certain” that a man who looked nothing like her initial descriptions was the passenger she had seen getting out of Childs’ Volkswagen.

During the 2017 hearing, Officer Serna admitted candidly that the hypnosis session he had performed on Mrs. Bargainer was based on an understanding that human memory works like a “video recorder”—a view that every scientist now

disavows. *See Exhibit 10.* But Officer Serna had been taught that memory was stored like videotapes in the mind, which could be rewound, paused, and scanned using the “movie theater” hypnosis technique. That “technique” was something taught in a course designed for law enforcement, which Officer Serna had taken a few years before he was enlisted to hypnotized Mrs. Bargainer. That technique has since been thoroughly discredited as manipulating, not retrieving, memory.¹⁷

Officer Serna also admitted in 2017 that, after the Black murder case, he came to recognize that eyewitness identifications, such as the one used against Flores, can be deeply flawed, which is why he started to recommend that the Farmers Branch PD adopt standards to protect against false identifications. *See Exhibit 10.* But his efforts were resisted, and he ultimately moved on to another line of work. *See id.*¹⁸ *See also* TEX. CODE CRIM. PROC. art 38.20 (now requiring every law enforcement agency in Texas to have a written policy regarding photographic and live lineup identification procedures).

Based on the partial police file associated with the Black murder investigation, finally disclosed in 2016, it is clear that the Farmers Branch PD kept minimal records

¹⁷ In the wake of extensive investigative reporting by *The Dallas Morning News*, inspired in part by Flores’s case, the Texas Rangers recently decided to abandon the use of investigative hypnosis. *See Exhibit 11*, also available at <https://www.dallasnews.com/news/investigations/2021/03/11/texas-rangers-stop-using-hypnosis-after-dallas-morning-news-investigation-reveals-dubious-science/>. *See also Exhibit 12.*

¹⁸ Serna’s concerns were valid. The Innocence Project, which filed a brief on this issue in support of Flores, has identified incorrect eyewitness identification as the most common factor in cases where the defendant was subsequently exonerated through DNA testing. *See Exhibit 13.*

of the “procedures” utilized to try to obtain identifications from various witnesses who had seen the two males get out of a distinctive, multi-colored Volkswagen Bug the morning that Mrs. Black was shot. The few records that exist show a highly suggestive process and the complete absence of any meaningful safeguards to avoid contaminating memory.

Numerous intervening scientific studies have been published that explain why the circumstances of Mrs. Barganier’s initial observation during the pre-dawn hour on January 29, 1998, were far from ideal for encoding *any* reliable memory and why the process used to try to obtain an identification from her was profoundly flawed. *See Exhibit 8; Exhibit 12.* This scientific development is why the Court of Criminal Appeals held (years after Flores’s trial) that expert testimony challenging the reliability of eyewitness identification must be admitted. *See Tillman v. State*, 354 S.W.3d 425 (Tex. Crim. App. 2011) (citing scholar Brandon Garrett’s *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* and statistics noting volume of wrongful convictions involving eyewitness identification error).

During that previous habeas proceeding, Flores also tried to bring to this Court’s attention some of the evidence of police and prosecutorial misconduct that was just then being unearthed. But the State vehemently objected to the development of that evidence, arguing that it was “not relevant” to the narrow hypnosis claim that had been authorized for further factual development. In response to a renewed *Brady*

motion, the State insisted that there was nothing more to disclose and then moved to strike most of the witnesses on Flores’s witness list. This Court granted the State’s request, radically truncating the number of witnesses Flores was permitted to call to testify.

Despite developing a robust record regarding the scientifically unsound practice of using hypnosis as a “memory retrieval tool” and of many other variables that made Mrs. Barganier’s belated identification unreliable, this Court ultimately adopted wholesale the State’s proposed findings of fact and conclusions of law. Flores’s challenge to the use of “investigative hypnosis” was then denied by the Court of Criminal Appeals in a two-page opinion without any explanation. *See Ex parte Flores*, No. WR-64,654-02, 2020 WL 2188757 (Tex. Crim. App. May 6, 2020) (unpub.).

