W98-02133-N(B)

195TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY

EX PARTE
CHARLES DON FLORES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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The Court, having considered Charles Don Flores's ("Applicant") subsequent application for writ of habeas corpus, the State's answer, all motions and exhibits filed by the parties, the testimony and documentary evidence offered at the subsequent writ hearing conducted on October 10, 11, and 16, 2017, official court documents and records, and the Court's personal experience and knowledge, makes the following findings of fact and conclusions of law:

I. HISTORY OF THE CASE

Applicant is confined pursuant to the judgment and sentence of the 195th Judicial District Court of Dallas County, Texas, in cause number F98-02133-N, in which Applicant was convicted by a jury of capital murder for the shooting death of Elizabeth Black committed in the course of a home invasion robbery on January 29, 1998. On April 1, 1999, the jury answered the special issues in a manner requiring the imposition of the death sentence. Applicant appealed his conviction and sentence to the Court of Criminal Appeals. On November 7, 2001, the Court of Criminal Appeals affirmed his conviction and sentence. *Flores v. State*, No. AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (not designated for publication).

On September 13, 2000, in accordance with Article 11.071 of the Code of Criminal Procedure, Applicant filed an application for writ of habeas corpus. The application, filed by state habeas counsel, raised twelve grounds for relief. On December 14, 2000, Applicant filed a *pro se* amendment to his application, raising nineteen additional grounds for relief. This Court issued findings of fact and conclusions of law recommending that relief be denied on all thirty-one grounds on April 12, 2006, and the Court of Criminal Appeals expressly adopted the trial court's findings and denied relief on September 20, 2006. *Ex parte Flores*, No. WR-64,654-01, 2006 Tex. Crim. App. Unpub. LEXIS 744 (Tex. Crim. App. Sept. 20, 2006) (not designated for publication).

Applicant filed his initial federal petition for habeas relief on September 18, 2007, raising forty-five potential claims. Applicant filed an amended petition on March 24, 2008, raising only four claims. The United Stated Magistrate Judge recommended that relief be denied on March 3, 2011. *Flores v. Thaler*, No. 3-07-CV-0413-M-BD, 2011 U.S. Dist. LEXIS 158338 (N.D. Tex. Mar. 3, 2011). Subsequently, Applicant filed a motion to withhold a determination pending the United States Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Following the Supreme Court's opinions in these cases and

supplemental briefing by the parties, the federal district court denied relief and declined to grant Applicant a certificate of appealablility on July 17, 2014. *Flores v. Stephens*, No. 3:07-CV-0413-M, 2014 U.S. Dist. LEXIS 97028 (N.D. Tex. July 17, 2014). The Fifth Circuit Court of Appeals refused to grant Applicant a certificate of appealability on July 21, 2015. *Flores v. Stephens*, 794 F.3d 494 (5th Cir. 2015).

On October 20, 2015, the State filed a motion to set an execution date, with March 15, 2016 as the proposed execution date. *See* Tex. Code Crim. Proc. Ann. art. 43.141 (West 2015). Applicant filed a response opposing the setting of an execution date prior to the United States Supreme Court's resolution of his petition for writ of certiorari, which Applicant filed on October 19, 2015. In a hearing held on December 3, 2015, this Court set Applicant's execution for June 2, 2016, six months from the date of the hearing.

On January 25, 2016, the United States Supreme Court denied certiorari review of the Fifth Circuit's decision. *Flores v. Stephens*, 136 S. Ct. 981 (2016).

On May 19, 2016, Applicant filed the instant subsequent state application for writ of habeas corpus and a motion for stay of execution.[1]

[1] Applicant's federal habeas counsel, Bruce Anton and Mary Margaret Penrose filed the motion for stay of execution and the instant subsequent application for writ of habeas

Applicant raised four grounds for relief, alleging: (1) new scientific knowledge discredits the testimony of [Jill Barganier] the only eyewitness to the crime; (2) Applicant was denied the effective assistance of trial counsel when trial counsel failed to investigate or produce any mitigating evidence on Applicant's behalf during the sentencing proceedings; (3) Dallas County continues to evidence racial bias in its prosecution and punishment in capital cases and Texas's capital-punishment statutes are unconstitutional as applied to Applicant, a Hispanic, because they arbitrarily allowed the white male principal to be released on parole even before the less culpable Hispanic accomplice is scheduled to be executed; and, (4) as applied to Applicant, the "law of parties" is unconstitutional because it allowed an unjustifiable disparity between the more-culpable principal and less-culpable accomplice. (*See* Subsequent Writ Application at pp. 34, 63, 119, 124).

The State filed a motion to dismiss the subsequent application on May 25, 2016.

On May 27, 2016, the Court of Criminal Appeals stayed the Applicant's execution, held that the Applicant's first allegation satisfied the requirements

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corpus. Subsequently, counsel moved to withdraw from the case and the Office of Capital and Forensic Writs was appointed to represent Applicant in the subsequent writ proceedings.

of Article 11.071, § 5, and remanded the allegation to this Court for consideration on the merits. *See Ex parte Flores*, No. WR-64,654-02, at *2 (Tex. Crim. App. May 27, 2016).

The State filed a timely response to Applicant's subsequent application on September 26, 2016. Tex. Code Crim. Proc. Ann. art. 11.071, §§ 6(b), 7(a) (West Supp. 2016).

The Court appointed the Office of Capital and Forensic Writs ("OCFW") to represent Applicant "on the single ground of his subsequent writ application that the Court of Criminal Appeals has remanded to this Court to resolve." (*See* Order Granting Motion to Withdraw and Appointing New Counsel, Dated Aug. 11, 2016).

A live evidentiary hearing was held on October 10, 11, and 16, 2017. Applicant presented the following witnesses at the hearing: (1) Jill Barganier, (2) Alfredo Serna, (3) Jerry Baker, (4) Dr. Margaret Kovera, Ph.D., and (5) Dr. Steven Lynn, Ph.D. The State called Dr. George Mount, Ph.D. and Dr. David Spiegel, M.D.

II. FACTUAL SUMMARY

In its opinion on direct appeal, the Court of Criminal Appeals summarized the facts of the offense and investigation as follows:[2]

> Elizabeth Black, the deceased, resided with her husband in Farmers Branch. At approximately 6:30 a.m. on January 29, 1998, Mr. Black left for work. He returned home three hours later to discover Mrs. Black's body beneath the den table. Mr. Black immediately called the police, who arrived at the scene within a few minutes. An autopsy established that Mrs. Black had died as the result of a single gunshot.
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> Nearby, officers discovered the Blacks' Doberman pinscher, Santana, shot through the back. The size of the wound suggested a large-bore weapon, such as a .44 caliber. Fragments of potato littered the floor, table, walls, and ceiling in the vicinity of the victim. On the floor near Mrs. Black's body, police officers found a .380 caliber bullet. Officers located a shell casing of the same caliber and a piece of potato on the floor inside the garage. The spent cartridge's presence suggested that a semiautomatic pistol, rather than a revolver, had fired the shot that killed Mrs. Black. A police detective testified that a second round struck the dog. Although officers did not find another bullet or shell casing, they did find a hole in the carpet, and the size of the wound and patterns of blood and potato spatter tended to corroborate this hypothesis.
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> While searching the rest of the house, police discovered a hole in the wall above the toilet in the hall bathroom. In the master bathroom, someone had punched a hole in the wall near the laundry hamper, opened the commode top, and tore the sink and medicine cabinet from the wall. Police found a large potato inside the sink. A ladder extending to the attic access-door stood in a rear room. There were no signs of forced entry or struggle.

[2] Footnotes 5 and 6 have been added to include additional facts with citations to the record.

Officers discovered $39,000 in cash hidden inside the master bedroom closet. Mr. Black stated that the Blacks' incarcerated son, Gary, had left this money with his parents before going to prison for selling drugs. Gary's common-law wife, Jackie Roberts, had been receiving $500 of this money from the Blacks each month.

Neighbors reported that a purple, pink, and yellow Volkswagen had been parked in the Blacks' driveway around 7:35 on the morning of the murder. The garage door was open a few feet, which was unusual. The Volkswagen driver got out, rolled underneath the garage door, and raised the door to admit the Volkswagen's passenger. A neighbor identified [Applicant], dressed in dark-colored clothing, as the passenger, but other witnesses could not identify the passenger. After entering the garage, the two men shut the door. One neighbor heard a thud, but stopped investigating the matter upon observing the multi-colored Volkswagen, which he had previously seen at the home of Jackie Roberts.

Jackie Roberts (Jackie), who was on probation for possessing methamphetamine, lived with her mother and three children on Emeline Street, a short distance from the Blacks' home. She had become romantically involved with Ricky Childs about three weeks before the murder. Childs, a drug dealer, habitually carried a .380 semiautomatic pistol in the back of his waistband.

Childs, [Applicant], and several acquaintances spent the early morning hours of the day of the murder inside [Applicant's] trailer using methamphetamine and marijuana. Childs and [Applicant] left the trailer together in Childs' multi-colored Volkswagen at approximately 3:00 a.m., arriving at Jackie's home at some time later that morning. Jackie had arranged for an acquaintance, Terry Plunk, to sell Childs and [Applicant] a quarter-pound of methamphetamine. She had not expected [Applicant], dressed in a long black duster, to accompany her and Childs to purchase the methamphetamine, but [Applicant] refused to hand over his money without attending the drug transaction

for fear of being "ripped off." The trio rode in Jackie's El Camino to an apartment near Love Field Airport, where they met Plunk. During the transaction, [Applicant] weighed the drugs on a portable digital scale and declared that the quantity delivered by Plunk was a quarter-ounce short.[3] Plunk made up the alleged shortage to avoid a confrontation. Jackie, Childs, and [Applicant] then drove to [Applicant's] home with the drugs. [Applicant] weighed the methamphetamine again and again accused Plunk of shortchanging him, insisting that the deal had been for a half-pound instead of a quarter-pound. [Applicant] then pointed a gun at Jackie and asked what her "connection" would pay for her head. While Childs attempted to calm [Applicant] down, Jackie telephoned Plunk to see if he would cover the claimed shortage. Plunk refused. Childs, [Applicant], and Jackie then drove to a nearby house, where Childs and [Applicant] acquired three firearms. [Applicant] was armed with a "long, blue gun" and a handgun. Childs carried a larger handgun. When Jackie asked the men why they had armed themselves, they told her that it was none of her business.

To make up the alleged shortage, she agreed to pay [Applicant] $3,900 from the cash that Gary Black had hidden at his parents' home. Childs confirmed the existence of this money, and the two men dropped Jackie off at home sometime between 6:35 and 7:15 a.m. Childs' former girlfriend, Vanessa Stovall, testified that Childs and [Applicant] arrived at Childs' grandmother's home on High Meadow around 6:30 that morning. [Applicant] and Stovall smoked some methamphetamine before they left in the Volkswagen between 6:45 and 7:00 a.m.

In her living room, Jackie spoke briefly with Doug Roberts (Doug), who had arrived to take their son to school. Later that morning, Jackie left to visit Plunk. A short time after Jackie's departure, her mother told Doug about the murder of Mrs. Black. That evening, Doug went to the home of the victim's daughter,

[3] Jackie testified that Plunk had not shortchanged them and that [Applicant] was trying to rip off Plunk.

Sheila Black, and learned that neighbors had observed a pink and purple Volkswagen outside the house. Doug drove to Plunk's house to inform Jackie not only about the murder but also that neighbors had seen the multi-colored Volkswagen at the scene. He tried to convince Jackie to go with him to the police immediately, but Jackie feared possible retaliation or prosecution. Consequently, Doug drove her from Plunk's house to a hotel.

On his way to the police station, Doug disposed of a map, discovered by Plunk, that Jackie had drawn showing the area of her own home and the Blacks' house.[4] He reported Childs' possible involvement to the police that night and submitted to another police interview the next day. Law enforcement officers apprehended Jackie at Doug's apartment four days after the murder. By then, the police had arrested Childs.

When he was arrested, Childs possessed amphetamine and a partial box of the same brand of .380 ammunition found at the murder scene. A police search of his grandmother's residence uncovered a .44 Magnum revolver and shells, two boxes of .357 bullets, and a pair of gloves. Polarized-light microscopy of granular material found inside the Magnum barrel identified starch grains consistent with those from a potato.

A day after the offense, [Applicant] admitted to a friend, Homero Garcia, that he had shot the dog, but blamed Childs for killing the "old lady." [Applicant] made a similar statement to his father-in-law [Jonathan Wait, Sr.].[5]

Two days after the murder, [Applicant] and two others[6] towed Childs' Volkswagen to the parking lot behind the Grand

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[4] At trial, Jackie denied drawing the map for Childs and [Applicant], stating that she drew it four days before the murder to guide her ex-husband's girlfriend to the Blacks' home to babysit. She initially told police she drew it for Childs.

[5] Applicant told Wait that he had gotten himself into a little trouble and needed to get out of the country. Wait showed Applicant a newspaper article about Mrs. Black's murder and said, "You call this a little bit of trouble, killing a 64-year-old woman," to which Applicant responded, "I only shot the dog." (RR37: 82–86).

[6] Myra Wait and her brother, Jonathan. (RR36: 261–68).

Prairie roofing business owned by [Applicant's] father. There, between 6:00 and 7:00 p.m., [Applicant] sprayed the Volkswagen with black spray paint. At some point, the license plates were removed. The group then towed the vehicle up an I-30 freeway entrance ramp and onto the shoulder of the road. [Applicant] doused the Volkswagen with gasoline and set the interior on fire. When a passing motorist stopped to offer assistance, [Applicant] got into the tow car and drove away. Jonathan Wait, who was in the tow car with [Applicant], testified that the other motorist followed, but [Applicant] eluded the other vehicle after an extended high-speed chase during which [Applicant] fired several shots at the other car.

On April 18, 1998, at 7:00 p.m., Kyle police officers Slaughter and Oaks stopped a blue Volvo traveling north on I-35. [Applicant], the vehicle's sole occupant, could not produce a driver's license, but identified himself as Juan Jojola, [Applicant's] brother, and presented a social security card bearing that name. Because of the alias, the officers did not discover that [Applicant] had an outstanding federal warrant for his arrest. An angry motorist stopped at the scene to complain that the Volvo had almost run his automobile off the road.

