IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2019

No. _____

TONY EGBUNA FORD,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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***Member, Bar of the Supreme Court**

THIS IS A CAPITAL CASE

CAPITAL CASE

QUESTIONS PRESENTED

Whether the Texas Court of Criminal Appeals' unexplained dismissal of claims raised in a subsequent application for writ of habeas corpus, where the claims on their face met the statutory criteria to be considered on the merits and there was no reasonable basis for dismissing the claims, violated the most basic due process protection afforded the beneficiary of the state-created right to have claims in a subsequent habeas application considered on the merits?

PARTIES TO THE PROCEEDING IN THE TEXAS COURT OF CRIMINAL APPEALS

The State of Texas was represented by John Davis, an Assistant District Attorney for El Paso County, Texas.

The Petitioner, Tony Egbuna Ford, incarcerated on Texas' death row at the Polunsky Unit of the Texas Department of Criminal Justice, was represented by undersigned counsel, Richard Burr.

There are no other parties to the proceeding below.

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The order of the Court of Criminal Appeals of Texas refusing to authorize proceedings on Mr. Ford's subsequent application for writ of habeas corpus raising claims based on the Eighth and Fourteenth Amendments to the Constitution of the United States was entered September 11, 2019. *Ex parte Ford*, 2019 WL 4318695 (unpublished) [Appendix 1].

STATEMENT OF JURISDICTION

The final order of the Court of Criminal Appeals of Texas herein was entered September 11, 2019. *See* Appendix 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Eighth and Fourteenth Amendments to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

> [N]or shall any state shall deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. Introduction

Petitioner Tony Ford was wrongfully convicted of capital murder and attempted murder in El Paso County, Texas in 1993. In a subsequent application for writ of habeas corpus in 2018, presenting evidence that he was wrongfully convicted and sentenced to death, Mr. Ford asked the Texas Court of Criminal Appeals (hereafter, "CCA") to authorize him to proceed in the trial

court on the claims based on that evidence.[1] The court refused, simply stating without explanation that the application "failed to satisfy the requirements" of the state habeas statute for the consideration of a subsequent habeas application. With this order, the CCA violated Mr. Ford's due process right to a fair, non-arbitrary determination of his entitlement under state law to be heard on the merits of claims presented in a subsequent habeas application. Because the Court of Criminal Appeals itself violated Mr. Ford's due process rights and as a result, refused to consider or allow the trial court to consider claims based on evidence of actual innocence of capital murder, the Court should intercede on behalf of Mr. Ford.

The crime for which Mr. Ford was convicted and sentenced to death began as a home invasion and armed robbery in El Paso, Texas on the night of December 18, 1991. Two African American men forced their way into the home of Myra Concepcion Murillo and her adult daughters, Myra and Lisa, and teenage son Armando. Myra (the daughter) recognized a man named Van Belton as one of the intruders because she had gone to school with him. During the course of the crime, the person with Van Belton shot and killed Armando and shot and attempted to kill Ms. Murillo and her two daughters. Van Belton was arrested later than night and named Mr. Ford as the second intruder. Mr. Ford was arrested the next day and charged with capital murder. Mr. Ford's trial turned on the testimony of Ms. Murillo's daughters, both of whom identified Mr. Ford as the shooter. Van Belton did not testify. Mr. Ford testified in his own defense. He told the jury that he was not involved in anything that happened in the Murillos'

[1]A "subsequent" habeas corpus application in Texas is similar to a "second or successive" habeas corpus petition under the federal habeas corpus statute. *See* 28 U.S.C. § 2244(b). Like a Court of Appreals in a federal successive petition, the CCA must make a gateway decision whether to allow a subsequent application to be considered by the trial court.

home but only rode in a vehicle with Van Belton and Van's brother, Victor, to the Murillos' house. He waited outside for the Beltons to return after they forced their way into the house, and he had no idea that the Beltons intended to kill people in the house. Mr. Ford was, nevertheless, convicted on all counts and was sentenced to death for the murder of Armando Murillo and to life imprisonment for the three attempted capital murders.

In the intervening years, counsel for Mr. Ford have gradually uncovered evidence proving that Mr. Ford testified truthfully at trial. This evidence, which gave rise to five claims in the subsequent habeas corpus application, was the following:

- Within a few months after the crime – and before Mr. Ford's trial -- Victor Belton admitted to three people that he shot Armando Murillo. These witnesses were not known to the defense and were not called at trial.

- Myra Concepcion Murillo told her boyfriend, and perhaps the police, that there was a third person involved in the crime, waiting outside as a lookout. This was not known to the defense and Ms. Murillo was not asked about this when she testified as a victim impact witness in the penalty phase of the trial.

- Neighbors living across the street from the Murillos confirmed that three people were involved and confirmed a critical aspect of Mr. Ford's testimony concerning the involvement of the Belton brothers in the crime and his presence as a lookout. Mr. Ford testified that after a few minutes waiting in the truck he walked toward the house, only to hear shots and be met by Van Belton running out. He than ran back to the truck with Van. As he and Van were waiting in the truck, Victor Belton ran out, got in a car in front of the Murillos' house, and drove off. Neighbors saw these very same events take place, but they did not testify because neither the

police nor Mr. Ford's lawyers ever talked with them.

- Van Belton tried to get a mutual friend to lie about Mr. Ford doing the shooting.
- Victor Belton was involved in numerous violent attacks on other people for seemingly no reason, in situations strikingly like what happened in the house on Dale Douglas.
- The police knew that the Belton brothers were usually involved in criminal activity together, were armed, and were dangerous. However, they never investigated Victor Belton's involvement in the crime against the Murillos, because they settled early in their investigation on Mr. Ford as the shooter.
- The police settled on Mr. Ford as the shooter, because Van Belton told them he was the shooter, and a few hours later, the Murillo sisters identified him from a photo array. However, post-trial evidence has now shown those identifications to have been unreliable and inaccurate. The scientific field examining eyewitness identification has shown that the process by which the police had Myra and Lisa Murillo identify Mr. Ford utilized no safeguard designed to minimize the risks of mistaken identification. The worse thing the police did was to show a photo array to the Murillos that had a photo of Tony Ford but not Victor Belton in it. Photos of Ford and Belton showed that they looked a lot like each other. Without both photos being shown at the same time, Myra and Lisa were almost certain to pick out Mr. Ford, because he looked more like Victor Belton than anyone else in the group of photos they were shown.
- One of the aspects of the Murillos' identification testimony that eyewitness science has now shown to have no correlation to the accuracy of an identification is the eyewitnesses' professed certainty that they identified the person who actually committed the offense. The Murillos testified that they were certain of the accuracy of their identifications.

Nevertheless, when jury selection began in Mr. Ford's trial, Myra and Lisa Murillo expressed profound *uncertainty* to the prosecutor about their pretrial identifications of Mr. Ford. This was never disclosed to the defense. Nevertheless, both women testified thereafter that they were certain about their identification of Mr. Ford.