An appeal thereafter to the Supreme Court of the United State was supported by The Innocence Project and a group of 28 renowned cognitive scientists. *See Exhibit 13; Exhibit 12*. However, the Supreme Court declined to consider the hypnosis issue presented in Flores’s petition for writ of certiorari.¹⁹

That is, although the contemporary scientific understanding of memory roundly rejects the notion that police can use “investigative hypnosis” to retrieve

¹⁹ *See* <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-5923.html>.

reliable memories from witnesses urged to “imagine” themselves in a “magical movie theater” armed with a “magical remote control” that they can use to “remember more” about observations that had not been encoded in their memories to begin with, that contemporary scientific understanding has not yet led to a Texas court finding that Flores should receive a new trial.

V. Recent Developments Point to Additional Reasons to Authorize Likely Exculpatory DNA Testing.

In the 2021 session, the Texas Legislature passed a bill that would have banned hypnotically induced testimony from the courtroom, inspired in part by the Flores case. However, Governor Abbott vetoed the bill. *See, e.g.,* David Martin Davies, *How Texas almost banned forensic hypnosis*, TEXAS PUBLIC RADIO (Dec. 15, 2021), *available at* <https://www.tpr.org/news/2021-12-15/how-texas-almost-banned-forensic-hypnosis>. One of the few citizens who lobbied against the hypnosis ban was former ADA January, who has not worked in the DA’s Office since he was terminated in 2000. *See Exhibit 14 & Exhibit 15.*

Meanwhile, after Flores’s challenge to investigative hypnosis failed, the State sought to set an execution date, first in 2020 and again in 2021. This Court, however, deferred ruling on the State’s request, first because of barriers posed by the COVID-19 pandemic and then in light of ongoing developments in the case.

One development was the filing of an 850-page second subsequent writ application, supported by numerous volumes of evidence supporting Flores’s claims

of Actual Innocence and claims that his conviction had been obtained through rampant prosecutorial and police misconduct. But no court has yet to consider those claims or the evidence supporting them.

For instance, no court has considered the significance of the recantation of the State's trial expert, Charles Linch. *See Exhibit 9* (Linch acknowledging that his testing and trial testimony were without basis in science).²⁰ *See also Ex parte Mayhugh*, 512 S.W.3d 285 (2016) (Bexar County wrongful conviction in which the Court emphasized “the lack of reliable forensic opinion testimony corroborating the fantastical allegations” in the case and concluded “no rational juror could find” any of the four habeas applicants guilty beyond a reasonable doubt). Nor has any court considered that Linch's methodology is emblematic of the standardless approach of the Dallas crime lab at the time when he was employed there. *See Exhibit 16*. *See also Ex parte Chaney*, 563 S.W.3d 239 (Tex. Crim App. 2018) (Dallas County wrongful conviction wherein habeas applicant was found actually innocent based on undisclosed *Brady* material, post-conviction DNA testing excluding him as a

²⁰ After Flores's conviction, it came to light that Linch played a critical role testifying for the State in other cases where the defendant was subsequently exonerated or questions about innocence persist. *See, e.g., Ex parte Michael Nawee Blair*, Nos. AP-75,954 & AP-75,955, 2008 WL 2514174 (Tex. Crim. App. June 25, 2008) (unpub.) (Collin County wrongful conviction where habeas applicant was granted relief on actual innocence claim and his death sentence was vacated). Linch played a crucial role in the State being able to convict Michael Blair, as Linch's trace evidence analysis was the only physical evidence the State had at trial. Post-conviction DNA testing ultimately exonerated Blair.

contributor, and evolution in forensic science testimony about “bitemarks” identified at the Dallas crime lab that then had no quality controls).