After [Applicant] failed a series of field sobriety tests, Officer Slaughter initiated an arrest for driving while intoxicated. As the policeman started to cuff the suspect's hands behind his back, [Applicant] turned quickly and struck Officer Slaughter's head with his elbow. A struggle ensued, during which [Applicant] tried to push both police officers in front of oncoming traffic on the freeway. [Applicant] called the arrest "bullshit" and insisted that it was not going to happen. Finally, Officer Slaughter managed to push the group from the roadway into a nearby ditch. By chance, Deputy Mike Davenport of the Hays County Sheriff's Department arrived on the scene and assisted the police officers in handcuffing [Applicant]. The officers transported [Applicant] to the Hays County jail, where they charged him with driving while intoxicated and two counts of assault on a peace officer. Officer Slaughter suffered a swollen eye, and Officer Oaks had a

bite on her arm and an injury to a bone in her right hand. [Applicant] was released from jail on bond before authorities learned his true identity.

Following his arrest for the instant offense, [Applicant] was taken to Parkland Hospital for treatment of a knee injury, accompanied by Officer Bobby Sherman. Because of the nature of [Applicant's] injury and because he rode in a wheelchair, [Applicant] was virtually unrestrained. As Sherman and [Applicant] passed through an infirmary door, [Applicant] reached around with both hands and grabbed the grip of Sherman's pistol. Sherman grabbed [Applicant] by the neck, and they fell against the wall, then to the ground. Sherman felt the pistol coming out of its holster, but pushed the gun to the ground, forcing it from [Applicant's] hands. [Applicant] struggled for it again, threatened to kill Sherman, then bit him just above the elbow. As Sherman yelled, "Grab the gun," he again forced the gun from [Applicant's] hand, and a doctor grabbed it. Sherman remained on top of [Applicant] trying to hold him down, although [Applicant] continued to struggle violently. Sherman then tried to spray [Applicant] with Mace, but [Applicant] grabbed the can from him and began spraying it into Sherman's eyes and on hospital staff members. Sherman continued to try to restrain [Applicant] with the help of two or three hospital staff members. At some point, someone grabbed Sherman's handcuffs and handcuffed [Applicant].

Flores, No. 73,463, slip op. at *2–8.

III. APPLICANT'S ISSUE

(1) Applicant's single remanded claim, alleged as his first ground for relief in his subsequent habeas application, is stated in Applicant's application as follows:

> Flores is entitled to relief because new scientific knowledge discredits the testimony of the only eyewitness to the crime and (A) Article 11.073 requires a new trial because, without

> the State's use of [Jill Barganier's] flawed hypnotically induced testimony, Flores would not have been convicted; and (B) the State's reliance on now-debunked science violates Flores' constitutional rights to be free from cruel-and-unusual punishment, equal protection under state laws, and due process.

(*See* Subsequent Writ Application at pp. 34–63).

(2) Applicant bases his first ground for relief on the opinion of Dr. Steven Lynn, Ph.D., a professor of psychology at the State University of New York at Binghamton. (*See id.*; AWX: 5).

(3) Dr. Lynn provided an affidavit in this case, which Applicant attached to his subsequent application as Exhibit 1. (*See id.*, Ex. 1; AWX: 5). Applicant asserts that the "affidavit confirms that Barganier's testimony has since been conclusively determined as scientifically unsound," and would not have been admissible today. (*See* Subsequent Writ Application at p. 35, 40, 55).

(4) Applicant asserts that since his trial, the scientific community's knowledge has changed in four ways:

1) New studies have discredited the scientific community's understanding that hypnosis does not elicit false memories;
2) New studies have demonstrated the plasticity of hypnotically induced memories;
3) New studies show that hypnosis, even without leading questions, can create false memories; and
4) New studies show hypnosis creates memories about highly emotional events that change over time.

(*See* Subsequent Writ Application at p. 48 (citing Ex. 1 at pp. 20–21).

(5) Applicant argues that, based on this new scientific knowledge, the trial court's findings at the *Zani* hearing were erroneous and merit a new trial. (*See id.* at p. 39).

(6) Applicant asserts that "the State relied on scientific evidence regarding hypnosis and memory that has since been discredited," and that "[s]cientific knowledge now confirms that the scientific principles on which the State relied at trial actually increase the likelihood of critical error and wrongful convictions, casting a large shadow of doubt on Barganier's identification of Flores." (*See id.* at p. 42).

(7) Applicant further claims that the State "relied on accepted scientific understanding in 1999 that hypnosis could be used to recover memories without procedural safeguards aside from not suggesting facts." (*See id.* at p. 43).

(8) Applicant argues that "scientific studies since the trial have changed the state of scientific knowledge about hypnosis and recovered memories," and that the "new state of scientific knowledge firmly understands that 'hypnosis is an unreliable memory recovery technique.'" (*See id.* at pp. 39–40 (citing Exhibit 1 at pp. 20–21)).

(9) Applicant argues that the State did not present any physical evidence placing Applicant at the crime scene and rested its case on the "words of undesirables—drug dealers and drug users," and that the only "seemingly untainted evidence the State presented to place Flores on the scene was Barganier's hypnotically altered testimony." (*See* Subsequent Writ Application at pp. 35–36).

(10) Applicant argues that absent Barganier's identification he would not have been convicted. (*See id.* at p. 40).

IV. GENERAL FINDINGS OF FACT

(1) The Court takes judicial notice of the entire contents of the Court's file in Cause Number F98-02133-N.

(2) The Court takes judicial notice of all volumes of the reporter's record of the trial in Cause Number F98-02133-N. Citations to this record will be "RR__."

(3) The Court takes judicial notice of the entire contents of the Court's file in Cause Numbers W98-02133-N(A) and (B).

(4) The Court takes judicial notice of the reporter's record of the October 10, 11, and 16, 2017, subsequent writ hearing conducted on the instant habeas applications. Citations to the record will be "WRR__." Citations to Applicant's exhibits from the hearing will be "AWX__," and citations to the State's exhibits with be "SWX__."

(5) The Court had ample opportunity to observe all witnesses who testified at the subsequent writ hearing.

V. SPECIFIC FINDINGS OF FACT

ADMISSIBILITY OF HYPNOTICALLY REFRESHED TESTIMONY IN TEXAS

(6) Hypnotically refreshed testimony is admissible in Texas courts where the proponent of such testimony "demonstrate[s] to the satisfaction of the trial court, outside the jury's presence, by clear and convincing evidence, that such testimony is trustworthy." *Zani v. State*, 758 S.W.2d 233, 243 (Tex. Crim. App. 1988); *see also State v. Medrano*, 127 S.W.3d 781, 783 (Tex. Crim. App. 2004) (en banc.).

(7) The leading Texas case on the issue of hypnotically refreshed testimony is *Zani v. State*, in which the Court of Criminal Appeals explained the process the trial court should use to determine whether the testimony is trustworthy. *Zani*, 758 S.W.2d at 243.

(8) In assessing the trustworthiness of the testimony, the trial court should be alert to the four-prong dangers of hypnosis: hypersuggestibility, loss of critical judgment, confabulation, and memory cementing. *Zani*, 758 S.W.2d at 244 (internal quotations omitted).

(9) Hypersuggestibility can occur because the hypnotized person is in a state of increased suggestibility in which her disassociated attention is constantly sensitive to and responsive to cues from the hypnotist. *Zani v. State* ("*Zani II*"), 767 S.W.2d 825, 825 (Tex. App.—Texarkana 1989, pet. ref'd) (opinion on remand).

(10) Loss of critical judgement occurs when the hypnotized person loses the ability to make a mental evaluation of her ideas, images, and feelings. *Zani II*, 767 S.W.2d at 837.

(11) Confabulation occurs when the hypnotized person creates memory perceptions in an unconscious effort to please the hypnotist and believes the fabricated memories are real. *Zani II*, 767 S.W.2d at 836.

(12) Memory cementing happens when the more the hypnotized person goes over the memory in her mind, the more she becomes convinced it is an accurate remembrance. *Zani II*, 767 S.W.2d at 837.

(13) The *Zani* court adopted a non-exclusive list of ten factors for trial courts to consider when deciding whether hypnotically refreshed testimony is trustworthy in a given case. *Zani*, 758 S.W.2d at 243–44.

(14) The factors the trial court should consider, known as the "*Zani* factors" are:

1) The level of training in the clinical uses and forensic applications of hypnosis by the person performing the hypnosis;

2) the hypnotist's independence from law enforcement investigators, prosecution, and defense;

3) the existence of a record of any information given or known by the hypnotist concerning the case prior to the hypnosis session;

4) the existence of a written or recorded account of the facts as the hypnosis subject remembers them prior to undergoing hypnosis;

5) the creation of recordings of all contacts between the hypnotist and the subject;

6) the presence of persons other than the hypnotist and the subject during any phase of the hypnosis session, as well as the location of the session;

7) the appropriateness of the induction and memory retrieval techniques used;

8) the appropriateness of using hypnosis for the kind of memory loss involved;

9) the existence of any evidence to corroborate the hypnotically-enhanced testimony; and

10) the presence or absence of overt or subtle cuing or suggestion of answers during the hypnotic session.

Zani, 758 S.W.2d at 24–44; *see also Medrano*, 127 S.W.3d at 783.

(15) The Court of Criminal Appeals instructed that these factors are to be evaluated based on the totality of the circumstances. *Zani*, 758 S.W.2d at 244. This followed the approach made in *People v. Romero*, 745 P.2d 1003 (Colo. 1987) and *State v. Iwakiri*, 682 P.2d 571 (Idaho 1984) rather than the strict procedural guidelines method that was adopted in *State v. Hurd*, 432 A.2d 86, 95–97 (N.J. 1981).

(16) Under *Hurd*, hypnotically refreshed testimony was admissible only if the State demonstrated by clear and convincing evidence compliance with the following six procedural guidelines:

1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis.

2) The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator or the defense.

3) Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined.

4) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness's description of the events.

5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is

available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.

6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.

Hurd, 432 A.2d at 95–97.

(17) However, in rejecting this approach and instead adopting the totality of the circumstances review, courts recognized that there could be "circumstances where, even when the safeguards are not strictly or entirely followed, a trial court could nevertheless conclude that the testimony would still be sufficiently reliable for its admission." *Iwakiri*, 682 P.2d at 577. By way of example, the court noted that one of the safeguards is that only the hypnotist and the subject should be present during any phase of the hypnotic session, and this would prevent a criminal defendant from having his attorney present or prevent a person from requesting that his or her own psychiatrist be present to observe the session. *Id.* The court opined that the presence of a third person, such as an attorney or personal doctor would protect the rights of a subject, but at the same time would not necessarily render the entire testimony unreliable. Thus, merely because one of the safeguards was not followed should not result in the automatic exclusion of the entire testimony. *Iwakiri*, 682 P.2d at 577–78.

(18) The Court finds that while *Zani* was decided in 1988, the Court of Criminal Appeals reaffirmed the decision in 2004 in *State v. Medrano*. In *Medrano*, the court explained:

> With *Zani*, the Court created a standard for the trial courts to apply in determining the admissibility of hypnotically enhanced testimony—evidence based on a soft science. The Court recognized in *Zani* that the reliability of hypnotically enhanced testimony is especially in question due to the undetected amplification of

> disabilities in perception, memory and articulation in a witness's testimony. Although this standard was created in 1988, predating both *Kelly* and *Nenno,* the objective of reliability remains constant in all three opinions. In *Kelly* and *Nenno,* frameworks were developed to ensure the reliability of novel scientific evidence in the broad categories of hard and soft sciences, respectively. *Zani,* on the other hand, is a standard that applies in a soft science situation where a narrowly tailored framework was created to ensure the reliability of a particular scientific technique.

Medrano, 127 S.W.3d at 786–87.

HISTORY OF APPLICANT'S CHALLENGES TO BARGANIER'S IN-COURT IDENTIFICATION

(19) Jill Barganier and her husband Robert were the Blacks' next-door neighbors at the time of the offense, residing at 2959 Bergen Lane with their daughter and two sons. (RR35: 163–64RR36: 88).

(20) Jill Barganier testified as a witness for the State at Applicant's trial.

(21) Barganier entered the courtroom at Applicant's trial for the first time on March 23, 1999, the second day of the guilt-innocence phase of the trial. (RR35: 153–56; RR36: 91–92).

(22) Outside the presence of the jury, Barganier was questioned briefly by the State and the Court concerning the identifications she had made in Applicant's case and the hypnosis session she had undergone on February 4, 1998. (RR153–56).

(23) Barganier testified that she went to the police department on January 29, 1998, the morning of Mrs. Black's murder, and gave an account of what she saw that morning. (RR35: 154). Barganier testified that she gave descriptions of the two men she had seen getting out of the Volkswagen and identified the driver, Richard Childs, from a photo lineup prior to undergoing hypnosis. (RR35: 154–55).

(24) When asked by the Court whether she had been placed under hypnosis, and whether she had "actually go[ne] under," Barganier testified that she did not "know enough about it. I felt like I was." Barganier further stated that she had "never studied it or been under before." (RR35: 155).

(25) Barganier also testified that she did not make any additional identifications after the hypnosis session. (RR35: 155–56).

(26) Barganier was then excused from the courtroom. (RR35: 154–56).

(27) At that time, the defense objected to Barganier's testimony, arguing that the State had not demonstrated the trustworthiness of her hypnotically refreshed testimony as required by *Zani v. State*. (RR35: 157–61).

(28) In response, the State offered to have a "*Zani* hearing" the following morning and postponed calling Barganier as a witness pending the resolution of the hearing. (RR35: 157–61).

(29) After exiting the courtroom, Barganier asked to speak to one of the prosecutors, Greg Davis, and informed him that the Applicant was the man she had seen outside the Blacks' residence the day of the offense—that he was the passenger of the Volkswagen. (RR36: 13–15, 85–86; 92–93).

(30) The State informed the defense and the Court. (RR36: 15–16). Defense counsel informed the court that they objected to Barganier making an in-court identification of the Applicant, arguing that it was tainted by the hypnosis. (RR36: 16).

(31) The *Zani* hearing was conducted the following morning on March 23, 1999. (RR36: 12–118).

(32) Jill Barganier, Farmers Branch Police Detective Jerry Baker, Farmers Branch Police Officer and certified Forensic Hypnotist Afredo "Roen" Serna, and Dr. George R. Mount, Ph.D. testified at the hearing. (RR36: 18–109).

(33) Testimony at the hearing revealed that Barganier, not the police or the prosecution, requested the hypnosis. (RR36: 31, 89, 100).

(34) Barganier testified that she had assisted the police in creating a composite drawing of the driver of the Volkswagen and was able to positively identify him in two photo lineups as Richard Childs. (RR36: 88–90).

(35) Barganier testified that she was later asked to assist in a composite drawing of the passenger. (RR36: 90).

(36) Barganier testified that she thought hypnosis might help her to relax and be more precise. (RR36: 90).