- The person who planned the forced entry into the Murillos' home came forward recently to explain that the purpose of the break-in was to warn someone who lived in the Murillos' house and was dealing drugs to stay out of the territory another drug dealer was working. He further explained that no one was supposed to be hurt, and that the role Tony Ford was supposed to play was as the lookout while two others forced their way into the house.

II. Course of Prior Proceedings

Mr. Ford was arrested December 19, 1991, the day after the offense. He was indicted on one count of capital murder and three counts of attempted capital murder. Trial commenced July 7, 1993. Mr. Ford entered a plea of not guilty, despite the state's offer of a life sentence in return for a guilty plea, IX: 3-6,[2] and the jury returned verdicts of guilty on all counts on July 9, 1993. IX: 407. At punishment, the jury returned answers to the special issues requiring the imposition of a death sentence, and it also sentenced Mr. Ford to three life sentences on the three counts of attempted capital murder. The court sentenced Mr. Ford accordingly.

The judgment was affirmed on direct appeal. *Ford v. State*, 919 S.W.2d 107 (Tex. Crim. App. 1996). In the first state habeas corpus proceeding, the CCA adopted the trial court's recommended findings of fact and conclusions of law, denying relief on September 12, 2001. *Ex*

[2]References to the trial transcript, or "statement of facts" as it was then called in Texas, are to volume number (in Roman numerals) and page number(s).

parte Ford, No. WR-49,011-01.

On July 25, 2002, Mr. Ford timely filed a petition for writ of habeas corpus in federal district court. Relief was denied, *see Ford v. Cockrell*, 315 F.Supp.2d 831 (W.D.Tex. 2004), the Fifth Circuit affirmed, and the Court denied certiorari. *Ford v. Dretke*, 135 Fed.Appx. 769 (5th Cir. 2005), *cert. denied*, 546 U.S. 1098 (2006).

On November 23, 2005, Mr. Ford filed a motion in the trial court under Article 64.01 of the Texas Code of Criminal Procedure seeking DNA testing of biological material seeking to demonstrate that Victor Belton was involved in the crimes against the Murillo family and to exclude Mr. Ford as a participant in the murder and attempted murders.

On November 28, 2005, Mr. Ford filed a subsequent application for a writ of habeas corpus pursuant to Article 11.071 § 5 of the Texas Code of Criminal Procedure. Shortly thereafter, when the trial court indicated that it would order DNA testing pursuant to Mr. Ford's Article 64.01 motion, Mr. Ford moved to dismiss his subsequent habeas application. On December 14, 2005, the CCA "dismiss[ed] this application without prejudice so applicant may consider his position after the conclusion of any testing and may design any argument based on what he perceives to be the new situation...." *Ex parte Ford*, No. WR-49,011-02.

After several rounds of testing bloodstains on Victor Belton's clothing and shoes, the court concluded that "DNA testing [had] produced no definitive evidence connecting the blood on Victor Belton's clothing and shoes to this crime." Order, *State v. Ford*, No. 930D03565, 346th District Court, El Paso County (October 25, 2010). In the same order, the court directed that DNA testing commence on hair fragments connected to the crime scene. On June 17, 2016, the trial court found that "none of the [questioned] hair fragments were contributed by Victor Belton,

Van Belton, or Tony Ford." Findings Concerning DNA Testing of Crime Scene Hair Fragments, *State v. Ford*, No. 930D03565, 346th District Court, El Paso County (June 17, 2016).

On August 2, 2018, Mr. Ford filed the subsequent application for writ of habeas corpus that is at issue here. *See* Appendix 2, attached hereto (the filed application, without exhibits). Pursuant to the state habeas statute for capital cases, Tex. Code Crim. Proc. Article 11.071 § 5, the application is filed in the trial court but then transmitted to the CCA for its determination of whether the claims in the application meet the requirements for a subsequent application. On September 11, 2019, the CCA decide that the application did not meet these requirements. The entirely of the language in the order reaching and announcing this determination was the following: "We have reviewed the application and find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claims." *Ex parte Ford*, 2019 WL 4318695 *1 (unpublished) [Appendix 1].

III. Evidence at Trial

Myra Murillo and Lisa Murillo provided the evidence about the crime that occurred inside their mother's house the night of December 18, 1991. Their testimony was entirely focused on the behavior of the men they saw in their house. They each identified Mr. Ford as the shooter and Van Belton as the other person who broke into their house. Their accounts, taken together, established the following:

At about 8:30 pm, two black men knocked on the door and asked for the man of the

house. IX: 55, 59. Ms. Murillo[3] told her daughters that she had told the men that she and the man of the house were sick and couldn't talk. The men then went away. *Id*. A few minutes later, two black men kicked in the door, demanding the man of the house and wanting to know where the money was. *Id*. at 65, 108, 115. One of them hit Armando on the head with a gun shortly after entering. *Id*. at 60. When they learned that the man of the house was not there, and that there was no money, the intruders took jewelry from various family members. *Id*. at 67, 68. One of the men – whom both Myra and Lisa said they identified as Tony Ford, *id*. at 60, 113 – demanded car keys. *Id*. at 69. Lisa threw keys at him, and he got angry and started shooting everyone. *Id*. at 69-72. After he shot or shot at everyone, both men left.

One of the lead investigators on the case was El Paso Police Detective Antonio Tabullo. After the testimony by Myra and Lisa Murillo, he testified that Van Belton had identified Mr. Ford as the other intruder, thus appearing to corroborate the accuracy of the Murillos' claimed eyewitness identifications. Tabullo testified as follows:

> Q. And after Mr. Belton was arrested, what did you or any members of the El Paso Police Department do with him?
>
> A. I went ahead and interviewed Mr. Belton, and during his interview, I took a confession statement from Mr. Belton.
>
> Q. And during the course of interviewing Van Nash Belton and taking a statement from him, did you receive any additional information as to who the second suspect might have been that was involved at the homicide at 1571 Dale Douglas?
>
> A. Yes, I did.

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[3]References to "Ms. Murillo," are to Myra Concepcion Murillo, the mother of Myra, Lisa, and Armando Murillo. For ease of reference, the daughters, Myra Murillo and Lisa Murillo, are referred to as "Myra" and "Lisa," intending no disrespect.

Q. And who would that have been?

A. That was Tony Ford.

. . . .

Q. Now, when you received the information from Van Nash Belton that Tony Ford was with him when this offense occurred, what did you do with that information?

A. I went ahead and relayed this information to my partner, which was the co-case agent, Detective Lowe.

IX: 157-158.