In 2021, Flores also tried to bring to the courts’ attention a new scientific consensus that had emerged about *limited* circumstances when eyewitness identifications can be deemed reliable. A peer-reviewed paper about the new consensus was published in 2021. *See Exhibit 17*. The leading scientist authoring this paper is Dr. John Wixted, who has studied Flores’s case.

Upon applying the new scientific consensus to the facts of this case, Dr. Wixted was compelled to write to the Dallas CIU, urging it to revisit Flores’s case. *See Exhibit 18*. Dr. Wixted explained that the new science regarding eyewitness identifications is not only relevant to understanding why Mrs. Bargainer’s identification was unreliable. The new science also shows that her failure to identify Flores initially when her memory was fresher is *evidence of his innocence*. *See Exhibit 19*.

But no court has yet heard from Dr. Wixted or considered the new science and its relevance to this case. *But see Ex parte Lydell Grant*, 622 S.W.3d 392 (Tex. Crim. App. 2021) (Harris County wrongful conviction wherein habeas applicant was found actually innocent although multiple eyewitnesses had (erroneously) identified him as the person seen stabbing the victim).

In November 2021, to demonstrate his good faith, Flores voluntarily submitted to a polygraph exam, which was conducted by Eric Holden of Behavioral Measures. Mr. Holden is a licensed polygrapher with extensive experience working with law enforcement and prosecutors. **Exhibit 20**. The results of Mr. Holden's testing demonstrated conclusively to him, the expert, that Flores was truthful in his assertion that he was not present at the Blacks' house the day that she was shot and played no role in the attempted robbery of her home or her murder.

Thereafter, a summary of the results of the polygraph were shared with counsel for the State. *See* **Exhibit 21**. Additionally, Flores granted permission for Mr. Holden to discuss his testing methodology, results, and conclusions freely with representatives of the DA's Office, including Cynthia Garza, Chief of the CIU. *See* **Exhibit 22**.

Undersigned counsel do not know whether any agents with the DA's Office have yet spoken with Mr. Holden about the polygraph results, which Mr. Holden characterized as definitive. The parties have, however, conferred regarding various discovery matters with the potential to produce exculpatory evidence. For instance, the State authorized SWIFS to conduct limited testing related to the chewing gum retrieved from the crime scene the day of the murder. *See* **Exhibit 23**. According to State's counsel, the unknown male DNA profile has been run though the CODIS database, but that did not result in a hit.

Therefore, the identity of the person who left a fresh wad of green gum lying on the bloody carpet in the Blacks' living room on January 29, 1998, has still not been identified.

ARGUMENT & AUTHORITIES

I. DNA Testing Is Now the Gold Standard for Solving Crimes, and New Methods Can Produce Evidence That Exculpates Flores.

Since 1989, there have been **at least 3,178** post-conviction exonerations in the United States, most obtained as a result of DNA testing. **134** of those individuals served time on death row. The number of exonerations in Texas is **445**, among the highest in the country.²¹

DNA testing is now recognized as a far 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*, 557 U.S. 52, 62 (2009). Indeed, DNA testing's utility in the criminal justice system has been "undisputed" for some time. *Maryland v. King*, 133 S. Ct. 1958, 1966 (2013). Technological advances since Flores's 1999 trial have, however, dramatically increased its sensitivity. *See, e.g.*, John M. Butler, FUNDAMENTALS OF

²¹ *See* National Registry of Exonerations data, available at <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

FORENSIC DNA TYPING 111 (3d ed. 2009). Merely touching an object may leave trace DNA in the form of sweat, oils, or skin cells that analysts can now extract and test. National Institute of Justice, *DNA Evidence: Basics of Identifying, Gathering, and Transporting* (2012).

In recognition of DNA's extraordinary probative value, in 2001 the Texas Legislature passed a statute providing a convicted person the right to forensic DNA testing, reflecting the Legislature's view that reliable verdicts are indispensable to the integrity of the criminal justice system. Chapter 64 of the Texas Code of Criminal Procedure cuts through traditional legal barriers so that DNA testing can occur at *any stage* of post-conviction proceedings. Since its original enactment, the Legislature has made multiple changes to *strengthen* Chapter 64—first in 2007, then in 2011, and most recently in 2015. Each amendment affirmed the Legislature's belief in the critical importance of exposing wrongful convictions.