(37) Barganier testified that she was nervous and afraid because the passenger had scared her. (RR36: 89). Barganier testified: "[The passenger] looked at me when I was looking through the window. I thought we had made eye contact. I was just real nervous." (RR36: 89).

(38) Barganier also found composite drawing difficult and noted that it was computerized, which was different from what she had expected. (RR36: 90).

(39) The hypnosis session was held at the Farmers Branch Police Station on February 4, 1998.

(40) The session was conducted by Officer Alfredo Serna, a certified investigative hypnotist, and witnessed by Investigator Jerry Baker, who operated the camera but otherwise said nothing. (RR36: 18–19, 34).

(41) Investigator Baker and Officer Serna both testified that they were unaware that Applicant had become a potential suspect in the murder at the time of the hypnosis session. (RR36: 20, 30–31, 38, 57).

(42) The State stipulated that another Farmers Branch police officer had spoken with the police in Irving and knew that they were looking for someone who went by the name "Fat Charlie." (RR36: 28).

(43) Investigator Baker testified, however, that neither he nor Officer Serna knew any of the details until after the hypnosis session. (RR36: 30–31). Officer Serna also testified that had no knowledge of the Applicant as a suspect prior to the hypnosis session and had not seen any pictures of Applicant. (RR36: 37).

(44) Officer Serna, who was also a crime scene technician, testified that he had been to the Blacks' residence to collect and document evidence at the crime scene, but had not spoken to any witnesses at the crime scene. (RR36: 37). Officer Serna also testified that aside from the hypnosis session with Barganier, he had not spoken to any witnesses in this case. (RR36: 37–38).

(45) Officer Serna also testified that he did not know that Barganier had already identified the driver of the Volkswagen, Richard Childs, prior to the hypnosis session. (RR36: 43–44).

(46) Officer Serna testified that he was aware of the four possible dangers of hypnosis and explained the dangers to the court. (RR36: 35–42).

(47) Officer Serna testified that Barganier appeared to be in good physical and mental condition and was not fatigued, depressed, intoxicated or on drugs and was a suitable subject for hypnosis. (RR36: 48).

(48) Officer Serna testified that he used the movie theater technique because Barganier expressed some tension or trauma associated with the event and "the fact that she felt the suspects had seen her or that their eyes had crossed" and that she may have been concerned about retaliation. (RR36: 39, 46, 55–56).

(49) During the course of the hypnosis session, Officer Serna suggested nothing to Barganier, provided no feedback, and avoided reinforcing any aspect of her recollection. (RR36: 37, 40, 41, 49).

(50) Officer Serna also testified that he believed Barganier would have been able to identify Applicant if she had not had the hypnosis session. (RR36: 59).

(51) The State called Dr. George Mount, a psychologist with extensive experience in forensic hypnosis, as an expert witness at the *Zani* hearing. (RR36: 60; SX: 86).

(52) Dr. Mount testified that he had evaluated several hundred hypnosis sessions, taught hypnosis for twenty years, and was on the board that developed the exam for the Texas Commission on Law Enforcement Officers Standards and Education ("TCLEOSE") that peace officers are

required to take in order to be certified as an investigative hypnotist. (RR36: 62–63, 72).

(53) Dr. Mount had viewed the videotape of the hypnosis session and was of the expert opinion that the hypnosis session had been conducted in such a way as to guard against the "four possible dangers" of hypnosis and had satisfied the ten factors of *Zani.* (RR36: 60–62, 65–71, 72). He saw no evidence on the videotape of any incorrect procedures. (RR36: 63–65).

(54) Dr. Mount testified that the movie theater technique is a standard information eliciting technique and is commonly used. (RR36: 63–64, 69).

(55) Dr. Mount also testified that "[h]ypnosis is a subjective phenomenon. No one can one hundred percent guarantee they were or were not hypnotized. If they weren't hypnotized, it's just an interview." (RR36: 72).

(56) Dr. Mount testified that no one can tell the difference between a true memory and a pseudomemory and that is why corroborating evidence is useful. (RR36: 81–82).

(57) Dr. Mount also testified that he did not subscribe to the video recorder model of memory, that it "is an erroneous belief about how memory works." (RR36: 82).

(58) Jill Barganier further testified before the Court that while the hypnosis session had made her feel more relaxed, it did not "firm up" an impression of the Volkswagen passenger. (RR36: 101).

(59) Barganier also testified that while she may have seen a photograph of Applicant on the news at the time of his arrest, she had not looked at the newspaper during trial nor had she seen a picture of Applicant during the trial. (RR36: 108).

(60) She testified that she understood the seriousness of the situation and was positive in her identification. (RR36: 108–109).

(61) In closing argument, Jason January, the lead prosecutor at Applicant's trial, summarized the corroborating evidence as follows:

> And I believe that the evidence either has shown or will show that her identification has been corroborated by the fact that number one, Jaime Dodge saw the Defendant and Rick Childs in that Volkswagen a few hours before saying that they were going to go to Farmers Branch.
>
> That Jackie Roberts saw the Defendant and Rick Childs in that Volkswagen within hours of the – within an hour of the murder. The Defendant wanted money, that she had discussed being at the victim's house.
>
> That Judy Haney saw the Defendant and Rick Childs a few hours prior to the killing.
>
> That Terry Plunk saw the Defendant and Rick Childs a few hours prior to the killing together.
>
> That Doug Roberts saw the Volkswagen and Rick Childs as the driver at 6:30 in the morning.
>
> That Jill Bargainer [sic], in fact, does pick out Rick Childs as the driver of that vehicle prior to hypnosis.
>
> That Vanessa Stovall sees the Defendant and Rick Childs in that Volkswagen literally minutes prior to going over to the Bergen address that morning.
>
> That Michelle Babler sees two men, and the passenger is consistent with the build and physical description of this Defendant that she pointed out in court.
>
> That Nathan Taylor saw two men with gloves in that Volkswagen, again bolstering the credibility of Jill [Barganier].
>
> We have two witnesses that are going to testify that the Defendant admitted to being present at the scene.
>
> We also have a witness that is going to testify that he sees the Defendant, identifies the Defendant burning the Volkswagen two days after this offense out on I-30.

(RR36: 111–13)

(62) At the conclusion of the hearing, the Court denied Applicant's motion to suppress Barganier's in-court identification of Applicant. (RR36: 117–18).

(63) The Court made specific findings of fact and conclusions of law, which were dictated to the court reporter:

> Well, the Court finds that Officer Alfredo Serna was a qualified forensic hypnotist; that Farmers Branch investigators that were involved in the case and in the hypnotic – or hypnosis session had no photograph of [Applicant] and no description of [Applicant] at that time which they could impart to Ms. [Barganier].
>
> The Court has viewed the video and saw nothing that it believed was subjective, either verbal or nonverbal, nor any cues to Ms. [Barganier] about her identification.
>
> The hypnotist merely inquired whether she could describe the two persons who had gotten out of the Volkswagen, and she had very little. In fact, although it's obvious that there was a hypnosis session, whether you could call her hypnotically refreshed – her testimony hypnotically refreshed is a question.
>
> I noticed no refreshment beyond perhaps the eye color, and I believe she had previously stated that they were dark eyes, and it was compatible even with that.
>
> The real issue here is whether her in-court identification is trustworthy or not. And if it is not trustworthy by reason of the hypnosis, then obviously it could not be admissible.
>
> There is ample corroboration of the fact that the Defendant was the passenger in the Volkswagen, all which was just enumerated by the Prosecutor. The Court finds that under the totality of the circumstances, that there is clear and convincing evidence that the hypnosis undergone by Ms. [Barganier] did not render her eyewitness – in-Court eyewitness identification of the Defendant untrustworthy; therefore, the motion of the Defendant to disallow her testimony is denied.

(RR36: 117–18).

(64) The Court notes that while it was not a requirement, the trial court judge, Judge Nelms, viewed the videotape of the hypnosis session. (RR36: 117–18); *See Zani*, 758 S.W.2d at 240 n.7 758 S.W.2d at 244.

(65) The trial court also granted the defense a "running objection" to Barganier's identification testimony. (RR36: 117–18, 277).

(66) In the presence of the jury, Barganier identified Applicant as the passenger in the Volkswagen that she had seen in the Blacks' driveway the morning of the murder. (RR36: 283–85).

(67) The defense reserved their cross-examination of Barganier, and called her back to the stand during its case-in-chief challenging her ability to adequately see the men due to the fact that sunrise was not until 7:25 a.m. the morning of the murder. (RR38: 12–19). Barganier was adamant that there had been enough light for her to see the men. (RR38: 22).

(68) Defense counsel did not question Barganier about having undergone hypnosis. (RR38: 12–19); *See Zani*, 758 S.W.2d at 240 n.7 ("Once admitted by the trial court, credibility of the hypnotically enhanced testimony may be attacked before the jury.").

(69) The Court, in an abundance of caution, included the following instruction in its charge to the jury:

> During the trial there was testimony that on February 4, 1998, State's witness Jill [Barganier] was hypnotized by Farmers Branch Police Officer Serna in an effort to refresh, restore, or improve her memory regarding a description of the passenger of a multi-colored Volkswagen automobile she told officers she had seen at the residence of Elizabeth Black on the morning of January 29, 1998. If you find and believe from the evidence, or if you have a reasonable doubt, that her in-court identification of the defendant, Charles Don Flores, as such passenger was a false memory or the result of suggestion or any improper influence, whether intentional or unintentional, arising from her

having been hypnotized, if she was hypnotized, which rendered her in-court identification of the defendant untrustworthy, you will disregard her in-court identification of the defendant and not consider it for any purpose whatsoever. However, if you find and believe from the evidence beyond a reasonable doubt that her in-court identification of the defendant was not a false memory or the result of suggestion or improper influence while she was hypnotized, if she was, you may consider her credibility and the weight to be given her testimony regarding her in-court identification of the defendant as you would the testimony of any other witness.

(CR1: 134–35).

(70) Following his conviction, Applicant filed a direct appeal to the Court of Criminal Appeals, challenging the admission of Barganier's in-court identification on the basis that that the trial court erred by admitting Barganier's identification testimony because the State had failed to prove by clear and convincing evidence that hypnosis had not tainted her memory. *Flores*, No. 73,463, slip op. at 22.

(71) The Court of Criminal Appeals rejected the claim. *Id.* at 23. In so doing, the court explained that the trial court's procedures in admitting the testimony substantially complied with *Zani*, the trial court was aware of the dangers inherent in hypnosis, that it did not abuse its discretion in allowing the testimony, and that the jurors had been free to attach whatever weight they deemed appropriate to Barganier's testimony. *Id.* at 22–23. The court explained:

> As a precautionary measure, the trial court conducted a hearing following the procedures set out in *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1998), and gave the jury instructions to disregard any testimony arising from false memory, suggestion, or improper influence.
>
> When it made the decision to admit [Barganier's] testimony, the trial court in this cause was aware of the

> dangers inherent in hypnosis and the factors that this Court set out in *Zani* to determine the trustworthiness of hypnotically recalled testimony. After hearing all of the testimony and presumably taking the dangers of hypnosis into account, the trial court overruled appellant's motion to exclude [Barganier's] testimony.
>
> We also are aware of the dangers of the effects of hypnosis on memory, but we find that the procedures utilized by the trial court in this cause substantially conformed with those set out in *Zani*, and that it did not abuse its discretion in allowing the testimony.

Id. at 23.

(72) Applicant also challenged Barganier's identification testimony in his initial state application for writ of habeas corpus. Applicant alleged that Barganier's identification was unconstitutionally tainted because the State used improper hypnotically enhanced identification procedures which denied him due process under the Texas and United States constitutions. (*See* Applicant's Initial Application for writ of habeas corpus, Tr. Ct.'s Findings of Fact and Conclusions of Law, at p. 47).

(73) This Court found that Applicant's claim was procedurally barred because it was raised and rejected on direct appeal. (*Id.* at p. 47). This Court also analyzed the merits of the claim in the alternative, reaffirmed its prior findings, found that Applicant had failed to show that Barganier's identification of him was the result of hypnosis or unconstitutionally tainted, and concluded that the testimony was properly admitted and, even if it was not, that any harm was prevented by a curative instruction. (*Id.* at 47–54).

(74) The Court of Criminal Appeals expressly adopted the Court's findings in its order denying relief. *Flores*, WR-64,654-01, 2006 Tex. Crim. App. Unpub. LEXIS 744, 2006 WL 2706773, at *1.

(75) Subsequently, in his federal habeas petition, Applicant claimed that the trial court improperly admitted Barganier's "hypnotically-enhanced identification testimony" in violation of his Fourteenth Amendment right to

due process and his Sixth Amendment right to confrontation. *Flores*, 2011 U.S. Dist. LEXIS 158338, at *2, 20.

(76) In support of his claim, Applicant included the affidavit of Dr. R. Edward Geiselman, an expert in eyewitness psychology. *Id.* at 24. In his affidavit, Geiselman "conclude[d] that 'the forensic interview session might have caused and otherwise affected the in-court identification of Charles Flores by eyewitness Jill Barganier.'" *Id.* "According to Dr. Geiselman, Barganier's identification testimony was untrustworthy and unduly suggestive because the interviewer told her, while under hypnosis, that '[y]ou might find yourself able to recall other things as time goes by.'" *Id.*

(77) The federal magistrate recommended that relief be denied, noting that "[e]ven if the court considers the Geiselman affidavit, which was never presented to the state habeas court, it does not overcome the presumption of correctness attached to the state court findings." *Id.*

(78) The federal district court adopted the magistrate's recommendation. *Flores*, 2014 U.S. Dist. LEXIS 97028, at *27–28.

(79) The district court also rejected Applicant's request to amend his federal petition, in light of the United States Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), to include a claim that trial counsel was ineffective for failing to adequately contest Barganier's testimony. *Id.* at 41. The district court determined that the claim would be procedurally barred and time barred, but also noted:

> Flores has not shown that an objection to this testimony would reasonably have prevailed if it had included the new evidence presented in these proceedings[, i.e., Geiselman's affidavit]. Since trial counsel could not be faulted for failing to take a futile action, *see Clark v. Collins*, 19 F.3d at 966, an ineffective-assistance-of-trial-counsel claim for failing to make this objection would not be substantial as required by *Martinez.*

Id. at 41.