The only other inculpatory evidence offered by the State was forensic evidence which was inconclusive as to Mr. Ford's involvement in the crime. The coat that Mr. Ford was wearing when he was arrested, similar to the coat that Myra and Lisa described the shooter as having worn, had what might have been a small bloodstain inside one of the pockets that may or may not have been connected to the crime.[4] Fibers that might have come from this coat were found on Armando Murillo's shirt, but the prosecution's expert was not certain whether the fibers were a match.[5] Moreover, even if the evidence plausibly connected the coat to the crime, Mr. Ford testified that Victor Belton had been wearing the coat that night – he had loaned the coat to Belton shortly before the crime, because Belton asked for it to conceal his gun. IX: 295-96.

The remaining prosecution evidence pointed to the Belton brothers as the perpetrators,

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[4]The stain was too small to type or test. Despite the absence of any scientific confirmation, the forensic examiner purported to identify the stain as blood; he acknowledged, however, that it was "consistent" with someone cutting a finger and putting his hand in the coat. IX: 329-330.

[5]The fibers were determined to be similar in color, size, and appearance to the wool fibers from Ford's coat. The state's expert testified that the fibers "could" have come from the coat. IX: 336-337.

not to Mr. Ford. The gun used in the shooting was believed to be .22 caliber (because of a bullet found in Myra's bedroom and the small caliber of a bullet recovered from Armando's body). *Id*. at 46, 205-10. Police investigators found .22 caliber bullets in the Beltons' house. *Id*. at 230, 245. In the same house, they also found a watch and jewelry box taken from the Murillos' home. *Id*. at 229-30. By contrast, nothing related to the crime was found in the house where Mr. Ford lived. *Id*. at 230.

The only other evidence about what happened that night was provided by Mr. Ford. He testified as follows:

Van Belton picked up Tony[6] from Marvin Dodson's house – where Tony was living – at about 9:00 pm on December 18, 1991. IX: 272-73. Van was a friend of Marvin Dodson; however, Van and Tony never really hung out. *Id*. at 273. After Van picked him up, they stopped at a 7-11 and picked up Van's brother Victor. *Id*. at 274. Victor was wearing jeans and a dark blue shirt. *Id*. Tony was wearing a black sweater and light brown pants and had a coat with him. *Id*. at 275.

The three of them then picked up a blue truck that belonged to a "friend of Ken's," *id*. at 276 – there was no explanation of who Ken was. They then went to Ken's house, where Tony and Van went in to see Ken. *Id*. They were there about 10 minutes. *Id*. at 277. They then left Ken's house, all three in the truck, and went to Dale Douglas. *Id*. Van's car was left at Ken's house. *Id*.

They parked the truck a "short way[] down from" the Murillos' house. *Id*. at 278. Van and Victor got out; Tony remained in the truck. *Id*. Victor borrowed Tony's coat when he got

[6]For ease of reference, Mr. Ford is often referred to hereafter as "Tony."

out of the truck to go to the Murillos' house, because Victor wanted to conceal the gun he had with him. *Id*. at 295-96. Van and Victor went to the house and knocked on the door but did not go into the house. *Id*. at 279. They returned to the truck and sat on a little wall that was over to the side of the truck and discussed what to do. *Id*. at 279-80.

Van and Victor then returned to the house and Van kicked the door open – it was very loud – and they both charged into the house. *Id*. at 280. When they had been in the house for about 10 minutes, Tony started getting scared because some people down the street seemed to have been alerted by the noise of the door being kicked in, and Tony felt they were staring at him, still in the truck. *Id*. at 281-82. Tony then got out of the truck and started walking toward the house; before he got there, however, a gunshot rang out. *Id*. at 282. He started running back toward the truck, then Van came running to the truck, too. *Id*. Van said nothing, but they did not drive off because Victor was not there. *Id*. at 282-83. Victor then ran out of the house and got into a blue car in the Murillos' driveway. *Id*. at 283. Van and Tony drove off in the truck, and Victor drove off in the blue car. *Id*.

Van and Tony then met Victor; Van got out of the truck and got in the car with Victor, and Tony drove the truck back to Ken's house. *Id*. at 283-84. Before getting out of the truck, Van emptied "trinkets" out of his pocket and left a VCR in the truck, but he did not give "a precise description of what happened in the house." *Id*. at 284. Van then also returned to Ken's house, bringing with him Tony's coat from Victor. *Id*. at 296.

Asked in a series of four questions whether he had shot Armando, Ms. Murillo, and Lisa, and whether he had shot at Myra, Tony testified, "No, sir, I did not," in response to each question *Id*. at 285.

In the penalty phase, neither the state nor Mr. Ford presented any psychiatric or psychological testimony. The state presented no evidence of prior criminal record, unadjudicated offenses, or bad character. In fact, the state stipulated that Tony was eligible for probation. The state presented only evidence from Armando Murillo's family members about the effect Armando's death and the others' injuries were having on them.

For the defense, Mr. Ford's mother testified that Tony was born on June 19, 1973, making him 18 at the time of the offense. Tony's mother and four other witnesses testified that Tony had never engaged in any violence or other acts of aggression, and opined that if incarcerated for life, he would follow the rules and regulations of prison society, take advantage of rehabilitation opportunities, and not be a future danger. Tony also testified at punishment and indicated that if his life were spared, he could follow prison rules and regulations. He cried on cross-examination, stating that he would not want what had happened to the Murillos to happen to anybody. X: 64-65. He also acknowledged that he felt it was wrong for him to be facing a possible death penalty. He explained: "Everybody is a victim in this case[,]" X: 66, including "[i]n some instances" himself, and maintained that he did not do anything wrong other than drive the Beltons to the Murillos' house. X: 66-67.

IV. Evidence Discovered or Developed Since Trial

The only issue disputed at trial was whether Mr. Ford was the other intruder who accompanied Van Belton into the Murillos' home. There was no dispute that this other person was the shooter. Myra and Lisa Murillo testified that Mr. Ford was this person. Mr. Ford testified that it was Van Belton's brother Victor.

The only evidence that Mr. Ford was the shooter was the identifications by Myra and Lisa

Murillo. The fibers found on Armando Murillo's clothing that were consistent with the fibers that made up Mr. Ford's coat, and the small stain in the coat pocket that appeared to be blood, tended to show that Mr. Ford's coat had been inside the Murillo's house, but Mr. Ford testified that Victor Belton wore it. The only unequivocal evidence that Mr. Ford was in the house was the identifications.