Utilizing new DNA testing methods may allow Flores to obtain a match to the unknown male DNA profile pulled from the gum found at the crime scene. Identifying an alternative perpetrator, although it should not be required, would be the most compelling way to prove Flores's Actual Innocence.

II. No Competent Evidence Has Ever Linked Flores to the Crime Scene.

Flores's conviction and death sentence bear all the indicia of a wrongful conviction. No physical evidence of any kind has ever linked him to the crime scene—no DNA, fingerprints, fibers, or ballistics evidence.

The State's principal evidence at trial was eyewitness testimony obtained thirteen months after-the-fact, during trial, and from a witness, Jill Bargainer, who had submitted to a highly suggestive "investigative hypnosis" session conducted by a police officer involved in the underlying investigation who had never hypnotized anyone before.

Aside from Mrs. Bargainer's fundamentally unreliable mid-trial, in-court "identification" of Flores, the State had no evidence of Flores's culpability that can withstand scrutiny. The other "evidence" the State relied on at trial consists of, for instance, a coerced, uncounseled report of a "confession" from Homero Garcia, obtained while he was in FBI custody and was falsely told that Flores had given him the murder weapon. At trial, Garcia claimed to have no recall of saying what was contained in the statement; well after Flores's trial, Garcia admitted that he had been pressured by ADA January, who offered to forego prosecuting Garcia in exchange for his (false) testimony. **Exhibit 24.**

The State also relied on profoundly unreliable trace-evidence testimony from former SWIFS analyst Charles Linch. Linch was recruited by the prosecutors mid-

trial and claimed to have found “potato starch” in Childs’ .44 magnum revolver as a result of “testing” undertaken the day before he testified; he was kept in the dark about the fact that the chain of custody on this gun had been broken and about the absurd hypothesis the State was trying to promote using his testimony. Since then, Linch has expressly and unequivocally disavowed both the method and results of his testing and the unscientific premise upon which it was based. *See Exhibit 9*. Further, Linch’s approach has been thoroughly debunked by an expert in crime lab standards, to which SWIFS did not then adhere because it was not even an accredited lab at the time. *See Exhibit 16*.

In the years since Flores’s trial, the State has also relied on representations made by Flores’s trial counsel that have never been subjected to any adversarial testing and are contradicted by contemporaneous notes in their own file. Statements, obtained by the State soon after the 1999 trial, reflect merely an unseemly betrayal. Lawyers, who submitted to being ambushed by the State at trial, afterwards turned on their own client to counter allegations of ineffectiveness arising from their failure, *inter alia*, to develop their client’s alibi defense and their indefensible decision to concede the client’s presence at the scene, contrary to his long-standing assertion of innocence. Their approach amounted to flagrantly deficient performance in the face of a prosecutorial culture then inclined to win at all costs.

The complex factual background, revealing fundamental problems with the investigation of Mrs. Black's murder and with Flores's prosecution were developed at length in a second subsequent state habeas application, supported by voluminous evidentiary proffers. But no court has yet agreed to even look at that evidence. *See Ex parte Flores*, No. WR-64,654-02, 2020 WL 2188757 (Tex. Crim. App. May 6, 2020) (unpub.) (refusing to consider the merits of any of the new claims).

Meanwhile, the exculpatory power of the DNA pulled from the chewing gum has not been pursued. Testing is available today that might well establish, scientifically, the identity of the second perpetrator (Childs' accomplice) by finding a match to the male DNA profile deposited on that gum. Therefore, Flores seeks access to the gum to have it tested utilizing current methods. *See* TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A).