(80) Next, the Fifth Circuit denied Applicant's request for a certificate of appealability to appeal the district court's denial of leave to amend his federal habeas petition to raise three ineffective assistance of counsel claims, including the one described above. *Flores*, 794 F.3d at 502. In specifically addressing Applicant's claim concerning trial counsel's failure to properly challenge Barganier's testimony, the Fifth Circuit explained:

> Reasonable jurists also could not debate the district court's conclusion that amendment would be futile because Flores failed to present a substantial [ineffective assistance of trial counsel] claim based on the failure to properly challenge Barganier's identification testimony, and therefore failed to show cause to excuse the procedural default of that claim. The record reflects that trial counsel vigorously challenged the admission of [Barganier's] testimony. Fearing that [Barganier] might identify Flores in the courtroom, defense counsel requested and obtained a hearing at which the State had the burden of producing clear and convincing evidence that the hypnosis session did not affect [Barganier's] identification of Flores. When the trial court denied their motion to suppress her testimony, defense counsel requested and received a running objection to her testimony. Further, defense counsel cross-examined [Barganier] about her ability to see the passenger in the Volkswagen, in an effort to discredit her identification. **Even assuming that trial counsel performed deficiently by failing to present expert testimony such as that in the affidavit of Dr. Geiselman, and assuming further that the trial court would have excluded Barganier's in-court identification of Flores had such expert testimony been presented, there is not a reasonable probability that the outcome of the trial would have been different, because there was ample other evidence that placed Flores at the scene of the murder, including his own admissions that he was there and shot the dog.**

Id. at 505–06 (emphasis added).

(81) Presently, Applicant is challenging Barganier's testimony pursuant to Article 11.073 of the Texas Code of Criminal Procedure.

PROCEDURAL BAR

(82) Texas law prohibits successive applications for writ of habeas corpus except in specifically defined circumstances. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a) (West Supp. 2016); *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). Those specific circumstances are limited to claims of newly discovered evidence, new rules of law, actual innocence, and actual lack of deathworthiness. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1)-(3) (West Supp. 2016); *Campbell*, 226 S.W.3d at 421. Accordingly, this Court does not have jurisdiction to consider a claim contained in a subsequent application for writ of habeas corpus until the Court of Criminal Appeals has determined the claim meets the requirements of the Article 11.071, § 5 procedural bar.

(83) In this case, section 5(a)(1) prohibits consideration of the merits of a successive habeas corpus application unless the successive application establishes that "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this Article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1) (West Supp. 2016); *Ex parte Woods*, 296 S.W.3d 587, 606 (Tex. Crim. App. 2009).

(84) A legal basis of a claim is unavailable if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(d) (West Supp. 2016).

(85) In this case, the Court of Criminal Appeals stayed Applicant's execution on May 27, 2016, held that only Applicant's first allegation, of the four allegations raised, satisfied the requirements of the Article 11.071, § 5

procedural bar, and remanded that allegation to this Court for consideration. *Ex parte Flores*, No. WR-64,654-02, at *2 (Tex. Crim. App. May 27, 2016) (unpublished order).

(86) The Court finds that the remanded claim is an Article 11.073 claim involving new science.

(87) Article 11.073 took effect on September 1, 2013. *See* Tex. Code Crim. Proc. Ann. Art. 11.073 (West Supp. 2016).

(88) The Court finds that Applicant filed his initial application for writ of habeas corpus on December 11, 2001. Applicant filed a subsequent application for writ of habeas corpus pursuant to Article 11.071 on May 19, 2016. Accordingly, Article 11.073 provided a legal basis for a claim that was unavailable at the time Applicant filed his initial habeas application.

MERITS OF THE CLAIM

(89) The Court finds that Applicant's claim is meritless.

(90) Article 11.073 of the Texas Code of Criminal Procedure applies to relevant scientific evidence that was not available to be offered by a convicted person at the convicted person's trial, or contradicts scientific evidence relied on by the State at trial. Tex. Code Crim. Proc. Ann. art. 11.073(a)(1),(2) (West Supp. 2016).

(91) In order to prevail on his Article 11.073 claim, Applicant must establish that relevant scientific evidence is currently available and was not available at the time of his trial because the evidence was not ascertainable through the exercise of reasonable diligence by Applicant before the date of or during the trial. *See* Tex. Code Crim. Proc. Ann. art. 11.073 (b)(1)(A) (West Supp. 2016).

(92) Applicant must also show that had the relevant scientific evidence been presented at Applicant's trial, on the preponderance of the evidence, he would not have been convicted. *See* Tex. Code Crim. Proc. Ann. art. 11.073 (b)(2) (West Supp. 2016).

(93) In a habeas proceeding, the applicant must plead facts which entitle him to relief and must prove his claims by a preponderance of the evidence. *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016); *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997).

(94) Applicant has not shown that there is relevant scientific evidence that is presently available that was not available to be offered by Applicant at the time of his trial.

(95) Specifically, the Court finds that the scientific evidence on hypnosis and memory that Applicant has presented in this proceeding, specifically the opinion of Dr. Steven Lynn, was readily ascertainable through the exercise of reasonable diligence at the time of Applicant's trial.

(96) The Court finds that even if Applicant had presented the testimony of Dr. Lynn or a similar expert at the *Zani* hearing at Applicant's trial, the result of the proceeding would not have been different.

(97) The Court further finds that Applicant has also failed to prove, by a preponderance of the evidence, that he would not have been convicted if Jill Barganier's identification testimony had been excluded.

(98) Accordingly, the Court finds Applicant fails to prove, by a preponderance of the evidence, facts entitling him to relief. Consequently, the Court finds Applicant fails to sustain his burden of proof.

(99) The Court finds that Applicant has failed to meet the requirements of Article 11.073.

Availability of the Scientific Evidence

(100) Applicant offered the opinion of Dr. Steven Lynn, Ph.D. in support of his claim.

(101) Dr. Lynn prepared an affidavit in this case that was included as an attachment to Applicant's subsequent writ application. (AWX: 5). Dr. Lynn also testified at the subsequent writ hearing on October 16, 2017. (WRR6: 7–150).

(102) Dr. Lynn became involved in this case when he was contacted in April 2016 by Gregory Gardner, one of Applicant's former attorneys. (WRR6: 21–22; AWX: 5 at p. 1).

(103) Dr. Lynn received his undergraduate degree in psychology from the University of Michigan in 1967 and his Ph.D. in clinical psychology from Indiana University in 1976. (SWX: 5).

(104) Dr. Lynn has been practicing psychology since 1976 and is currently licensed to practice in New York. (WRR6: 119; SWX: 5).

(105) Dr. Lynn reviewed the following materials in order to prepare his affidavit in this case:

(1) the transcript of Jill Barganier's [sic] testimony before the jury in Volumes 35, 36, and 38 of the reporter's record from Applicant's trial;

(2) a video recording of the hypnosis session of Barganier conducted by Officer Alfredo Roen Serna;

(3) a transcript of the video recording of the hypnosis session;

(4) the Farmers Branch Police Department Hypnosis Data Sheet dated February 4, 1998; and

(5) the transcript of the *Zani* hearing from Applicant's trial.

(*See* AWX: 5 at p. 1; WRR6: 25–26).

(106) In addition to these materials, Dr. Lynn testified that he also reviewed a document titled: "Time Line Barganier" prior to testifying at the subsequent writ hearing on October 16, 2017. (WRR6: 25–26). Dr. Lynn did not bring a copy of the document with him to the hearing and did not know who had prepared the document. (WRR6: 25–26).

(107) Dr. Lynn also did not know who had prepared the transcript of the video of the hypnosis session. (WRR6: 130).

(108) In his affidavit, Dr. Lynn offered the opinion that hypnosis is not a reliable means of refreshing memory, and in this case specifically, Dr. Lynn opined that "the use of hypnosis and the testimony rendered in the Flores matter were so fundamentally flawed that they raise a specter of doubt not only regarding the admission of the testimony of [Barganier], but also regarding the in-court eyewitness identification of [Applicant]." (AWX: 5 at p. 1).

(109) Dr. Lynn further opined that "[t]he way the hypnosis session was conducted and the testimony of the hypnotist, police officer, Mr. Alfredo Serna [sic], and the expert, Dr. George Mount, were riddled with problems," "[]t]he most egregious" of which "was the memory enhancement technique used." (AWX: 5 at p. 15).

(110) Additionally, Dr. Lynn opined that a "significant development in the study of psychology over the last two decades or so has been the decline and fall of the idea that memory is a vast, permanent and potentially accessible storehouse of information," that "'[h]uman memory works like a tape recorder or video camera, and accurately records the events we've experienced.'" (AWX: 5 at p. 2 (internal citations omitted)).

(111) Dr. Lynn offered the opinion that developments in the scientific knowledge concerning hypnosis and memory that "have occurred in the past two decades, around the time of and after the [Applicant's] trial" have "reinforced and expanded concerns about the risks of hypnosis for memory retrieval and supplement and firm concerns about the admission of hypnotically elicited testimony in judicial proceedings." (AWX: 5 at p. 2).

(112) Dr. Lynn offered the opinion that hypnosis increases the risk of false or inaccurate memories; increases the risk of enhanced or unwarranted confidence in the information recalled as a result of hypnosis; causes memories to become resistant to change and be highly malleable; and that pre-hypnotic warnings about the possible risks of hypnosis are only occasionally effective. (AWX: 5 at pp. 9–12).

(113) At the evidentiary hearing, Dr. Lynn testified that the debate over the reliability of hypnotically refreshed testimony is not a new debate, and existed prior to Applicant's trial, which is one of the reasons the *Zani* hearing was held in this case. (WRR6: 144).

(114) Dr. Lynn testified that when he began his career in 1976, he was a "true believer" in hypnosis and thought hypnosis could improve people's memories, but his opinion concerning hypnosis had changed by the 1980s and, by the time of Applicant's trial, he no longer was of the opinion that hypnosis could be reliably used to refresh memories. (WRR6: 30–37).

(115) The Court finds that prior to Applicant's trial, Dr. Lynn had edited a book titled "Truth and Memory" in 1998, and co-authored a chapter within the book. (WRR6: 126; SWX: 6).

(116) The Court finds that in 1997, Dr. Lynn co-authored a chapter titled "Hypnosis, Pseudomemories, and Clinical Guidelines: A Sociocognitive Perspective" in a publication entitled "Recollections of Trauma, Scientific Evidence and Clinical Practice." (WRR6: 126; SWX: 6).

(117) The Court finds that Dr. Lynn had also published multiple articles on the topic of hypnosis and memory prior to the time of Applicant's trial, including a 1997 article titled "Recalling the Unrecallable: Should Hypnosis Be Used to Recover Memories in Psychotherapy" and a 1998 journal article titled "Hypnotic Psuedomemories, Prehypnotic Warnings and the Malleability of Suggested Memories." (WRR6: 127; SWX: 6).

(118) The Court finds that prior to, and at the time of Applicant's trial, Dr. Lynn had already provided his expert opinion concerning the use of hypnosis to refresh or recover memories in multiple cases:

- In 1996, Dr. Lynn filed a declaration on behalf of the defendant in the California case *Miller v. Calderon*, CV 91-2652-KN, addressing whether hypnotic eyewitness recall is reliable. (WRR6: 122–23; SWX: 6)

- In 1997, Dr. Lynn testified for the plaintiff in *Nadean Cool v. Kenneth Olsen*, a civil trial in which Lynn testified "regarding the biasing effects of hypnosis in "recovering memories" in a case of dissociative identity disorder. (WRR6: 123; SWX: 6).

- In 1999, Dr. Lynn provided a report for the defendant on hypnotic procedures used on a witness in a capital murder

case in the Orange County, California case *People v. John Stephens.* (WRR6: 124; SWX: 6).

- In August 1999, Dr. Lynn testified for the plaintiff in a civil trial regarding the biasing effects of hypnosis in "recovering memories" in a case of dissociative identity disorder in *Hess and Wausau Insurance Companies v. Wisconsin Patients Compensation Fund and Fernandez, Circuit Court Branch 3, Marathon County, Wisconsin.* (WRR6: 124; SWX: 6).

(119) The Court finds that Dr. Lynn testified as an expert witness in the *Hess* case in August 1999. While Dr. Lynn testified that he did not have any specific recollection of his testimony in that case, Dr. Lynn testified that he had no reason to disagree with the following statements or the State's representation that his testimony consisted of the following: hypnosis creates the risk of false memories, hypnosis does not improve memory, hypnosis creates increased recall of both accurate and inaccurate information, a hypnotized person is vulnerable to misleading information, hypnosis can increase unwarranted confidence in remembered events, memory is reconstructive not reproductive, and memory does not work like a videorecorder. (WRR6: 126).

(120) Accordingly, the Court finds that prior to 1999, Dr. Lynn had conducted research, published articles, edited books and provided his expert opinion and testimony concerning the use of hypnosis to recover or refresh memory.

(121) The Court finds that Applicant's trial began on Monday March 22, 1999 and concluded on Thursday April 1, 1999. The *Zani* hearing occurred on March 24, 1999. (RR36: 12–118).

(122) Accordingly, the Court finds that the substance of Dr. Lynn's present opinion was available in 1999 at the time of Applicant's trial.

(123) The Court finds that, through reasonable diligence, Applicant could have obtained the testimony of Dr. Lynn, or a similar expert, at the time of Applicant's trial.

(119) The Court finds the testimony of State's expert Dr. David Spiegel, M.D. is relevant to this matter.

(120) Dr. Spiegel testified as the State's expert at the subsequent writ hearing on October 16, 2017. (WRR6: 152–271).

(121) In preparation for his testimony, Dr. Spiegel reviewed the video recording of the hypnosis session, the Farmers Branch Police Department Hypnosis Data Sheet prepared by Officer Serna, the transcript of the testimony from the *Zani* hearing, the transcripts of Barganier's testimony at Applicant's trial, the *Zani* case, Dr. Lynn's affidavit filed with the subsequent writ application, the State's Answer filed in the subsequent writ, and several witness statements. (WRR6: 193).

(134) Dr. Spiegel testified that he received his undergraduate degree in philosophy from Yale College in 1967, and his medical degree from Harvard Medical School in 1971. Dr. Spiegel also completed his fellowship training in psychiatry and community mental health at Harvard. (WRR6: 152; SWX: 7).

(135) Dr. Spiegel is presently licensed to practice medicine in California and was previously licensed to practice in Massachusetts and New York. (SWX: 7).

(136) Dr. Spiegel has been a professor of psychiatry at Stanford University since 1975 and currently holds an endowed position as a Wilson Professor. He is also the Associate Chair of Psychiatry and Behavioral Sciences, the Director of the Center on Stress and Health, and the Medical Director of the Center for Integrative Medicine at the Stanford University School of Medicine. (WRR6: 152; SWX: 7).