The cross-examination of Myra and Lisa Murillo, however, raised significant questions about the accuracy of their identifications. As the United States Court of Appeals for the Fifth Circuit explained in the appeal of Mr. Ford's federal habeas proceeding,

> Ford's attorneys presented Ford's defense of mistaken identity by effectively cross-examining Myra and Lisa and demonstrating the possibility that the sisters were mistaken in their identification of Ford as the shooter.
>
> During his cross-examination of Myra, Ford's attorney cast doubt on Myra's identification of Ford by showing that Myra avoided looking at the intruders because she recognized Van Nash [Belton] as a familiar face and did not want him to recognize her. During cross, Myra admitted that she looked down much of the time the men were in the house. The attorney also explored the discrepancies in Myra's description of Ford. Myra testified that the shooter was between five-four and five-five, wore a knitted cap that covered his hair and ears, and had a clear face. Cross-examination also established that on the night of the shootings, Myra described the shooter as being small-framed and with a clear complexion. These descriptions contrasted sharply with Ford's actual height of five-eight and his complexion which was marred by seven scars. Myra admitted that she never told the police that the shooter had any scars on his face. The attorney also established that although Myra testified on direct that she saw Ford shoot her brother and her mother, on the night of the incident, she did not tell the police that she actually saw the shooter shoot them. Instead, Myra told the police that she saw the back of the shooter and heard gunshots. Myra's cross-examination also showed that Myra viewed the shooter for a very short period of time; Myra estimated the shooting incident took between two and five seconds.
>
> The attorney also cast doubt on Lisa's identification. During cross, Ford's attorney established that Lisa did not see the shooter shoot members of the family because she had buried her face in a pillow; instead, the attorney showed that Lisa simply heard the gunshots. The attorney also showed that very shortly after the

> incident, Lisa was unable to give the police an accurate description of the men who entered her mother's house. Like Myra, Lisa described the shooter as having a very clear complexion and never mentioned that the shooter had scars on his face. The attorney confirmed with Lisa that the shooting incident occurred in a very short time period – in just five seconds, emphasizing the short period of time the sisters viewed the shooter.
>
> Notably, the attorneys succeeded in getting a photo of Victor Belton admitted into evidence. The photo was taken very shortly after the murder. Using the photo, the attorneys compared the physical characteristics of Ford and Victor Belton and explained how Ford and Victor Belton were the same height and were very close in weight and age. During closing arguments for the guilt-innocence phase of trial, Ford's attorney compared the relative weight, height, skin color, and facial features of Ford and Victor to show the jury how the sisters could be mistaken in their identifications of Ford. In addition, he emphasized how the physical similarities between Ford and Victor Belton, the stress of the situation, and the short period of time that the shooting occurred would have made it difficult for the sisters to remember precisely what the intruders looked like and could have resulted in a mistaken identity.

Ford v. Dretke, 135 Fed.Appx. 769, 774 (5th Cir. 2005).

On the basis of facts developed over the years since Mr. Ford's first state habeas proceeding, the doubts raised in cross-examination about the accuracy of the Murillos' identifications have grown exponentially, as has the evidence corroborating Mr. Ford's testimony about what he, Van, and Victor did that night. This evidence is set forth in detail in Mr. Ford's subsequent application for writ of habeas corpus. Appendix 2, at 12-56. Highlights of the evidence are as follows.

Within a few months after the crime – and before Mr. Ford's trial -- Victor Belton admitted to three people that he shot Armando Murillo. These witnesses were not known to the defense and were not called at trial. All three witnesses overheard Victor Belton or talked with him at parties. In each instance, Belton was boasting about having committed a murder and gotten away with it. Affidavits of Tammond Brookins (Appendix 2, at 16-17), David Tucker

(Appendix 2, at 17), and Marvin Dodson (Appendix 2, at 15). Due to other information they had, all three men realized Belton was admitting that he killed Armando Murillo. *Id*.

Myra Concepcion Murillo (the mother) told her boyfriend, and perhaps the police, that there was a third person involved in the crime, waiting outside as a lookout. Her boyfriend Joe Chrisman recounted what she told him: "[T]here were three people involved in the crime. Two men came inside and one stayed outside as a lookout." Appendix 2, at 28. This was not known to the defense and Ms. Murillo was not asked about this when she testified as a victim impact witness in the penalty phase of the trial.

Neighbors living across the street from the Murillos also confirmed that three people were involved and, in the course of that, confirmed another aspect of Mr. Ford's testimony. Mr. Ford testified that after a few minutes waiting in the truck he walked toward the house, only to hear shots and be met by Van Belton running out. He than ran back to the truck with Van. As he and Van were waiting in the truck, Victor Belton ran out, got in a blue car in front of the Murillos' house, and drove off. Neighbors saw these very same events take place Appendix 2, at 29 (account of Robert Bryant seeing two people running from the house to a truck following "a commotion across the street") (account of Albert Munoz seeing a "dark-colored" car leaving the Murillos' house after hearing gunshots). Neither Mr. Bryant nor Mr. Munoz testified because no one ever talked with them about this prior to 2014, when an investigator for Mr. Ford talked with them.

Van Belton tried to get a mutual friend, Marvin Dodson, to lie about Mr. Ford doing the shooting. Marvin Dodson planned the events that were supposed to take place at the Murillos' house. Appendix 2, at 13-14. "Ken" – the drug dealer for whom Dodson worked – learned that a

person living in the Murillos' house "began selling in our territory and cutting into our business." *Id*. at 13. "Ken wanted this person eliminated." *Id*. However, Dodson convinced Ken "to let me and some of my people go to see [this person] ... and ... warn the person off ... or ... join us." *Id*. at 13-14. Tony Ford was one of Dodson's "people" whom he wanted to help with this venture. Dodson made clear that "Tony's role was going to be to stay outside, whoever else went on this job. I told him I did not want him going inside the house at all. He was supposed to remain outside as a lookout." *Id*. Before the plan could be implemented, Dodson got arrested for a probation violation. Ken then allowed Van Belton to take it over and the crime at the Murillos' house ensued. Dodson was still in jail when Van Belton was arrested for the crime. He was put in the same part of the jail as Dodson. *Id*. Dodson met with Belton during recreation. Belton begged him to tell the police that "Tony did the shooting ... at the same time he was telling me that Victor was the one that did the shooting." *Id*. Dodson refused.

Victor Belton was involved in numerous violent attacks on other people for seemingly no reason, in situations strikingly like what happened in the house on Dale Douglas. The shooting spree at the Murillos' house was sparked when Lisa threw Myra's car keys at the man who became the shooter. This incident set him off and provoked him to start shooting. IX: 69-72. Victor Belton had both a reputation and a record of criminal charges for engaging in similar unprovoked, extremely violent outbursts. Two incidents in Victor's background in particular bear the hallmarks of such sudden, unprovoked violence. When Shirley Gilchrist was talking casually with Victor Belton and another friend in a car, Victor suddenly attacked Ms. Gilchrist "in an unwanted sexual way." Appendix 2, at 31. Attempting to defend herself, Ms. Gilchrist punched Victor, who then tried to choke her and then kicked her in the head before she was able

to get away from him. *Id*. In another incident, Victor attacked a woman named Yvonne Anderson when she was involved in an angry confrontation with a male friend of Victor. *Id*. at 32. Victor grabbed her by the sweater and threatened to kill her. *Id*. Her daughter then got out of the car and Victor threatened to cut her throat. *Id.* Ms. Anderson's sister then ran out of a nearby building telling Victor and his friend that the police were coming, and they fled. *Id*. By contrast, no one ever knew Tony Ford to behave in any way like this. He was " not violent," had "a good heart," and "was always the perfect gentleman." Appendix 2, at 23 and n.8.