Indisputably, the identity of the person whose DNA profile was left on the gum is material. The gum was found at the crime scene near the dead body of the Blacks' dog on the blood-soaked living room carpet. No explanation for the gum's presence on top of the blood-soaked carpet was offered at trial.²² Before Flores's trial, the State itself treated the gum as potentially inculpatory (and thus decidedly relevant); thus, the State arranged to have the gum tested for DNA using methods

²² Likewise, it was never explained why, at the outset of the investigation, the blood-soaked carpet was ripped up and thrown in a dumpster where it was rained on, destroying any evidentiary value it may have had. 35RR251.

then available—hoping it would match Flores’s DNA profile. A male DNA profile was obtained from the gum; but both Childs *and* Flores were excluded. Since that time, the State has only looked for matches that might explain away the gum; but all those who had, or might have had, a benign reason for being in the Blacks’ house in the hours before Mrs. Black’s death—the victim, the victim’s husband (William Black), and several children known to spend time at the Blacks’ residence—have all been excluded as a match. Mr. Black was the person who found his slain wife the morning of her death, which had occurred during a window of a few hours when he was away from home at work. Since Mr. Black was excluded as a match, there is no reasonable explanation for the presence at the crime scene of a “fresh” wad of gum,²³ containing male DNA, except this: the gum popped out of the mouth of one of the two men when they were startled by either the dog or Mrs. Black upon entering the house through the garage.²⁴

²³ The gum could not have been lying on top of the blood-soaked carpet for very long if it still looked “green” and “fresh” when the crime scene photos were taken on January 29, 1998.

²⁴ Mr. Black’s trial testimony made clear that the family did not use the garage, except for storage. His testimony also clarified his precise morning routine, which involved leaving the house each weekday morning around 6:00 AM and going to work for either a few hours or the whole day. He also explained that Mrs. Black took strong medications for a health condition, slept in and slept soundly. 35RR174-178. It is clear from long-concealed police notes that Jackie Roberts had told Childs about the Blacks’ schedules, about her belief that up to \$100,000 was hidden “in the walls” in a bathroom, and her belief that the Blacks would not likely report a robbery because the money was “dirty.” Thus, Childs knew the window when Mr. Black would be away from the house and Mrs. Black was expected to be fast asleep. Jackie also likely armed Childs with a garage door opener that had been in her possession, which explained how he and his accomplice were able to get in through the garage. These facts were not developed before the jury, however.

Trial prosecutors intentionally sought to bury Jackie Roberts' key role in the crime. Therefore, at the time, they had no interest in identifying the person whose DNA matched the profile obtained from the gum once Flores was excluded.

Flores contends that identifying the unknown male who spit out the gum in the Blacks' house on top of the bloody carpet is highly relevant to his claim of Actual Innocence. If the identify of that male can be ascertained, several key questions can be answered:

- Could that unknown male have been the passenger seen getting out of Childs' Volkswagen Bug in the Blacks' driveway during the pre-dawn hour the morning Betty Black was shot?
- Did that unknown male fit the initial descriptions given to law enforcement of a "white male" with "long hair" who had a "similar build" as Childs?
- Did this unknown male have a history with law enforcement that would explain why they worked with Childs to point a finger at Flores instead?
- Did this unknown male have a history with Childs that might explain why Childs was willing to conceal the man's identity in exchange for a remarkably generous plea deal, and why Childs served only 15 years in prison although it was known from the outset that he was the person who actually shot Mrs. Black and that he did so while out on bond for another serious drug case?
- Did the history these two men had with law enforcement explain why they declined to arrest Childs for days while evidence was destroyed and stories were coordinated even as narcotics investigators knew where Childs was and kept the house under surveillance?
- Did this unknown male have a history with Jackie Roberts, the estranged common-law wife of the Blacks' son, who had been telling her drug-addicted cohorts, including Childs, with whom she was having a sexual relationship at

the time of the murder, about drug money hidden in the Blacks' house that she believed was rightfully hers?