(137) Dr. Spiegel testified that his position at Stanford University involves both teaching and research and he is currently teaching a course on hypnosis. Dr. Spiegel spends approximately seventy percent of his professional time teaching and conducting research and spends the other thirty percent treating clinical patients at Stanford University. (WRR6: 153).

(138) Dr. Spiegel is a member of the National Academy of Medicine, an elected honor, which has been given to approximately 2000 physicians in the United States. (WRR6: 153).

(139) Dr. Spiegel was the past president of the Society for Clinical and Experimental Hypnosis and is a fellow of the American Society of Clinical Hypnosis. (WRR6: 153). Dr. Spiegel is also a distinguished life fellow of the American Psychiatric Association. (WRR6: 153).

(140) Dr. Spiegel was also the past president of the American College of Psychiatrists. (WRR6: 154).

(141) Dr. Spiegel testified that he has published approximately 370 articles in scientific journals and 150 book chapters, with 110 of those dealing specifically with hypnosis. (WRR6: 154).

(142) Dr. Spiegel is an associate editor of the International Journal of Clinical and Experimental Hypnosis and of the American Journal of Clinical Hypnosis. (WRR6: 154; SWX: 7).

(143) Dr. Spiegel has received numerous awards for his scholarly and professional activities including the Hilgard Award for Best Theoretic Contribution to Hypnosis, from the Society for Clinical and Experimental Hypnosis, approximately ten awards from the Society of Clinical and Experimental Hypnosis, and from Division 30—the hypnosis division of the American Psychological Association. (WRR6: 154; SWX: 7).

(144) Dr. Spiegel is currently conducting a study funded by the National Institutes of Health which examines the use of "repetitive transcranial magnetic stimulation to augment hypnotic analgesia." (WRR6: 155; SWX: 7 at p. 10).

(145) Dr. Spiegel was also a member of the DSM-4 and DSM-5 Work Group on anxiety, obsessive compulsive disorder, post-traumatic stress disorder, and dissociative disorder. He was specifically involved in writing the diagnostic criteria for dissociative disorders. (WRR6: 155–56).

(146) Dr. Spiegel testified that he has been involved in approximately 80 cases in the forensic setting. His role in those cases was to evaluate the use of hypnosis or test hypnotizability, and in five or six of those cases, Dr. Spiegel conducted the forensic hypnosis session himself. (WRR6: 162).

(147) Dr. Spiegel has provided expert testimony in approximately twenty cases, with an even mix of civil and criminal cases. (WRR6: 167–68).

(148) Dr. Spiegel's professional experience with hypnosis spans forty-five years. (WRR6: 168).

(149) Dr. Spiegel testified that over the span of his career he has personally used hypnosis with approximately 7,000 people. (WRR6: 155).

(150) Dr. Spiegel uses hypnosis clinically to treat pain, post-traumatic stress disorder, dissociative disorders, and psychosomatic disorders. (WRR6: 168).

(151) Dr. Spiegel was also part of the American Medical Association's Council on Scientific Affairs panel that evaluated the effects of hypnosis on memory. The group issued a written report of their findings in 1985 called "The Scientific Status of Refreshing Recollection by the Use of Hypnosis." (WRR6: 188; SWX: 8).

(152) Dr. Spiegel testified that the panel found that:

> [F]or certain kinds of nonsense information, information that has no intrinsic logic, hypnosis added nothing at all to your ability to retrieve information. It had some effect for memory of meaningful and complex material, more like what would occur in a -- in a crime scene, for example.
>
> And, basically, it also noted that part of what confounded our understanding of what effect hypnosis has on memory is that rarely do these studies control for the amount of retrieval. So the more information you retrieve, the more correct, but the more incorrect information you'll get. And most studies that studied hypnosis didn't control for how much was produced. So they'd say there's more incorrect information because the people in the hypnosis condition provided twice as much information, so there would be more incorrect, but the ratio was not necessarily any different.

> So it suggested that there can be complications with hypnotically refreshed memory, not unlike the things that are in the *Zani* hearing. And it suggested that caution should be used when hypnosis is used in the forensic setting, that it's no -- sometimes useful new information can – can be brought up. Sometimes false information, or confabulation, can occur. So it should be used with caution.

(WRR5: 189–90; SWX: 8).

(153) Dr. Spiegel testified that the disagreement or controversy in the scientific community concerning whether hypnosis is a reliable means of refreshing memory has existed in the field for at least the forty-five years he has been involved in the field and still exists today. (WRR6: 187–88).

(154) The Court finds that Dr. Spiegel testified that there have been new scientific studies on hypnosis and memory since the time of Applicant's trial, but the new studies have been consistent with what was already known prior to Applicant's trial. (WRR6: 190).

(155) Dr. Spiegel testified that many of the new studies have been "replications" of earlier studies, and that there has not been anything dramatically new or different from what was known before. (WRR6: 190–91).

(156) The Court finds that Dr. Spiegel was present during Dr. Lynn's testimony at the subsequent writ hearing on October 16, 2017.

(157) Dr. Spiegel testified that he was familiar with Dr. Lynn and with his work and also testified: "These concerns about hypnosis are not new and could easily have been presented forcefully by someone like Dr. Lynn or Dr. Lynn himself in 1999. Nothing has happened since then that really changes the picture." (WRR6: 167, 203).

(158) Finally, the Court finds that Dr. Lynn himself testified that if he had been contacted in 1999, he could have evaluated Applicant's case and testified on his behalf. (WRR6: 144).

(159) The Court further finds that a substantial portion of the studies cited by Dr. Lynn in the affidavit he prepared in this case pre-date Applicant's trial. (AWX: 5 at pp. 8–9, 11–13). This is also true of the list of articles that he asserts show significant developments in the scientific community concerning memory and hypnosis since the time of Applicant's trial in 1999. (AWX: 60).

(160) Dr. Lynn failed to provide any testimony concerning how these studies changed the field of hypnosis or memory to constitute new science within the meaning of Article 11.073. The Court finds that simply because there are new studies does not mean that there is new science within the meaning of Article 11.073.

(161) Additionally, Dr. Lynn's testimony was unreliable concerning the dates of relevant scientific developments. Dr. Lynn originally testified that the concept of "imagination inflation" was first introduced in 1998, or 1999; however, on cross-examination, Dr. Lynn testified that the concept was introduced in 1996. (WRR6: 47; 141). The affidavit submitted by Dr. Lynn in this case cites the study as having been published in 1996. (AWX: 5 at pp. 6, 23).

(162) Dr. Lynn also failed to reference his 2015 study, published in "Consciousness and Cognition," which Dr. Spiegel discussed in his testimony:

> And in this study, they had two kinds of movies, and so it's particularly salient to this Court because we're talking about the hypnotic movie theater approach. One was an emotionally compelling movie. One was kind of boring. And the idea was to see whether memory was different in emotionally arousing versus boring movies.
>
> And one of the conditions was to hypnotize people and see if you could get them to provide less accurate information. And the study showed, quite clearly, that hypnosis had zero effect on providing inaccurate

> information. So it contradicts what Dr. Lynn has been saying about the likelihood that just using hypnosis would, in fact, produce incorrect information.

(WRR6: 165).

(163) Accordingly, the Court finds that Applicant has failed to meet his burden of proving that the scientific evidence he presents herein was unavailable at the time of Applicant's trial.

(164) Additionally, and to the extent that Applicant is specifically challenging the use of the "movie theater" hypnotic technique used by Serna during the hypnosis session, the Court makes the following findings of fact.

(165) The Court finds that Dr. Lynn stated in his affidavit that the "most egregious problem [with the hypnosis session] was the memory enhancement technique used." (AWX: 5 at p. 15).

(166) Dr. Lynn states in his affidavit that the technique is "firmly grounded in the video recorder model of memory" and "relies on and promotes the use of imagination, which . . . can increase confabulation and increase confidence in memory independent of accuracy." (AWX: 5 at p. 16).

(167) The Court further finds that Dr. Lynn testified that a research study on the "movie theater technique" was conducted by Yuille and McEwan in the mid-1980s. (WRR6: 65–66). Dr. Lynn testified that the study compared those people who were exposed to the movie theater technique with those who were simply asked to review the events. (WRR6: 66). According to Dr. Lynn, the study showed that "there were 9.33 errors in recall in the film technique versus 7.08 in the other technique." (WRR6: 66).

(168) Because that study was available prior to Applicant's trial, Dr. Lynn or a similarly opinioned expert could have presented testimony concerning this study at Applicant's trial in 1999.

(169) Nevertheless, the Court finds that the movie theater technique, and screen techniques in general, are still used by experts in the field.

(170) The Court finds that Dr. Spiegel testified that screen techniques, like the

movie theater technique, are useful in a forensic setting because they help the victim or witness to remain calm and focused enough to do their best at recalling what they saw. (WRR6: 186).

(171) Dr. Spiegel testified that screen techniques are used to help the person face what is causing them stress while keeping their body comfortable because it dissociates the mental stress from the physiological stress. (WRR6: 186).

(172) Dr. Spiegel testified that he uses a version of this technique with his patients daily and testified that it was used in this case to put Barganier in a relaxed state to allow her to try and give the best recollection of what she saw. (WRR6: 184–86).

(173) Dr. George Mount, Ph.D., the clinical psychologist and hypnosis expert called by the State to testify during the *Zani* hearing at Applicant's trial, was also called to testify at the subsequent writ hearing. (RR36: 60–84; WRR5: 142).

(174) Dr. Mount has been licensed to practice in Texas since 1972 and though he is semi-retired, he maintains a private practice in Dallas, Texas. (WRR5: 142–43; SWX: 5).

(175) Dr. Mount's practice included forensic work for many years, including the evaluation of the use of hypnosis in forensic settings. (WRR4: 143).

(176) Dr. Mount helped develop the forty-hour course administered by the Texas Commission on Law Enforcement ("TCOLE") that law enforcement officers take in order to become certified as investigative hypnotists. (WRR5: 147–48).

(177) Dr. Mount testified that TCOLE still certifies peace officers as investigative hypnotists, and the "movie theater technique" continues to be part of the curriculum and is still used. (WRR5: 148).

(178) Dr. Mount explained that a person undergoing hypnosis may experience an abreaction, or emotional reaction, to the memory when there is a trauma involved. (WRR5: 148).

(179) Dr. Mount testified that the movie theater technique is used so that the

individual being hypnotized may visualize their memory without re-experiencing it. (WRR5: 148).

(180) Accordingly, the Court finds that the hypnotic technique used in this case has not been discredited to the extent that Applicant asserts. While the Court finds that there may be disagreement amongst the experts concerning the use of the technique, both Dr. Mount and Dr. Spiegel testified that this technique is still presently used in a clinical and forensic setting, and is useful in a forensic setting.

Reliability of Barganier's Identification Testimony

(181) Moreover, the Court finds that even if Applicant had presented the testimony of Dr. Lynn, or a similar expert, at his trial, the outcome of the *Zani* hearing would not have been different.

(182) The Court finds that Jill Barganier testified at the subsequent writ hearing on October 10, 2017. (WRR4: 31–179).

(183) Prior to testifying at the subsequent writ hearing, Barganier reviewed a transcript of her trial testimony. (WRR4: 35).

(184) Barganier confirmed that she requested the hypnosis session. (WRR4: 82).

(185) Barganier testified that no one had suggested to her that it was a technique that might help her remember better. (WRR4: 82, 144).

(186) Barganier testified that she had never been hypnotized prior to February 4, 1998 and did not believe she had read anything about hypnosis. (WRR4: 83).

(187) Barganier testified that she still believes that Applicant was the man she saw get out of the passenger side of the Volkswagen on the morning of Mrs. Black's murder. (WRR4: 170).

(188) The Court finds that Barganier's testimony at the subsequent writ hearing is consistent with her trial testimony.

(189) Alfredo Roen Serna, the former Farmers Branch Police Officer who performed the hypnosis session in this case, testified at the subsequent writ hearing.

(190) Prior to testifying at the subsequent writ hearing, Serna reviewed his trial testimony and the video of the hypnosis session. (WRR4: 198).

(191) Serna retired from the Farmers Branch Police Department in July 2016 and currently works as an investigator with the Federal Public Defender's Office for the Northern District of Texas. (WRR4: 238).

(192) Serna was a patrol officer with the Farmers Branch Police Department at the time of Mrs. Black's murder. (WRR4: 181–82). Serna was also a crime scene technician and a certified investigative hypnotist. (WRR4: 182; 186–87).

(193) Serna received his certificate in investigative and forensic hypnosis in 1996 from the University of Houston Downtown Criminal Justice Center after completing a forty-hour course. (WRR4: 186–87; SX: 85; AWX: 43).

(194) The Court notes that Serna has not maintained his certification as an investigative hypnotist because his career path moved toward accident investigation and crime scene investigation, and therefore, he had not kept up with the current requirements for investigative hypnosis. (WRR4: 188–89).

(195) Serna confirmed that he had no information about the suspects in this case prior to the hypnosis session. (WRR4: 202).

(196) Serna also testified that his goal in using hypnosis in this case was to help Barganier "to calm down and relax enough to where she would be able to feel comfortable talking" about what she saw. (WRR4: 203).

(197) The Court finds that Serna was aware that some people were not hypnotizable and he could not be certain that Barganier had actually been hypnotized. (WRR4: 244–45). Serna also testified that it occurred to him at the time of the hypnosis session that Barganier was not hypnotized. (WRR4: 245). Serna testified that if she was not hypnotized, the session was simply a witness interview conducted by a police officer. (WRR4: 245).

(198) The Court finds that Serna's testimony at the subsequent writ hearing is consistent with his trial testimony.

(199) Jerry Baker also testified at the subsequent writ hearing. (WRR4: 253–306).

(200) Baker was a criminal investigator with the Farmers Branch Police Department's Criminal Investigation Division at the time of this offense and at the time of Applicant's trial. (WRR4: 256–57). Baker had been a police officer for approximately twelve years at the time of Applicant's trial. (WRR4: 298)

(201) Baker retired from the Farmers Branch Police Department in 2014. (WRR4: 255).

(202) Baker testified that he was present in the room with Barganier and Serna during the entirety of the hypnosis session and his role was to operate the video camera. (WRR4: 272, 276). Baker was sitting off-screen behind Serna during the session. (WRR4: 276–78).

(203) Baker also testified that he had not seen any photographs of the Applicant prior to the hypnosis session and did not know the name "Charles Don Flores." (WRR4: 282).

(204) Baker testified that he did not make any suggestions to Barganier during the hypnosis session and noted that her eyes were closed during the hypnosis. (WRR4: 300).

(205) Baker testified that he had no interactions with Barganier either before or after the hypnosis session. (WRR4: 301).