The police knew that the Belton brothers were usually involved in criminal activity together, were armed, and were dangerous. An El Paso police detective told Mr. Ford's investigator, "[T]hose two [the Belton brothers] were always together, ... they were inseparable." Appendix 2, at 25. The same office continued, "[T]hey were violent, they were runners and they were into stealing cars, dealing dope and we were told that they were armed at times, ... to use caution when dealing with them." *Id*. at 24. Despite this knowledge, the police never investigated Victor Belton's involvement in the crime against the Murillos, because they settled early in their investigation on Mr. Ford as the shooter.

The police settled on Mr. Ford as the shooter, because Van Belton told them he was the shooter, and a few hours later, the Murillo sisters identified him from a photo array. However, those identifications were not only drawn into question by defense cross-examination at trial – where the trial court had denied the defense request for an eyewitness expert – but have now been shown to be unreliable and inaccurate by post-trial evidence. The scientific field examining eyewitness identification has shown that the process by which the police had Myra and Lisa Murillo identify Mr. Ford utilized no safeguard designed to minimize a mistaken identification.

Appendix 2, at 33-43 (detailing the many safeguards that could have been utilized but were not, and the unreliability of numerous aspects of the Murillos' identifications[7]). The worse thing the police did however, was to show a photo array to the Murillos that had a photo of Tony Ford but not Victor Belton in it. Photos of Ford and Belton showed that they looked a lot like each other, and that Mr. Ford stood out in the photo array as very different in appearance from the others depicted.[8] Because of these deficits in the photo array, Myra and Lisa were almost certain to pick out Mr. Ford, because he looked more like Victor Belton than anyone else in the group of photos they were shown.

Despite the Murillo sisters professed certainty from the witness stand about their pretrial identification of Mr. Ford, one month before that, when jury selection began in Mr. Ford's trial, they expressed deep uncertainty to the trial prosecutor. The court reporter for the trial, Robert Thomas, recounted the following in an affidavit taken when Mr. Ford's petition for writ of

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[7]For example, an eyewitness's degree of confidence in the accuracy of the identification has no correlation with whether the identification is actually accurate, Appendix 2, at 35, and an identification made by an eyewitness of a different race than the perpetrator is much more likely to be mistaken than a same-race identification. *Id*. at 35, 36 and n.16 (citing the results of a study in El Paso showing that when a Latino eyewitness identified a Black suspect, the eyewitness was mistaken <u>*two-thirds of the time*</u>, compared to less than one-third of the time when the suspect was also Latino).

[8]The eyewitness expert funded for Mr. Ford in federal habeas proceedings conducted two studies concerning the photo array viewed by the Murillos. The first examined whether the photo array viewed by the Murillo sisters was composed in a manner that drew the Murillos' attention to Ford. This study determined that the photo array was composed of people so different in appearance from Ford that he was nearly *four times* more likely be picked out by persons given a verbal description of the facial features of the suspect in the Murillo murder. The second study asked participants to compare the similarity of Ford's facial appearance to the other five people included in the photo array and then, to Victor Belton (who was *not* included in the photo array shown the Murillos). The results showed that Tony Ford and Victor Belton were, by far, the most similar looking. Appendix 2, at 38 and n. 18.

certiorari was pending at the conclusion of federal habeas proceedings:

> On the morning of the first day of voir dire in Mr. Ford's trial and after Mr. Ford was already seated at the defendant's table, I saw the prosecutor Marilyn Mungerson bring Lisa and Myra Murillo outside the closed door of the courtroom. The prosecutor and the Murillo sisters stood close to where I was standing, within six feet of where I was, so I could overhear what they were saying. I heard the prosecutor ask the sisters to look into the window and look at Mr. Ford 'one more time.' The prosecutor asked the sisters, 'Does this look like him [the shooter]?' Both sisters hesitated and looked unsure before one answered, 'You know, it kind of looks like him.'

Appendix 2, at 41-42. This information was never disclosed to the defense, and thereafter both women testified they were certain about their identification of Mr. Ford as the shooter.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Under applicable state law, Mr. Ford was entitled to have the claims raised in his subsequent habeas corpus application heard on the merits. The CCA's unexplained dismissal of these claims violated Mr. Ford's protection against arbitrary state action afforded by the Due Process Clause of the Fourteenth Amendment.

The statutory provision that governs subsequent habeas corpus applications in Texas capital cases is Texas Code of Criminal Procedure, Article 11.071 § 5. Section 5(a) sets forth the requisites for such an application:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) 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 or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty

beyond a reasonable doubt; or

> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

This provision creates a liberty interest protected by the Fourteenth Amendment's Due Process Clause against arbitrary deprivation: A capital habeas petitioner is entitled under this provision to have a claim raised in a subsequent habeas corpus application heard on the merits if the claim meets one of the three criteria enumerated in Article 11.071 § 5(a). There is no doubt that this statute creates such an entitlement. The CCA has said as much. Thus, in *Ex parte Blue*, 230 S.W.3d 151, 153 (Tex.Crim.App. 2007), the court explained, "Under this provision, a subsequent capital habeas applicant is entitled to a merits-review of a claim if he can show [one of the three criteria in Section 5(a)]." Concurring, Judge Keller, agreed: "Article 11.071, § 5 prohibits the consideration of a subsequent application unless it meets one of three exceptions." *Id*. at 168 (Keller, J., concurring).

In *Kentucky Dept. Of Corrections v. Thompson*, 490 U.S. 454 (1989), the Court explained how a state creates a liberty interest protected by the Due Process Clause. "Stated simply, 'a State creates a protected liberty interest by placing substantive limitations on official discretion.'" *Id*. at 462 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)). Continuing, the Court explained,

> [T]he most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decision-making, *Hewitt v. Helms*, 459 U.S. [460], 472 [(1983)], and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

Kentucky Dep't of Corrections, 490 U.S. at 462.

This is precisely what the Texas legislature did when it in enacted Article 11.071 § 5(a). It established "substantive predicates" – the three criteria set forth in § 5(a) – to govern the CCA in deciding whether to allow the trial court to hear a claim raised in a subsequent habeas corpus application. And, it "mandat[ed] the outcome to be reached upon a finding that [one of] the relevant criteria have been met." Thus, under *Ex parte Blue*, 230 S.W.3d at 153, the habeas applicant is "entitled to a merits-review of a claim if he can show [one of the three criteria]."