- Did this unknown male have some relationship with the Black family, such as with their son Gary Black, who was in prison at the time of the murder for selling drugs, revenue from which was hidden in the Blacks' house?
- Did this unknown male help Childs deposit his Volkswagen at the Big Tex trailer park after the murder by driving him away thereafter to his grandmother's house where Childs remained holed up for two days, strategizing with Jackie Roberts and others?
- Did this unknown male help Childs get rid of the murder weapon (a .380 caliber pistol that was never found)?
- Did this unknown male help Childs dispose of their clothing, which likely contained trace evidence—such as blood, sheetrock dust from the walls that were bashed in during the attempted robbery, and/or potato splatter from the “silencers” Childs had elected to use during the crime?
- Is this unknown male still alive or has he, like several other of the State's key trial witnesses, disappeared or died under mysterious circumstances in the intervening years?

This motion seeks access to information that can, at last, uncover the truth about the circumstances surrounding Betty Black's death and the decision to pursue Flores as a suspect despite the complete absence of physical evidence linking him to the crime scene.

The current leadership of the DA's Office has represented that the State is interested in working cooperatively to determine the truth.

III. The Testing Requested Satisfies the Requirements of Chapter 64.

The State represents that the DNA profile found on the chewing gum was already run in the CODIS database. However, CODIS only includes the profiles of individuals who were convicted of a felony after the State began mandating incarcerated felons to submit biological material for analysis.²⁵ This process can only lead to a match to a precise individual—and only if the individual’s profile is in this limited database. The new scientific methodology of forensic genetic genealogy permits obtaining leads based on far more exhaustive searches, and the technique has already been used to identify numerous perpetrators whose profiles are *not* in the CODIS database.

Flores can demonstrate compliance with all conditions set forth in Chapter 64:

First, it is uncontested that the requested evidence (the chewing gum) was secured in relation to the offense and was in the possession of the State during the trial of the offense. *See* TEX. CODE CRIM. PROC. art. 64.01(b).

Second, the evidence sought to be tested “has a reasonable likelihood of containing biological material.” *See id.* art. 64.01(a-1). In fact, because it was previously tested and biological material was found, this too is uncontested.

²⁵ Flores’s hypothesis is that Childs’ co-perpetrator was someone who was well-connected and managed to *avoid* incarceration despite criminal culpability.

Third, the requested evidence was not previously subjected to the DNA testing and analysis that Flores seeks to pursue. *See id.* art. 64.01(b)(1). Previous testing was limited largely to attempts to tie the gum to Flores or Childs, which failed. Meanwhile, DNA testing methods and accuracy have evolved considerably since the previous, minimal testing of this item undertaken in 1999. The techniques used at that time are now considered obsolete and insufficient in the forensic industry. *See generally* Richard Li, FORENSIC BIOLOGY (2d. ed. 2015) (describing new developments in analysis methods and practice that have led to rapid advancements in forensic biology—both the techniques used to identify it and the methodology to analyze it). More importantly, Flores now seeks *a match* using the new methodology of forensic genetic genealogy, which did not exist at the time of trial and only recently became widely available. Moreover, this testing cannot be done without access to evidence within the State’s custody and control. *See Ex parte Calderon*, 309 S.W.3d 64 (Tex. Crim. App. 2010) (Bexar County wrongful conviction finding habeas applicant established Actual Innocence by relying on evidence that, even if previously known to him, was not previously available to him).

Fourth, the requested evidence exists and is in a condition making DNA testing possible—per the State’s representations. *See* TEX. CODE CRIM. PROC. art. 64.03(a)(1)(A)(i).

Fifth, the evidence has been subjected to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, replaced, or altered in any material respect—or at least the State has established that the evidence has been in the custody of the Farmers Branch PD since some time after it was sent in 1999 to an entity then known as “Gene Screen” and, more recently, to SWIFS. *See* TEX. CODE CRIM. PROC. 64.03(a)(1)(A)(ii). Under Texas law, absent affirmative evidence of tampering, the chain of custody of an item of evidence held by the prosecution is fully established whenever the “beginning and end” of that custody is documented—that is, if the item was at one time received or collected by State officials and is shown to be in State custody at the time of its admission, transfer, or subsequent use. *See, e.g., Porter v. State*, 969 S.W.2d 60, 66 (Tex. App.—Austin 1998, pet. ref’d); *Gallegos v. State*, 776 S.W.2d 312, 315-16 (Tex. App.—Houston [1st Dist.] 1989, no pet.). This principle applies equally when an item is kept in an evidence room for an extended period of time. *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997).