(206) The Court finds that Baker's testimony at the subsequent writ hearing is consistent with his testimony at Applicant's trial.

(207) The Court is not persuaded by Dr. Lynn's testimony concerning the lack of trustworthiness of Barganier's in-court identification of the Applicant.

(208) The Court notes that Dr. Lynn has never testified on behalf of the party offering the testimony of a witness who has undergone hypnosis. (WRR6:

120–21).

(209) The Court finds that Dr. Lynn does not subscribe to the current definition of hypnosis recognized by the American Psychological Association ("APA").

(210) Dr. Lynn testified that there "are different current scientific understandings of what hypnosis is" and there are "many definitions of hypnosis." (WRR6: 27).

(211) Dr. Lynn testified that the definition he is comfortable with is the following: "A situation that is defined as hypnosis, presumed to be hypno[tized] by a person who is invited to respond to imaginative suggestions." (WRR6: 27).

(212) Dr. Lynn conceded that this definition is not the current definition accepted by Division 30 of the APA. (WRR6: 143). Instead, Dr. Lynn testified that while his definition was accepted by the APA in 1994, it is not the current definition and is a highly controversial definition. (WRR6: 143).

(213) Dr. Spiegel testified that the definition that Dr. Lynn subscribes to is not the current definition and is no longer the accepted definition because "the majority in the field don't agree with it." (WRR6: 163).

(214) Dr. Spiegel explained that "the current definition from Division 30 involves stating that hypnosis is a state of highly focused attention with reduced peripheral awareness and an openness to suggestion, and that's an agreed-upon definition." (WRR6: 163–64).

(215) The Court finds that Dr. Spiegel was involved, along with a number of colleagues, in writing the current definition that is accepted by the APA. (WRR6: 164).

(216) Dr. Spiegel further explained that the "problem with Dr. Lynn's definition is that it tends to imply that people just enter an imagined world in hypnosis and all they're doing is making up things, imagining things rather than experiencing them. And so some of the issues he raises about vulnerability to suggestion are important issues, but I think it is not a comprehensive [definition] and it's not a currently accepted definition of what hypnosis is." (WRR6: 164).

(217) Additionally, the Court finds that Dr. Lynn's analysis of several of the *Zani* factors is incongruous and his evaluation of the *Zani* factors as a whole is not credible.

(218) The Court finds that Dr. Lynn's evaluation of the first *Zani* factor, the level of training in the clinical uses and forensic applications of hypnosis by the person performing the hypnosis, was incongruous.

(219) Dr. Lynn testified that he did not believe that Officer Serna's training in the "clinical uses of forensic hypnosis" was adequate because he "used a technique that previous research even had -- had showed could produce a greater frequency of inaccurate memories." (WRR6: 60).

(220) The Court finds that this is not the relevant analysis for this factor and, in fact, seems to combine two of the *Zani* factors. The appropriateness of the memory retrieval technique is a separate factor to be evaluated under *Zani*, distinct from the qualifications and training of the hypnotist.

(221) The Court finds that the hypnotist in this case, Alfredo Roen Serna, was certified as an investigative hypnotist on August 7, 1996. (SX: 85).

(222) The Court finds that TCOLE, formerly known as TCLEOSE, is permitted to establish minimum requirements for the training, testing, and certification of peace officers who use investigative hypnosis. *See* Tex. Occ. Code Ann. § 1701.403 (West 2012).

(223) The Court finds that "[a] peace officer may not use a hypnotic interview technique unless the officer: (1) completes a training course approved by the commission; and (2) passes an examination administered by the commission that is designed to test the officer's knowledge of investigative hypnosis. Tex. Occ. Code Ann. § 1701.403 (West 2012).

(224) The Court finds that Serna took the requisite forty-hour course approved by TCOLE and was certified at the time he conducted the hypnosis session in this case.

(225) The Court finds that there is no requirement under *Zani* that the person performing the hypnosis session be a psychiatrist or psychologist. *Zani*, 758 S.W.2d at 243–44.

(226) Additionally, the Court notes that the hypnotist in *Zani* was Texas Ranger Carl Weathers. *Zani II*, 767 S.W.2d at 827. Weathers had an associate degree in law enforcement, and had attended a one-week course at the Texas Department of Public Safety Investigative Hypnosis Training School. *Zani II*, 767 S.W.2d at 827. The *Zani II* court found Weather's training and experience sufficient. *Zani II*, 767 S.W.2d at 867.

(227) The Court finds that, at the time of the hypnosis session, Serna had the requisite training and certification to perform the hypnosis session in this case.

(228) Moreover, the Court finds that Dr. Spiegel testified that while he would have done things a little differently from Serna, he did not see anything particularly fatal in the session and thought the way Serna conducted the questioning during the session was reasonable. (WRR6: 194–95).

(229) As for the second *Zani* factor, Dr. Lynn testified that Serna was not sufficiently independent from the investigators, prosecutors or defense to conduct the session. (WRR6: 60).

(230) In *Zani II*, the court determined that though the hypnotist was a Texas Ranger, he had no preconception of the description of the suspect and was not trying to make a case against any particular person. The Court finds that the same is true in this case. The Court finds that Serna testified that he had worked the crime scene as a crime scene technician but had not interviewed any witnesses. Serna also testified that he had not seen a photograph of Applicant or heard Applicant's name at the time of the hypnosis session. Serna also testified that he was not even aware that Barganier had already identified Richard Childs as the driver of the Volkswagen. This is evident in the session due to Serna's spending equal time on descriptions of the passenger and the driver.

(231) The Court finds Serna's testimony regarding this matter at the subsequent writ hearing was consistent with his trial testimony. The Court finds that after observing Serna's demeanor and testimony provided to this court at the subsequent writ hearing on October 11, 2016, the Court finds that Serna is a credible witness and his testimony is credible and reliable.

(232) Dr. Lynn also evaluated the third factor, the existence of a record of any information given or known by the hypnotist concerning the case prior to the hypnosis session, noting that he had seen nothing other than that Serna collected evidence from the crime scene. (WRR6: 61).

(233) However, as noted above, Serna testified concerning his knowledge prior to the session, and the Court accepts that testimony.

(234) As for the fourth factor, the existence of a written or recorded account of the facts as the hypnosis subject remembers them prior to undergoing hypnosis, Dr. Lynn testified that he "received a brief statement to that effect." (WRR6: 61). Presumably, Dr. Lynn is referring to the pre-hypnotic interview conducted by Serna on the video. It does not appear from Dr. Lynn's testimony that he considered any of the notes the Farmers Branch Police Department wrote concerning Barganier's descriptions. (AWX: 10; SWX: 2). Additionally, Dr. Lynn referenced the report generated by Serna following the session, which would not be relevant to the analysis of this factor. (WRR6: 61).

(235) Dr. Lynn testified in regards to the fifth factor, the creation of recordings of all contacts between the hypnotist and the subject, that he did not believe we saw all of the contacts between the hypnotist and subject because "we did not see the full bodies of both the individual who was interviewed and Mr. Serna." (WRR6: 62).

(236) The Court finds that a video recording of the hypnosis video was admitted for record purposes at Applicant's trial and at the subsequent writ hearing. (SX: 84; AWX: 26).

(237) Under *Zani*, there is no requirement that the hypnosis session be video recorded. In fact, the hypnosis session in the *Zani* case was only audio recorded. *Zani II*, 767 S.W.2d 825, at 826. Accordingly, Dr. Lynn's analysis of this factor is incongruous.

(238) Moreover, this factor refers to whether there is a recording of the entirety of the contact between the two. Serna testified that the entirety of his interaction with Barganier is contained on the video recording. (SX: 84; AWX: 26). Barganier also testified that she met Serna for the first time

when she went into the room for the hypnosis session. (WRR4: 86).

(239) Factor six of the analysis involves the presence of other persons in the room and the location of the session. Dr. Lynn testified that it was contrary to good practice and to *Zani* to have another person in the room. (WRR6: 62). Dr. Lynn also testified that it was very concerning that the location of the hypnosis session was at the police department because it was contrary to *Zani* and because it could increase pressure for her to make an identification. (WRR6: 62).

(240) The Court notes that in the *Zani* case, in addition to the hypnotist and witness, there were three other people present in the room during the session, including an artist who actually questioned the witness during the hypnosis session. *Zani II*, 767 S.W.2d at 825.

(241) At the subsequent writ hearing, Barganier testified that her husband had requested a second person to be in the room with her, to act as a sort of "chaperone." (WRR4: 87). Barganier testified that they would not allow her husband to be present during the session because they wanted it to be a "closed environment." (WRR4: 87).

(242) In this case, there was no evidence that Baker made any comments or signaled to Barganier during the session, and even if Baker had attempted to signal Barganier, she had her eyes closed during the session.

(243) The Court also finds that Baker had not seen a photograph of Applicant and could not have fed her a description of Applicant.

(244) The Court also notes that if Barganier felt any pressure to identify anyone as a result of the location of the session and presence of Baker, she failed to identify anyone immediately after the session.

(245) The seventh *Zani* factor is the appropriateness of the induction and memory retrieval technique used. The Court finds that Dr. Lynn gave no opinion as to the induction technique used. Dr. Lynn testified that the memory retrieval technique used in this case, the movie theater technique, was not an acceptable technique. (WRR6: 64). Dr. Lynn testified that this technique required Barganier to use her imagination and asked her to watch a documentary film. (WRR6: 64). Dr. Lynn opined that by stating the

film is a documentary film, there is a notion that the memories will be accurate. (WRR6: 65).

(246) The State's expert, Dr. Spiegel, testified that he was not concerned about the use of the term "documentary" during the hypnosis session. (WRR6: 186). Dr. Spiegel testified:

> I actually think it was a good term because there's a difference between and movie and a documentary. You know, movies are things that are made up. Documentaries are films of real events. And I think what he was saying is, try and get your best recollection of the real event, of what really happened.
>
> So if there is a power to suggestion, I think the use of the word "documentary" was a suggestion to her, just try and remember as clearly as possible what actually happened, what you actually saw. And it did succeed, as she reported, in helping reduce her anxiety. She did not feel as frightened.

(WRR6: 186).

(247) Dr. Spiegel also testified that he was not concerned about Serna's instruction to Barganier to imagine herself in a movie theater. (WRR6: 187). Dr. Spiegel explained that the theater is used to help the person being hypnotized know they are safe and comfortable, and that the person is going to observe an event. (WRR6: 187). Dr. Spiegel testified that this does not automatically contaminate the memory of the event itself. (WRR6: 187).

(248) The Court finds that while Dr. Lynn did not specifically address the eighth *Zani* factor, the appropriateness of using hypnosis for the kind of memory loss involved, the Court finds that it was Lynn's overarching opinion that he did not believe hypnosis was an acceptable method for refreshing memory.

(249) The Court finds that there is a disagreement in the scientific community on whether hypnosis can be reliably used to refresh memory. (WRR6: 187).

(250) The Court finds that Dr. Spiegel testified that he does not believe hypnosis

is a substitute for good police work, and should be a last resort rather than a first resort, but was of the opinion that hypnosis can be useful in the forensic context because hypnosis can help people who have experienced or witnessed traumatic events and are having difficulty recalling the events. (WRR6: 168).

(251) Like Dr. Lynn, Dr. Kovera, and Dr. Mount, Dr. Spiegel also testified that the video recorder model of memory is inaccurate and testified that memory is reconstructive. (WRR6: 169).

(252) Dr. Spiegel also testified that it was his opinion that Dr. Lynn overestimates the dangers of suggestion and confabulation, and in challenging Dr. Lynn's opinion, pointed to some of Lynn's own published work, including Lynn's 2015 study in "Consciousness and Cognition" which "showed, quite clearly, that hypnosis had zero effect on providing inaccurate information." (WRR6: 164–65).

(253) Dr. Spiegel also referenced a 1991 study of Lynn's in the Journal of Personality and Social Psychology that did not support Lynn's present opinion:

> [In that study,] he tried to insert an incorrect experience, a telephone ringing, and had a real experience, pens, pencils dropping out of a jar. And he found that the expectation of the subjects, how they were prepared, whether or not they thought hypnosis would improve memory, had absolutely no effect on their rate of accepting. In fact, none of them ultimately accepted the -- the false suggestion that a phone had rung when it had not.

(WRR6: 165).

(254) Dr. Spiegel testified that "these studies . . . . demonstrate that there are real limits to how much the hypnotic experience can or will contaminate memory or cause people to produce false information." (WRR6: 165).

(255) Dr. Lynn failed to evaluate the ninth *Zani* factor, whether there was any evidence to corroborate Barganier's testimony. (WRR6: 66). Dr. Lynn testified:

> I tried to restrict -- the answer is no. And I tried to restrict -- no. I take that back. I -- I saw there was some reference to multiple corroborators, but I did -- did not focus in on that because I'm not an expert in eyewitness testimony or corroboration. And -- and so I just basically glanced at that.

(WRR6: 66). Dr. Lynn further testified that he did not know if there were any other witnesses who claimed to have seen what Barganier saw that morning. (WRR6: 66).

(256) Dr. Lynn's decision not to consider any corroborating evidence, a factor under *Zani* that goes to the reliability of the testimony, was considered by the Court when weighing the credibility of Dr. Lynn's testimony.

(257) In contrast, the State's expert Dr. Spiegel testified that corroborating evidence is necessary when using hypnosis in a forensic setting. (WRR6: 181).

(258) Dr. Spiegel explained: "Anytime I use hypnosis with a patient or in a forensic setting, I say the fact that you say something in hypnosis doesn't mean it's true, and the fact that you don't recall something doesn't mean it isn't true. It does not add to the truth value, and corroboration is extremely important." (WRR6: 181).

(259) Dr. Spiegel further testified: "For myself, as an expert in hypnosis, evaluating situations like this, corroboration is one of the absolute necessities. And I, in evaluating cases, look at the -- whatever corroborating evidence is there in reaching an overall decision." (WRR6: 182).

(260) Dr. Spiegel testified that because corroboration is a factor to consider under *Zani*, it is very important to look at the corroborating information and decide whether it makes it more or less likely that the testimony that emerged after hypnosis is accurate. (WRR6: 182–83).

(261) The Court finds that there is considerable evidence in this case that corroborates Barganier's identification. (*See supra* finding 61; *see infra* findings 285–329; *see also* RR36: 111–13).

(262) Dr. Lynn also failed to evaluate whether there was any subtle cuing or suggestions of answers during the hypnotic session. In that regard, the Court finds that the video of the hypnosis session is the best evidence on this issue and reveals no evidence of either cuing or suggestion of answers. (AWX: 26). Barganier had her eyes closed throughout the hypnosis session, and there was no evidence of Serna or Baker suggesting answers or cuing her in any way. (AWX: 26).