Mr. Ford raised five claims in his subsequent habeas corpus application. Each claim met one of the criteria under § 5(a). Nevertheless, the CCA dismissed Mr. Ford's claims without explanation. This dismissal violated the most fundamental protection of the Due Process Clause, the protection against arbitrary state action.

To help the Court understand how arbitrary the CCA's action was, Mr. Ford will highlight two of his claims.

A. Mr. Ford's right to due process was violated, because the testimony of Myra and Lisa Murillo that they were certain that Mr. Ford was the shooter was known by the prosecution to be false and the information that would have revealed it as false was suppressed.

1. The merits of the claim

At trial, Armando Murillo's sister Myra was the second prosecution witness, following the medical examiner. She began recounting the events of the crime and fairly early in her testimony claimed to identify Mr. Ford as one of the intruders:

> Q. And then what did you see?
>
> A. Within a few seconds I turned back to look at my mom to the right, and that's when I saw this defendant right here.
>
> Q. Can you point him out again?

A. This one right here.

Q. The man in the white shirt with the glasses?

A. Yes, ma'am, in the white shirt, and those glasses.

MS. BRADLEY: Your Honor, may the record reflect that the witness has identified the defendant?

IX: 60-61.

Thereafter, Ms. Murillo referred frequently to things "this defendant" or "Mr. Ford" or "Tony" had done, IX: 61, 62, 64, 65, 66, 67, 68, 69, culminating with the shootings: "I saw this defendant right here shoot my brother in the head," IX: 70, "this defendant here hooked his arm around [my mother] and shot her on the right side in the head," IX: 71, and "I got the strength to just push him and the gun wen off in the air somewhere, and I fell to the ground." *Id*. Ms. Murillo's direct examination then concluded with the following question and answer:

Q. Is there any doubt in your mind that Mr. Tony Ford was the shooter on December 18, 1991?

A. No doubt at all.

IX: 76.

On cross-examination, Ms. Murillo turned to spirituality to give added emphasis to how certain she was about her identification of Mr. Ford:

> [F]or some reason – this may sound crazy, but I felt like I was protected, like spiritually. And ninety-nine percent, I felt that I wasn't going to die. And that one percent, I just knew I was going to have to hang on because these two men were not going to get away with what they did.
>
> And therefore I did want to look at him, and which I did have time. And I will never forget a face like his.

IX: 83-84.

Lisa Murillo testified immediately after her sister. She initially identified Mr. Ford as the second intruder in the following colloquy:

> Q. Did you see anyone else besides the person that took you from the kitchen into the den and kicked you? Was there any other person in the house that you had seen?
>
> A. As I was walking toward the hallway, I saw this defendant.
>
> Q. And you're pointing to the person in the white shirt and glasses?
>
> A. Yes.
>
> Q. Lisa, is there any doubt in your mind that the person sitting here was the person that you saw in the hallway outside your sister's bedroom?
>
> A. There's no doubt.
>
> MS. MUNGERSON: Your Honor, may the record reflect the witness has identified the defendant?

IX: 113.

As with her sister, Lisa Murillo then referred frequently to things "the defendant" or "this defendant" had said or done, IX: 115, 116, 117, 118, culminating with his saying he was "going to blow you all away" because she had thrown car keys at him. IX: 119. Her testimony then concluded with the following question and answer:

> Q. Is there any doubt in your mind that the defendant sitting right here was the person that shot your brother and your mother and you?
>
> A. I have no doubt.

IX: 124.

Notwithstanding the Murillo sisters' expressed certainty that Tony Ford was the second intruder in their house, that they observed Mr. Ford do and say various things, and that they had

"no doubt" that Mr. Ford was the shooter, *in truth*, as voir dire began on June 7, 1993, II: 1, they were *not certain* that the second intruder was Mr. Ford. As court reporter Robert Thomas recounted, he overheard a conversation outside the courtroom door between the prosecutor and the Murillo sisters as jury selection was about to begin:

> I heard the prosecutor ask the sisters to look into the window and look at Mr. Ford 'one more time.' The prosecutor asked the sisters, 'Does this look like him [the shooter]?' Both sisters hesitated and looked unsure before one answered, 'You know, it kind of looks like him.'

Appendix 2, at 42. One month later, on July 7, 1993, IX: 1, Myra and Lisa Murillo both testified that they had no doubt whatsoever that Mr. Ford was the second intruder and shooter. Nothing took place between June 7 and July 7 to improve the Murillos' memory about whether Mr. Ford was the second intruder and shooter. What undoubtedly *did* take place is that the prosecutors put pressure on Myra and Lisa to testify with certainty that Tony Ford was the shooter, because their identifications were the State's whole case against Mr. Ford. As revealed by what they are now known to have said on June 7, however, their testimony one month later was false.[9]

A conviction procured through the use of false testimony is a denial of the due process guaranteed by the Federal Constitution. *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935);

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[9]One might reason that between the Murillos' expressed *uncertainty* on June 7, 1993, and their expressed *certainty* when they testified on July 7, 1993, each simply resolved any doubts she had on June 7 and testified with certainty one month later. That reasoning could not stand, however, in light of the Murillos' testimony at a pretrial hearing on May 14, 1993 on a defense motion to suppress the identifications. In that hearing, each also expressed certainty about the accuracy of their identifications. I-C: 26, 38 (Myra Murillo testifying that she had "[n]o doubt at all" that Mr. Ford was the person who shot her brother), 45 (Lisa Murillo testifying that she "[w]ould [n]ever forget [Mr. Ford's] face" based on what she saw that night). Hence, based on the Murillos' sworn testimony on May 14, 1993, there would have been no uncertainty on June 7, 1993, which could have been resolved by July 7, 1993. The only reasonable conclusion is that the certainty they expressed both times they testified was false.

Napue v. Illinois, 360 U.S. 264, 269 (1959). It does not matter that the falsehood goes to an issue of credibility. *Napue*, 360 U.S. at 270. When false testimony is knowingly presented by the State, the *State* has the burden of proving beyond a reasonable doubt that their false testimony did not contribute to the verdict. *United States v. Bagley*, 473 U.S. 667. 680 n.9 (1985).

The State cannot possibly meet this burden, because the State's entire case rested on the testimony of Myra and Lisa Murillo. If they had testified that they were not certain Mr. Ford was the second intruder and shooter, Mr. Ford would not have been convicted of capital murder or attempted murder. The only other evidence that possibly connected him to the crime was his overcoat, yet the forensic evidence associated with the coat was tenuous, and Mr. Ford testified that Victor Belton wore the coat into the Murillos' house. The jury could not have convicted Mr. Ford of capital murder or attempted murder without the testimony of Myra and Lisa Murillo that they were certain he was the second intruder and shooter.