Sixth, the identity of the second perpetrator (aside from Childs) has long been a disputed issue in the case. *See* TEX. CODE CRIM. PROC. art. 64.03(a)(1)(B).

Seventh, Flores would not have been convicted if results pointing directly to a different perpetrator had been obtained through DNA testing. *See id.* art. 64.03(a)(2)(A). As noted above and described at length in his 850-page writ

application, no competent evidence links Flores to the crime scene. Evidence that might well identify the second perpetrator would provide further support for his Actual Innocence claim.

In any event, Chapter 64 does not require showing that exculpatory results would necessarily prove “actual innocence,” a “Herculean task.” *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). Instead, a petitioner need only show by a *preponderance of the evidence* that he would not have been convicted if the jury had been presented with the exculpatory DNA results. TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A).

The Texas Legislature adopted this standard in 2003, intentionally amending the language requiring defendants to show that exculpatory results would necessarily “prove their innocence.” *Kutzner v. State*, 75 S.W.3d 437, 438 (Tex. Crim. App. 2002), *superseded by statute on other grounds, as stated in Smith v. State*, 165 S.W.3d 361, 364-65 (Tex. Crim. App. 2005). Citing this legislative history, the CCA has clarified that the statute’s language requires a petitioner to show merely that there exists “at least a 51% chance that he would not have been convicted,” *Smith*, 165 S.W.3d at 364-65, or “a reasonable probability of a different outcome had the DNA test results been available at the time of trial.” *Whitfield v. State*, 430 S.W.3d 405, 422 (Tex. Crim. App. 2014).

Eighth, the requested DNA testing is not made to unreasonably delay the execution of sentence or administration of justice. *See* TEX. CODE CRIM. PROC. art. 64.03(a)(2)(B). Although the State previously sought the setting of an execution date, no date has yet been set. Additionally, agents of the State have affirmatively represented to undersigned counsel that they ***will not seek an execution date*** while negotiations between the parties about outstanding discovery are still in process.

This is the first time Flores has been in a position to seek DNA testing pursuant to Chapter 64. As noted above, the report related to the item for which testing is sought was not prepared until after trial was already underway. Thereafter, Flores spent years with either no representation or with only ineffective counsel. On the brink of his last execution date, his previous federal counsel fought his conviction by focusing on the State's reliance on the eyewitness identification Mrs. Barganier made for the first time mid-trial after she had been, quite literally, hypnotized by law enforcement. A discrete claim challenging the reliability of investigative hypnosis was only finally resolved in February 2021 when the Supreme Court of the United States declined to take up Flores's appeal of the denial of relief arising from the hypnosis claim. Soon after that claim was exhausted, Flores moved with alacrity to file a subsequent writ application, which included his Actual Innocence claim and raised the issue of the State's failure to test the chewing gum in search of a match to a suspect other than Flores and Childs.

Finally, Article 64.01(a) provides that a motion for DNA testing under Chapter 64 be “accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.” Flores attaches here his sworn declaration (**Exhibit 3**) filed in support of his second subsequent writ application. That declaration contains facts in support of his Actual Innocence claim and thus in support of the relief requested in this motion.

In short, Flores’s request satisfies all of Chapter 64’s requirements.

IV. Granting the Request for Access to the Gum to Undertake DNA Testing and an Analysis Using Contemporary Techniques Will Comport with Previous CCA Decisions.