(263) The Court also finds that Dr. Lynn was not aware that the Texas Court of Criminal Appeals had reaffirmed *Zani* in the case *State v. Medrano* in 2004. (WRR6: 133–34).

(264) The Court further finds that Dr. Mount reviewed his testimony from the *Zani* hearing at Applicant's trial and the video of Barganier's hypnosis session prior to testifying at the subsequent writ hearing. (WRR5: 145). Dr. Mount testified that he was aware that the Court of Criminal Appeals had reaffirmed the *Zani* decision in 2004 in *Medrano*. (WRR5: 149). Dr. Mount testified that he stood by his trial testimony and did not see anything in his testimony that he presently disagreed with. (WRR5: 146).

(265) The Court also finds that, in reaching his conclusions, Dr. Lynn failed to consider Barganier's expectation for the hypnosis session despite having testified that a person's expectations regarding hypnosis were of particular importance.

(266) Dr. Lynn testified that there is a "basic presumption when someone enters into a hypnotic scenario, particularly for forensic purposes, is that it will improve memory and that the memories that ensued following that methodology are likely to be accurate. After all, why would one go through that particular procedure if it would not have -- have value?" (WRR6: 44–45). Dr. Lynn testified that this is problematic "because expectancy is a vital part of how people respond to suggestions more generally." (WRR6: 45).

(267) The Court finds, however, that Barganier testified that that she did not believe that hypnosis could help her remember more. (WRR4: 161). Instead, as Barganier testified to both at Applicant's trial and at the subsequent writ hearing, she requested the hypnosis session to help her

relax. (RR36: 90, 101; WRR4: 160–61).

(268) Dr. Spiegel agreed that it was important to know what Barganier's expectations were for the hypnosis session and important to know whether she believed the hypnosis was for memory retrieval or relaxation. (WRR6: 198–99).

(269) Dr. Spiegel testified that Barganier "asked for the hypnosis, not to improve her memory but simply to help her deal with the anxiety that would come up with trying to remember. And emotion and memory are linked, and so it was a perfectly reasonable request to just say, try and help me handle the anxiety I have while I'm trying to think about what I saw." (WRR6: 180).

(270) Dr. Spiegel testified that not everyone is hypnotizable and it was conceivable that Barganier was not hypnotized because she is not hypnotizable, but there was no way to tell because her hypnotizability was not tested. (WRR6: 178--79, 196). Dr. Spiegel noted that the session did not seem "like such a profound experience to her," there was no dramatic increase in her production. (WRR6: 196).

(271) Dr. Spiegel testified that the retrieval of a memory can be triggered by many things, such as sight, sound, touch and smell. (WRR6: 200).

(272) Dr. Spiegel also testified that is was certainly possible that seeing Mr. Flores in person triggered the retrieval of her memory from the day of the murder. (WRR6: 201).

(273) Dr. Spiegel testified that it was his opinion that Barganier's identification of Applicant had nothing to do with the hypnosis session that occurred thirteen months prior to the identification, but rather that her identification was the result of that being "the first time that she had had a face-to-face confrontation with him since that time 13 months ago, and the -- the totality of her experience of him is what led to her identification." (WRR6: 201).

(274) Dr. Spiegel also testified that it was significant that Barganier did not make an identification when she viewed the photo lineup after the hypnosis session. (WRR6: 201). Dr. Spiegel explained:

> And so she was using her judgment, restraining herself from making an identification, whether she could or she couldn't.
>
> ....
>
> So I think it showed that she was using judgment. She was evaluating her ability to make a decision.
>
> And the time when you would worry about hypnosis influencing somebody would have been the time immediately after the hypnosis session, when she's looking at the lineup, and she did not ID anybody then.
>
> If she were falsely confident about her newly refreshed hypnotic recollection, I think it's likely that right after the hypnosis she would have said, yes, that's him, but she didn't.

(WRR6: 201–02).

(275) Dr. Spiegel also testified that it was highly unlikely that a suggestion that you might remember more or will remember more would survive for 13 months. (WRR6: 202). Dr. Spiegel explained:

> There was a study that Martin Orne, who we talked about before, did in which they hypnotized a bunch of subjects, gave them postcards and said, mail one a day.
>
> And they wanted to see how long the hypnotic instruction would last, and there were two kind of interesting findings. One was it didn't last very long. It was like 24 days on average before people just stopped doing it. But the interesting thing was that just telling people to do it had as much of an effect as a hypnotic suggestion that they should to it. So there was nothing special about hypnosis in getting them to do it.

(WRR6: 202–03).

(276) The Court finds that the State argued at trial that Barganier's testimony

was of independent origin from the hypnosis and was not the product of the hypnosis session.

(277) The Court finds that there is no reason to deviate from its original findings on the reliability and admissibility of Barganier's identification testimony.

(278) Accordingly, the Court finds that, under the totality of the circumstances, the State established by clear and convincing evidence that Barganier's post-hypnotic testimony was reliable.

Evidence Supporting Applicant's Guilt Absent Barganier's Identification

(279) The Court finds that to meet his burden under Article 11.073, Applicant must show not only that the trial court would have excluded Jill Barganier's identification testimony as a result of Applicant's new scientific evidence, he must also show that as a result of that exclusion he would not have been convicted. *See* Tex. Code Crim. Proc. Ann. art. 11.073(b)(2) (West Supp. 2016).

(280) The Court finds that Applicant has failed to show, by a preponderance of the evidence, that he would not have been convicted if Barganier's testimony identifying him as the Volkswagen passenger had been excluded.

(281) Of note, the State was prepared to proceed with Applicant's capital murder trial without Barganier's identification, as no one knew Barganier was able to identify Applicant as the Volkswagen passenger until she saw him in court in the midst of trial.

(282) While Applicant argues that there is no direct evidence linking him to the crime, the Court notes that "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). In circumstantial evidence cases, it is not necessary that every fact and circumstance "point directly and independently to the defendant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances." *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993); *Hooper*, 214 S.W.3d at 13.

(283) This includes evidence as to the identity of the perpetrator, which may be proved by direct or circumstantial evidence. *See Earls v. State,* 707 S.W.2d 82, 85 (Tex. Crim. App. 1986); *Oliver v. State,* 613 S.W.2d 270, 274 (Tex. Crim. App. 1981) (on reh'g).

(284) Juries are permitted to draw multiple reasonable inferences from facts as long as each is supported by the evidence presented at trial. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Hooper*, 214 S.W.3d at 16–17.

(285) The Court finds that at Applicant's trial, Jackie Roberts, Terry Plunk and Judy Haney all testified about a drug deal that occurred in the late evening hours of January 28, 1998 and early morning hours of January 29, 1998, leading up to Mrs. Black's murder.

(286) Jackie Roberts, who was dating Applicant's co-defendant Richard Childs at the time of the offense, met with Childs at her home on the evening of January 28, 1998. (RR34: 118, 119, 120). Childs had asked her to set up a deal with a man named Terry Plunk in which $3,900 was to be exchanged for a quarter-pound of methamphetamine. (RR34: 115, 117, 118). Applicant, whom Roberts had not previously met, was with Childs. (RR34: 118, 119, 120). The two men had arrived in Child's Volkswagen, described as a "hippie" or "slug bug," with dark tinted windows that was haphazardly painted with multiple colors, particularly pink and purple. (RR34:79–81, 230–32; RR35: 64, 92; RR36: 247).

(287) Prior to arriving at Roberts' house, the two men had been in Irving at Applicant's trailer where they had spent several hours "doing drugs" in the company of Jamie Dodge and Jonathan Wait, Jr. (RR34: 78, 79, 98; RR36: 250–52, 257).

(288) Roberts, Childs, and Applicant left Roberts' house to make the drug deal in her El Camino, leaving the Volkswagen blocking the driveway. (RR34: 121). Roberts drove them to Judy Haney's apartment in Dallas, where the drug exchange with Plunk was to take place. (RR34: 122–23). Roberts testified that the original plan was for Roberts and Plunk to make the exchange while Childs and Applicant stayed in the vehicle; Applicant,

however, would not agree to this arrangement, so all three entered Haney's apartment. (RR34: 123–24, 183).

(289) During the deal, Applicant complained that he had been "shorted" on the drugs. (RR34: 127–28, 176–77). Roberts and Haney testified that Applicant weighed the drugs on a digital scale that he had brought with him and claimed that the drugs were short by a quarter ounce. (RR34: 127–28, 176-177).

(290) Terry Plunk testified that he just wanted to get the deal over with, so he put a quarter ounce in a separate bag and gave it to Applicant. (RR34: 128–29, 214). Plunk was then paid. (RR34: 129, 214–15).

(291) Roberts testified that she had seen a small silver gun on Childs and thought Applicant might have a gun because she noticed that he was fidgety. (RR34: 132–33). Because of the presence of weapons, and the fact that the drugs were not noticeably short, Roberts feared that she and Plunk were going to be "ripped off." (RR34:134). Roberts testified that she wanted to stay there with Plunk and Haney, but Childs insisted that she leave with him and Applicant. (RR34:134).

(292) Roberts testified that the three left and went to Applicant's trailer in Irving. (RR34: 134–35). Applicant again weighed the drugs and insisted that he had been "ripped off." (RR34:137–38). Roberts testified that at one point, Applicant held a gun to her head and demanded either the full amount of drugs or his money back. (RR34: 138–150). She further testified that even after Applicant calmed down a bit, he continued to demand either more drugs or $3,900, and was really pressing the issue. (RR34: 150, 152).

(293) Roberts told Applicant that she could get the money from her in-laws' house but she needed a day in which to do it. (RR34: 150). Roberts' ex-husband Gary Black had $39,000 secreted at his parents' house. The money was allegedly kept behind a suitcase in the closet of the Blacks' master bedroom. (RR34: 68–70; RR38: 191). Gary had acquired the money from his drug dealing and was incarcerated at the time of the offense. (RR34: 52, 253; RR38: 137). Childs, who knew about Gary Black's money, confirmed that she could get the money. (RR34: 150–51; RR38: 136). Applicant, however, would not take "tomorrow" for an answer and

saw an opportunity to get an even larger amount of money immediately. (RR39: 101).

(294) The jury heard that in addition to finding the bodies of Mrs. Black and the family dog, police summoned to the crime scene found the Blacks' home in disarray; fixtures had been pulled out of bathrooms, as if someone were looking for something in the walls of the house. (RR35: 199-202).

(295) Additionally, the jury heard the testimony of Vanessa Stovall, one of Childs' girlfriends. Stovall testified that Childs and Applicant came to her home around 6:30 a.m. on the morning of the murder. (RR35: 69, 71, 82, 89). The three of them smoked methamphetamine together. (RR35: 73–74, 90). Applicant and Childs then left Stovall's home, together, in the Volkswagen. (RR35: 75, 95). Accordingly, Stovall's testimony placed Applicant in the Volkswagen with Childs, whom Barganier had positively identified as the driver just moments before the men were seen getting out of the same car at the Blacks' home. (RR35: 75, 95).

(296) The jury also heard from Michelle Babler, and her son Nathan Taylor, also neighbors of the Blacks. Their testimony placed the Volkswagen in front of the Blacks' home at the time Barganier saw the two men. (RR35: 104, 106, 108, 135–39, 144, 149). Babler and Taylor testified that they saw two men get out the car. (RR35: 108, 139). Babler testified that the Applicant and the passenger in the Volkswagen were similar in appearance. (RR35: 115–16). Her son Nathan noticed that the men were dressed in black and had gloves on. (RR35:140).

(297) Jamie Dodge and Judy Haney testified that between the time Applicant left his trailer and Mrs. Black's murder, he was dressed in black clothing, particularly a long black coat called a duster. (RR34: 84–85, 175–76, 195).

(298) The Volkswagen was also seen by Jill Barganier's husband Robert on his way to work just after his wife had seen the vehicle. (RR35: 174–75).

(299) The Court finds that even if Jill Barganier's identification of Applicant had been excluded, she would still have been permitted to testify about the events that occurred prior to her hypnosis, including her positive identification of Richard Childs as the driver of the Volkswagen.

(300) Additionally, Applicant's own statements to those close to him placed him at the Blacks' residence during the offense.

(301) Homero Garcia and Applicant's father-in-law Jonathan Wait, Sr. both testified that Applicant told them that he was at the Blacks' home and participated in the offense.

(302) Homero Garcia, an old high school friend of Applicant's, testified that he saw Applicant the evening after the murder. (RR36: 231–32, 237). Applicant told Garcia that he and Childs had gone to a house to get some money and the whole deal had gone bad. (RR36: 237). Applicant explained that he had shot a dog and that Childs had shot an old lady. (RR36: 220, 224, 234). Applicant then traded guns with Garcia; giving Garcia a .380 in exchange for a .357. (RR36: 220, 222; SX 64, 65). Applicant told Garcia that this was not the gun used in the offense, and forensic analysis confirmed this. (RR36: 228; RR38: 88). However, Garcia also testified that he had seen Applicant with a .380 on prior occasions. (RR36: 221).

(303) Jonathan Wait, Sr., the father of Applicant's common-law wife Myra Wait, testified that Applicant told him that he had set the Volkswagen on fire and needed to get out of the country. (RR37: 85–86). Wait's son had previously called his attention to a newspaper article about the murder and told him that Applicant was the man they were looking for. (RR37:82). When Wait confronted Applicant with the article, Applicant told Wait that he had gotten into a "little trouble" and admitted that he "shot the dog." (RR37: 84–85, 94).

(304) Additionally, the jury heard that Applicant destroyed the Volkswagen that was seen outside the Blacks' residence the morning of the murder.

(305) "Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt." *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004)

(306) Jonathan Wait, Jr., Myra's brother, testified that on Saturday, January 31, 1998, Applicant asked for help with the Volkswagen; Applicant wanted to

tow the vehicle to Ajax Roofing, a business owned by Applicant's father, in Grand Prairie, Texas. (RR36: 261, 263–64, 275). Wait, Jr. steered the vehicle as it was towed, while Myra followed in her red Suzuki. (RR36: 262). At the roofing company, Applicant used three or four cans of Black spray paint to paint the Volkswagen. (RR36:264).

(307) Applicant then hooked the Volkswagen up to the Suzuki. (RR36: 266). Wait, Jr. steered the Volkswagen as Applicant pulled it to an exit ramp at Interstate 30 and West 19th. (RR36: 266–67). Wait, Jr. testified that Applicant then poured gasoline on the car, lit a piece of paper, and threw it onto the Volkswagen. (RR36: 268). The vehicle burst into flame. (RR36:268).