Giving emphasis to this reality, trial counsel Greg Anderson has averred that even if the statements overheard by the court reporter were only available as impeachment, the outcome of the trial may well have been different:

> I believe the eyewitness testimony was the crucial evidence in the case. Our trial strategy was that Victor Belton was the likely person to have shot the victims in the case. His facial features were similar to Tony's and the witnesses may have been mistaken in their identification.
>
> Some time after the trial, I became aware that Bob Thomas attested that he heard the eyewitnesses say they were not sure about their identifications just as the trial was starting. Had I known that the witnesses said they were unsure of their identifications, I would have impeached them with their statements, and I believe this may have made a difference in the trial.

Appendix 2, at 60.

2. Under Article 11.071 § 5(a)(1), Mr. Ford was entitled to have this claim heard on the merits

In *Ex parte Campbell,* 226 S.W.3d 418 (Tex.Crim.App. 2007), the application raised a claim based on facts arguably not previously available. The CCA explained how Article 11.071, Section 5(a)(1) must be applied:

> [T]o satisfy Art. 11.071, § 5(a), 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence.

Id. at 421 (footnotes omitted). *See also Ex parte Brooks,* 219 S.W.3d 396, 400-01 (Tex.Crim.App. 2007) (noting that, in a subsequent application in a non-capital case, a habeas applicant must make a "prima facie showing" of facts that establish a cognizable constitutional claim as well as one of the criteria under a provision identical to Article 11.071 Section 5(a)).

The preceding discussion establishes that Mr. Ford made a prima facie showing of a *Mooney/Napue* claim. He also made a prima facie showing of the provision in Section 5(a)(1), because the facts supporting this claim were not available at the time he filed his first state habeas application.

When Mr. Ford's previous habeas application was filed on February 2, 1998, no one had any reason to believe that the court reporter, Robert Thomas, had information relevant to Mr. Ford's case that was not contained in the record of trial court proceedings. The only reason Mr. Ford learned that he did have such information was due to a happenstance encounter between Mr. Thomas and an investigator working with undersigned counsel during Mr. Ford's federal habeas corpus proceedings in late 2002. This investigator, William Juvrud, stated that he was "in the 346th District Court to obtain an order for the release of the photo line-ups used in the

original trial and was talking with the court reporter, Robert Thomas." Appendix 2, at 84. Mr. Juvrud was not there to interview Mr. Thomas because he or Ford's counsel had reason to believe that Mr. Thomas had relevant non-record-based information. He was there to gain access to evidence through the trial court. He happened to see Mr. Thomas in the court's chambers and started talking with him about Tony Ford's case. This chance encounter led to information that Mr. Thomas had received from law enforcement officers; the officers told Mr. Thomas that they heard the "word on the street" was that Victor Belton had gotten away with the Murillo murder. *Id*. Thereafter, when co-counsel in federal habeas proceedings followed up on Mr. Juvrud's chance conversation with Mr. Thomas, he also learned that Mr. Thomas had overheard the Murillo sisters indicating to Assistant District Attorney Marilyn Mungerson, as voir dire began, that they were not certain that Tony Ford was the shooter.

Under § 5(e) of Article 11.071, "a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." Plainly, the non-record facts known by Robert Thomas were not "ascertainable through the exercise of due diligence on or before" the filing of the previous habeas application. Due diligence does not encompass chance revelation of relevant facts. *Cf. Ex parte Miles*, 359 S.W.3d 647, 664 & n.16 (Tex. Crim. App. 2012) (noting, "[n]othing in the record indicates [a key prosecution witness] would have recanted earlier").

Accordingly, under § 5(a)(1), the merits of this claim were plainly eligible for consideration on the merits by the trial court. The CCA's dismissal of the claim without explanation was arbitrary.

B. The Eighth Amendment categorically exempts Mr. Ford from the death penalty, because his participation and culpability are too minimal to warrant the death penalty.

1. The merits of the claim

The Eighth Amendment prohibits a sentence that is disproportionate to the offense. In *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), the Court ruled that a defendant in a capital murder case who: (1) did not actually kill the victim, (2) did not intend that lethal force be used, (3) did not intend to kill, (4) was not a major participant in a felony offense underlying the murder, and (5) did not show a reckless indifference for human life, is categorically exempt from the death penalty.

As the facts summarized herein and set forth in detail in Appendix 2 show, Mr. Ford was not the shooter, did not intend that anyone be shot or killed, and was a minor participant in the underlying aggravated robbery. These facts, under state law, at the pleading stage must be assumed to be true. *See Ex parte Campbell, supra. See also Ex parte Staley*, 160 S.W.3d 56, 63 (Tex.Crim.App. 2005) ("[u]nder ... Article 11.071, ... [a] subsequent application for a writ of habeas corpus must state specific, particularized facts which, if proven true, would entitle him to habeas relief").

In *Enmund*, the Court ruled that the defendant was categorically exempt from the death penalty, despite facts that showed he was at least as culpable as Mr. Ford, if not more so. Earl Enmund had previously been convicted of a violent felony (armed robbery). 458 U.S. at 805 (O'Connor, J., dissenting). The trial court found that Enmund was the one who planned the robbery. *Id.* at 806. As Enmund stood by a few hundred feet from the crime scene, his accomplice robbed, shot, and killed an 86-year-old man and a 74- year-old woman. *Id*. at 784-

86. After the murders, Enmund personally disposed of the murder weapon. *Id*. at 806 (O'Connor, J., dissenting).

The Court explained in *Tison* why under these facts the death penalty was disproportionate for Mr. Enmund:

> Armed robbery is a serious offense, but one for which the penalty of death is plainly excessive; the imposition of the death penalty for robbery, therefore, violates the Eighth and Fourteenth Amendments' proscription "'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Weems* v. *United States*, 217 U.S. 349, 371 (1910) (quoting *O'Neil* v. *Vermont*, 144 U.S. 323, 339-340 (1892)); cf. *Coker* v. *Georgia*, 433 U.S. 584 (1977) (holding the death penalty disproportional to the crime of rape). Furthermore, the Court found that Enmund's degree of participation in *the murders* was so tangential that it could not be said to justify a sentence of death. It found that neither the deterrent nor the retributive purposes of the death penalty were advanced by imposing the death penalty upon Enmund. The *Enmund* Court was unconvinced "that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken." 458 U.S. at 798–799. In reaching this conclusion, the Court relied upon the fact that killing only rarely occurred during the course of robberies and such killing as did occur even more rarely resulted in death sentences if the evidence did not support an inference that the defendant intended to kill.

Tison, 481 U.S. at 148–49. As in *Enmund*, Mr. Ford alleged facts which, if true, demonstrate that his degree of participation in *the murder* was too tangential to justify a sentence of death.