Granting the relief requested here comports with decisions by the CCA in this area. *See, e.g., Raby v. State*, No. AP-74,930 (Tex. Crim. App. June 29, 2005) (not designated for publication).²⁶ In *Raby*, the CCA granted requests for further DNA testing even though the evidence against Raby was far more extensive and credible than any evidence ever adduced against Flores. The CCA authorized testing primarily because the nature of the attack suggested the possibility that the attacker might have left some of his DNA on the victim and items found at the crime scene. *Id.*, slip. op. at 8. At trial, Raby was convicted and sentenced to death for murdering a woman in her home. Raby—unlike Flores—was acquainted with the victim and

²⁶ Because the *Raby* decision was not designated for publication, it has no precedential value 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).

had been in her home on several prior occasions. In *Raby*, the trial evidence 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 Raby 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. The voluntariness and truthfulness of this statement were not disputed at trial. The CCA affirmed Raby's conviction on appeal and denied state habeas corpus relief. Notwithstanding the substantial evidence of Raby's guilt, the CCA *granted* his Chapter 64 motion for DNA testing years later.

Among the CCA's relevant findings in *Raby* was the rationale that the likelihood of a struggle between the victim and the perpetrator could yield exculpatory DNA evidence. Additionally, the CCA was persuaded that the fingernails might hold blood other than that belonging to Raby or the decedent, thus warranting further 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).

Most importantly, habeas applicants like Flores, who were convicted using what is now recognized as profoundly flawed evidence, such as unreliable eyewitness identification, have since been exonerated using new DNA testing and

analytical methods. That testing has, in many cases, led to identifying the true perpetrator who had long evaded accountability. *See, e.g., Ex parte Patrick Waller*, 2008 WL 4356811 (Tex. Crim. App. 2008); *Ex parte Johnny Edward Pinchback*, 2011 WL 2364318 (Tex. Crim. App. 2011); *Ex parte Richard Bryan Kussmaul*, 548 S.W.3d 606 (Tex. Crim. App. 2018); *Ex parte Lydell Grant*, 622 S.W.3d 392 (Tex. Crim. App. 2021).

PRAYER FOR RELIEF

The purpose of post-conviction DNA testing is to use scientific technology to determine if a wrongful conviction has occurred. DNA testing cuts directly to objective fact and is far more discriminating and accurate than any other current method of proof. Because access to evidence for DNA testing and then a forensic genetic genealogy analysis has the potential to produce exculpatory results that, more likely than not, would have convinced any reasonable juror not to convict Flores, this Court should grant his motion. Flores respectfully asks that this Court ORDER the State and its agents to:

- Produce the full Gene Screen and SWIFS files of all previous DNA testing conducted on the chewing gum found at the crime scene;
- Allow access to the chewing gum for DNA testing at a reputable laboratory to be identified by Dr. Colleen Fitzpatrick;
- Search the State's case file and query any persons who potentially have knowledge of the location of the missing crime scene photograph(s) taken of the chewing gum found in the Blacks' living room and then produce a quality

reproduction or negative to Flores's counsel; and

- File a notice with the Court no later than two weeks after the entry of an Order confirming compliance or explaining what obstacles remain.

A proposed order is filed with this motion for the Court's convenience.

Respectfully submitted,

/s/

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***Post-Conviction Attorneys for
Charles Don Flores***

CERTIFICATE OF CONFERENCE

Mr. Flores's legal team has conferred with counsel for the State via email about the relief requested in this motion on multiple occasions. Mr. Flores's counsel have not yet received a response to their last query, sent on August 2, 2022, endeavoring to move the matter forward. Mr. Flores's counsel will provide the Court with any updates about whether the relief requested is opposed, thus necessitating a hearing.

/s/

Gretchen S. Sween

CERTIFICATE OF SERVICE

The foregoing motion has been served on attorneys representing the State in this matter via the electronic filing system and electronic mail.

/s/

Gretchen S. Sween

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Gretchen Sween on behalf of Gretchen Sims Sween

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Status as of 9/7/2022 2:10 PM CST

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