(308) James Jordan testified that he was driving on Interstate 30 when he observed the scene. (RR37: 13–18). Jordan initially thought that another motorist might need assistance and was in the process of pulling off the road to offer help when Applicant "lit the bug." (RR36: 268-69; RR37: 19–20). As Applicant drove off in the Suzuki, Jordan gave chase, intending to get his license number so he could turn Applicant in to the police. (RR36:269; RR37:22).

(309) Applicant attempted to evade Jordan by driving at an excessive rate of speed, swerving in and out of traffic, running red lights, and, at one point, jumping the median into oncoming traffic. (RR36: 270–73; RR37: 27–39). Applicant also fired several gun shots at Jordan's car. (RR36: 269; RR37: 28, 31, 52). Jordan made an in-court identification of Applicant as the man he saw on January 31, 1998. (RR37: 18).

(310) Wait, Jr. testified that Applicant was exhilarated during this time and later referred to it as "drama." (RR36:273). The jury also heard that once Jordan abandoned the chase and stopped to call 911, Applicant stopped at a gas station, bought some beer, and threw away the paint cans. (RR36:273–74; RR37: 39).

(311) Roberts testified that Applicant and Childs procured weapons from a house in Irving just hours before the murder of Mrs. Black; Applicant came out of the house with the smaller of these two weapons. (RR34: 143–44; RR38: 113).

(312) The jury also heard that Childs was arrested on the evening of January 31, 1998. (RR36: 177–79). Ammunition consistent with a shell casing found in the Black home was in his possession at the time. (RR36: 179–82, 183, 194). A search of the premises where he had been staying uncovered a .44 Magnum revolver which was found to have residue on the inside of the barrel consistent with potato starch. (RR36: 197, 211–13; SX: 53, 54).

(313) A .44 magnum is a larger gun than a .380 firearm. (RR38:102,110). The evidence shows that a .380 bullet and spent casing were recovered from the Blacks' home. (RR35: 236–37; SX: 49, 50).

(314) The Court finds that the jury could have reasonably concluded that if Childs had the .44 Magnum, Applicant must have wielded the .380 which killed Mrs. Black. The jury could have also reasonably concluded that Applicant had destroyed or disposed of the .380 used to kill Mrs. Black, just as he had the Volkswagen.

(315) The jury also heard that Applicant went to extreme efforts to avoid apprehension and later to escape from custody.

(316) A few days after the murder, Applicant fled to Mexico, telling Wait, Sr. that he had to get out of the country and was not going to be "taken alive." (RR37: 85–86; RR37: 138, 140, 141).

(317) The jury also heard that on his return from Mexico, Applicant struggled to avoid arrest in Kyle, Texas and gave a false name and false identification. (RR37: 109, 117–27).

(318) On April 18, 1998, at approximately 7:00PM, Kyle Police Officers, Dustin Slaughter and Patsy Oaks, were dispatched to investigate a possible intoxicated driver on the frontage road of the highway. (RR37: 97–103). The vehicle was a blue Volvo, and Applicant was identified as the driver. (RR37: 104, 106, 108–09). Officer Slaughter got behind the vehicle and, when he observed erratic behavior, initiated a traffic stop, though the Volvo was not immediately responsive. (RR37: 104–06).

(319) Officer Slaughter identified himself as a police officer and informed Applicant that he was being stopped for failure to maintain a single lane of traffic and suspicion of DWI. (RR37: 109). When he requested

identification, Applicant said that he had none, gave his name as Juan Jojola and presented a Social Security card with that name. (RR37: 109). He explained that he was coming from Mexico and was on his way to Dallas. (RR37:130). Subsequent evidence revealed that the Volvo re-entered the United States from Mexico on April 18, 1998 at 1:29 p.m. at Progresso, Texas. (RR37: 140, 143–44).

(320) Applicant initially cooperated with the officers, though he performed poorly on a field sobriety test. (RR37: 110–13). Officer Slaughter also received information from a driver who stopped and informed the officer that Applicant "almost ran him off the road costing him his life." (RR37: 115). Subsequent to a pat-down performed by Officer Oaks, Applicant was informed that he was being arrested for DWI. (RR37: 116).

(321) The officers were able to get one handcuff on Applicant when he turned around and hit Officer Slaughter with his elbow. (RR37: 117). Officer Oaks jumped on Applicant and a struggle broke out with Applicant cussing, fighting, and making statements like "fuck you, bitch" and "it wasn't going to happen." (RR37: 118–20, 122–23). Applicant tried to move the struggle onto the highway, where there was heavy traffic, and a posted speed limit of 70. (RR37: 122). Officer Slaughter testified that he feared for his life and that of Officer Oaks. (RR37: 122). The officers were eventually able to subdue Applicant when another deputy arrived to help. (RR37: 123). As a result of this incident, Officer Slaughter had a swollen left eye. (RR37: 127). Officer Oaks suffered a bite on her arm and an injury to one of the bones in her hand. (RR37: 127).

(322) Applicant was booked for DWI and for assault on a police officer under the name of Juan Jojola. (RR37:126-127). He was able to gain release before his true identity was learned. (RR37: 126—27, 134).

(323) Here, it is obvious that Applicant wanted to avoid apprehension by State authorities. Applicant fled Dallas shortly after the murder of Mrs. Black and traveled to Mexico. He had explained to Jonathan Wait, Sr. that he was in some "trouble," and had admitted to both Wait and Homero Garcia that he had shot the Black's dog. The authorities were seeking Applicant for investigation as a suspect in a capital murder case. Applicant was fully

aware of his complicity in the crime and that he could be arrested if located.

(324) Flight is a circumstance from which an inference of guilt may be drawn. *Devoe v. State*, 354 S.W.3d 457, 470 (Tex. Crim. App. 2011); *Alba v. State*, 905 S.W.2d 581, 586 (Tex. Crim. App. 1995).

(325) Avoiding apprehension is similar to flight and constitutes a quasi-admission of guilt. *Cawley v. State*, 310 S.W.2d 340, 342 (Tex. Crim. App. 1957); *see also Alba v. State*, 905 S.W.2d 581, 586 (Tex. Crim. App. 1995). No distinction is made between flight from the immediate scene of the crime and flight from peace officers. *See Burks v. State*, 876 S.W.2d 877, 902 903 (Tex. Crim. App. 1994) (flight from peace officer trying to arrest defendant); *Valdez v. State*, 623 S.W.2d 317, 321 (Tex. Crim. App. 1981) (flight from the scene of the crime); *see also Foster v. State*, 779 S.W.2d at 859 (holding that flight is no less relevant if it is only flight from custody or to avoid arrest).

(326) Moreover, the evidence of false identification and avoiding apprehension is highly probative since a strong inference of guilt may be drawn therefrom. *Cawley v. State*, 310 S.W.2d at 342.

(327) The jury also heard that just prior to his arrest on May 1, 1998, Applicant led FBI agents on a dangerous high speed chase, which ended with a head on collision, a foot race through a residential area, and a violent physical struggle. (RR37: 148–49, 157–69).

(328) The evidence further showed that while being treated at Parkland hospital for a broken kneecap suffered in the May 1st collision, Applicant attempted to escape from custody by taking a deputy sheriff's gun and threatening to kill him. (RR37: 188–91, 193, 194, 201, 208, 220–29). During the struggle, Applicant maced the officer. (RR37: 194, 209, 217, 230–36). It took three to four people to eventually subdue Applicant. (RR37: 195–98, 217–18, 232).

(329) The Court finds that these efforts demonstrate a clear consciousness of guilt. *See, for example, Ransom v. State*, 920 S.W.2d 288, 299 (Tex. Crim. App. 1994); *Alba v. State*, 905 S.W.2d at 586; *Burks v. State*, 876 S.W.2d 877,

902–03; *Felder v. State*, 848 S.W.2d 98; *Cawley*, 310 S.W.2d at 342. Consciousness of guilt is perhaps one of the strongest kinds of evidence of guilt. *See Torres v. State*, 794 S.W.2d 596, 598–600 (Tex. App.—Austin 1990, no pet.).

(330) In light of all of the foregoing evidence, the Court finds that Applicant has failed to show, on the preponderance of the evidence, that he would not have been convicted if Barganier's identification of him as the Volkswagen passenger had been excluded.

VI. ADDITIONAL FINDINGS

Testimony of Dr. Margaret Kovera, Ph.D.

(331) The Court finds that Applicant also offered the testimony of Dr. Margaret Kovera, Ph.D. in support of his claim.

(332) Dr. Kovera received her Ph.D. in psychology from the University of Minnesota in 1994 and is a professor of psychology at the John Jay College of Criminal Justice at the City University of New York. (WRR5: 8–9; AWX: 4).

(333) Dr. Kovera testified that her expertise is in eyewitness identification and memory and specifically with law enforcement's use of eyewitness identification and she provides consultation in that area primarily to defense counsel. (WRR5: 11–12).

(334) The Court finds that Dr. Kovera's knowledge concerning hypnosis was based on reading research studies but she has not conducted any experiments involving hypnosis. (WRR5: 32).

(335) The Court finds that Dr. Kovera is not an expert in hypnosis and is not qualified to render an opinion concerning hypnosis.

(336) The Court finds that Applicant has not raised a claim challenging the eyewitness identification procedures used by the Farmers Branch Police Department.

(337) The Court finds that Applicant has not raised a claim challenging

Barganier's in-court identification on the basis of improper eyewitness identification procedures.

(338) The Court finds that Applicant's instant claim is based on new science concerning the effect of hypnosis on memory.

(339) The Court finds that Dr. Kovera's testimony concerning eyewitness identification procedures is not relevant to the specific claim raised by Applicant in his subsequent writ application.

Applicant's Initial Writ Application

(340) This Court notes that it has taken judicial notice of Applicant's original state habeas proceeding and of its findings in that proceeding, cause number W98-02133-N(A).

(341) In his initial application for writ of habeas corpus, Applicant claimed that defense counsel, Brad Lollar, "suddenly changed his defense strategy" when he argued in closing argument during the guilt/innocence phase of Applicant's trial that Applicant was guilty of burglary of the Blacks' home. (*See* RR39: 83-86). Applicant claimed that this occurred following the testimony of Jill Barganier.

(176) Applicant's trial counsel, Doug Parks and Brad Lollar, provided affidavits addressing several claims of ineffective assistance of counsel raised by Applicant in his initial state habeas application.

(342) In the findings of fact and conclusions of law, the Court found both attorneys to be credible witnesses, that the statements contained in their affidavits were worthy of belief, and accepted the statements contained in the affidavits as true and correct. (Tr. Ct.'s Findings of Fact and Conclusions of Law at pp. 28–29).

(343) The Court finds that Mr. Lollar attested to the following:

> I did not call Myra Wait to alibi the defendant because she told me that he was, in fact, present at the home of the

> decedent and witnessed the co-defendant, Rick Childs, murder the decedent, and that at the time they were engaged in the burglary of the decedent. I could not sponsor testimony that I knew was perjurious. Moreover, [Applicant], Mr. Parks and I agreed that the defense we would present was that the defendant was guilty of the burglary, but that the murder of Mrs. Black was an unanticipated independent action of the co-defendant. [Applicant] told me that this was true.
>
> . . . .
>
> Moreover, such testimony [concerning potatoes as silencers] merely confirmed what the defendant told us, that he and the codefendant had gone to the house to do the burglary and had armed themselves with potato-laden guns in order to shoot the Doberman dog they expected to find there.

(Tr. Ct.'s Findings of Fact and Conclusions of Law, Appendix B at pp. 2–3).

(344) The Court finds that Mr. Parks attested to the following:

> One of [Applicant's] allegations is that Mr. Lollar and I failed to call Myra Wait as an alibi witness. Prior to trial, we discussed two different defensive strategies. One, which we referred to as "Plan A," was to rely on an alibi, while "Plan B" was to admit that [Applicant] had gone to the Black home with the intention of committing burglary, but had no intention to kill anyone.
>
> Mr. Lollar and I met with Myra Wait in Mr. Lollar's office prior to trial. I recall we discussed alibi as a possible defense. It was clear that Ms. Wait was getting a lot of pressure from [Applicant's] family, particularly his father. We spoke to Myra outside the presence of [Applicant's] parents and she told us that she could not truthfully

provide an alibi for [Applicant].

> A strategic decision was made to go with "Plan B," which was our best defense to capital murder or, in the alternative, to the death penalty. . . . [Applicant] was consulted on this defense and knew prior to trial what our strategy was.

(Tr. Ct.'s Findings of Fact and Conclusions of Law, Appendix E at pp. 1–2).

(345) Accordingly, the Court finds that Barganier's in-court identification did not alter Applicant's defense strategy at trial.

VII. CONCLUSION

(346) The Court finds that Applicant has failed to prove by a preponderance of the evidence that he is entitled to relief under Article 11.073.

(347) The Court recommends that Applicant's subsequent application for writ of habeas corpus be denied.

ORDER

The Clerk is **ORDERED** to prepare a transcript of all papers in cause number W98-02133-N(B) and to transmit the same to the Texas Court of Criminal Appeals as provided by article 11.071 of the Texas Code of Criminal Procedure.

The transcript shall include certified copies of the following documents:

1. Applicant's Subsequent Application for Writ of Habeas Corpus and any other pleadings filed by applicant in cause number W98-02133-N(B), including any exhibits;

2. The State's Answer to Applicant's subsequent application

filed in cause number W98-02133-N(B);

3. Any other pleadings filed by the State in cause number W98-02133-N(B);

4. Any proposed findings of fact and conclusions of law filed by the State and Applicant in cause number W98-02133-N(B);

5. This Court's findings of fact and conclusions of law, and order in cause number W98-02133-N(B);

6. Any and all orders issued by the Court in cause number W98-02133-N(B);

7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number W98-02133-N(B), unless they have been previously forwarded to the Court of Criminal Appeals.

The Clerk is further **ORDERED** to send a copy of this Court's findings of fact and conclusions of law, including its order, to Applicant's counsel, the Office of Capital and Forensic writs (Benjamin Wolff and Carlotta Lepingwell), at 1700 N. Congress Ave., Suite 460, Austin, TX 78701, and to counsel for the State, Dallas County Assistant District Attorneys Rebecca Ott and Jaclyn O'Conner Lambert, at Frank Crowley Courts Bldg., 133 N. Riverfront Blvd., LB-19, Dallas, TX 75207-4399.

SIGNED the 3rd day of October, 2018.

Judge Hector Garza
195th Judicial District Court
Dallas County, TX