On the other hand, Mr. Ford's conduct is vastly different from the conduct of the defendants in *Tison*, where the Court held the defendants were eligible for a death sentence. Ricky and Raymond Tison were two brothers who helped their father, a convicted murderer, and his cellmate, another convicted murder, escape from prison. Even though neither brother personally killed any of the victims, the Court held both were eligible for the death penalty:

> Raymond Tison brought an arsenal of lethal weapons into the Arizona State Prison which he then handed over to two convicted murderers, one of whom he

> knew had killed a prison guard in the course of a previous escape attempt. By his own admission he was prepared to kill in furtherance of the prison break. He performed the crucial role of flagging down a passing car occupied by an innocent family whose fate was then entrusted to the known killers he had previously armed. He robbed these people at their direction and then guarded the victims at gunpoint while they considered what next to do. He stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting. Instead, he chose to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown.
>
> Ricky Tison's behavior differs in slight details only. Like Raymond, he intentionally brought the guns into the prison to arm the murderers. He could have foreseen that lethal force might be used, particularly since he knew that his father's previous escape attempt had resulted in murder. He, too, participated fully in the kidnaping and robbery and watched the killing after which he chose to aid those whom he had placed in the position to kill rather than their victims.

Id. at 151–52.

The *Tison* Court further described by way of example what it meant by "major participation" and "reckless indifference to human life," which permitted a death sentence, and contrasted it with a situation which did not:

> ***Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery***, each petitioner was ***actively involved*** in ***every element*** of the kidnaping-robbery and was ***physically present*** during the ***entire sequence of criminal activity*** culminating in the murder of the Lyons family and the subsequent flight.

Id. at 158 (emphasis supplied). *See also People v. Banks*, 61 Cal. 4th 788, 809, 351 P.3d 330, 343 (2015) ("The Supreme Court ... made clear felony murderers ... who simply had awareness their confederates were armed and armed robberies carried a risk of death[] lack the requisite reckless indifference to human life.").

Like the contrasting case before by the Court in *Tison*, Mr. Ford has alleged facts demonstrating that he, unarmed, "merely s[at] in a car away from the actual scene of the murder."

481 U.S. at 158. Moreover, the reliable evidence no longer reflects that Mr. Ford acted with reckless indifference to human life or that he ever thought that the Belton brothers would kill anyone.

Enmund's reasoning – which *Tison* did not overrule – applies with equal force to Mr. Ford:

> The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett v. Ohio*, 438 U. S. 586, 605 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson v. North Carolina*, 428 U. S. 280, 304 (1976). Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

Enmund, 458 U.S. at 798.

The evidence put forward in Mr. Ford's application makes at least a *prima facie* showing of evidence that Mr. Ford testified truthfully at trial. His trial testimony established that he was no more culpable for capital murder than was Earl Enmund. Accordingly, as in *Enmund*, "Putting [Ford] to death to avenge [a] killing[] that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." 458 U.S. at 801. Mr. Ford is constitutionally ineligible for the

death penalty.

2. Under Article 11.071 § 5(a)(1), Mr. Ford was entitled to have this claim heard on the merits

Constitutionally *ineligible* for the death penalty under *Enmund v. Florida*, Mr. Ford was entitled for that reason to have his claim considered on the merits in his subsequent habeas application.

The CCA held in *Ex parte Blue*, 230 S.W.3d 151, 161 (Tex. Crim. App. 2007) that "[t]he language of Article 11.071, Section 5(a)(3) is broad enough on its face to accommodate an absolute constitutional prohibition against, as well as statutory ineligibility for, the death penalty." While the Court in *Blue* mentioned only intellectual disability and being a juvenile at the time of the offense as grounds for being "constitutionally ineligible for the death penalty," *id*., persons charged with capital crimes who play the role Mr. Ford played in the crime with which he was charged are also constitutionally ineligible for the death penalty under *Enmund* and *Tison v. Arizona*. The *Blue* court clearly meant to include any basis for constitutional ineligibility for the death penalty as encompassed with Section 5(a)(3), because "once it has been definitively shown at trial that the offender was in fact [constitutionally ineligible for the death penalty], no jury would even have occasion to answer the statutory special issues. In short, no rational juror would answer the special issues in favor of execution because no rational juror *could,* consistent with the Eighth Amendment."

Accordingly, consideration of this claim on the merits was required under Article 11.071, § 5(a)(3).

WHY THE QUESTION PRESENTED IS WORTHY OF THE COURT'S TIME AND ATTENTION

The CCA's dismissal of claims that it determines do not meet the requirements of Article 11.071, § 5(a) often evokes an explanation from the court. Recent cases make that quite clear. *See, e.g., Ex parte Storey*, 584 S.W.3d 437, 438-40 (Tex.Crim.App. 2019) (explaining, in a three-page per curiam opinion, that because the factual basis for a *Mooney/Napue* claim was ascertainable at the time the initial habeas application was filed, the claim was dismissed); *Ex parte Davila*, 2018 WL 1738210 at *1 (Tex. Crim. App. Apr. 9, 2018) ("Applicant has failed to make a prima facie showing of a *Brady* violation, his ineffective assistance claim is procedurally barred because it should have been raised in his initial writ application, and he has failed to show that the law he claims renders the Texas scheme unconstitutional applies to the Texas scheme. Thus, applicant has failed to meet the requirements of Article 11.071 § 5"); *Ex parte Cruz-Garcia*, 2017 WL 4947132 at *2 (Tex. Crim. App. Nov. 1, 2017) ("Applicant fails to make a prima facie showing that the new evidence [presented in a due process claim] is material to the outcome of his case. Accordingly, we dismiss applicant's subsequent application as an abuse of the writ under Article 11.071 § 5(a)(1) without reviewing the merits of the claims raised.").

This practice casts in an even starker light the unexplained dismissal of Mr. Ford's claims, all of which made out prima facie cases on the merits and on the Section 5(a) criteria. The order in Mr. Ford's case, *see* Appendix 1, leaves the reader trying to imagine why the claims were dismissed. In the context of federal habeas corpus proceedings, where the federal habeas statute requires deference to state court decisions, the Court has addressed how a federal court should analyze the question of deference when a state court decision provides no explanation for

its decision. *Harrington v. Richter*, 562 U.S. 86 (2011). The Court explained, "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id*. at 98. While there is no special deference due the CCA's decision in certiorari review of that decision, even if a "no reasonable basis" for the decision standard were applied, Mr. Ford would meet it. There simply is no reasonable basis for the CCA's decision in his case if the CCA did what it has said it must do in this stage of the proceedings – examine whether the facts alleged establish a prima facie case (1) on the merits, and (2) on one of the Section 5(a) criteria, for each claim.

The Due Process protections afforded state-created rights entitle a petitioner to at least this much process: to have some reasonable basis for the denial of the rights guaranteed to them by state law. *Accord Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (in the context of a challenge to the pretrial detainment of persons suspected of criminal acts, states must "provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty"). The Court must intervene – at least to require that the lower court attempt to justify its action -- in such circumstances. The fair administration of the Texas statute governing the consideration of claims in subsequent habeas corpus applications depends on this.

Respectfully submitted,

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