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

APPENDIX
PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

Appendix 1

2019 WL 4318695
Only the Westlaw citation is currently available.

Court of Criminal Appeals of Texas.

EX PARTE Tony Egbuna FORD

WR-49,011-03

|

SEPTEMBER 11, 2019

ON APPLICATION FOR WRIT OF HABEAS CORPUS, CAUSE NO. 69441-346, IN THE 346TH JUDICIAL DISTRICT COURT EL PASO COUNTY

ORDER

Per curiam.

*1 This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In July 1993, Applicant was convicted of the offense of capital murder. The State presented evidence that Applicant shot and killed Armando Murillo, Jr., during the course of a robbery at the Murillo residence in El Paso in 1991. The jury answered the special issues submitted, and the trial court assessed punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Ford v. State*, 919 S.W.2d 107 (Tex. Crim. App. 1996).

This Court denied relief on Applicant's initial post-conviction application for writ of habeas corpus. *Ex parte Ford*, No. WR-49,011-01 (Tex. Crim. App. September 12, 2001)(not designated for publication). Applicant filed a second post-conviction application for writ of habeas corpus, but he later moved to abate or dismiss it when the trial court granted testing of biological material under Chapter 64 of the Texas Code of Criminal Procedure. We dismissed the second post-conviction application for writ of habeas corpus without prejudice. *Ex parte Ford*, No. WR-49,011-02 (Tex. Crim. App. December 14, 2005)(not designated for publication). Applicant's instant post-conviction application for writ of habeas corpus was received in this Court on September 25, 2018.

Applicant presents five allegations in the instant application. In Claims A and B, he complains of false testimony from eyewitnesses Myra and Lisa Murillo. In Claim C, he asserts that he would not have been convicted if newly discovered scientific evidence had been presented at his trial, and he is therefore entitled to relief under Article 11.073 of the Texas Code of Criminal Procedure. In Claim D, he argues that the State's investigative procedure was so improper that it violated his right to due process of law. In Claim E, he contends that his participation in the offense was too minimal to warrant the death penalty.

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.

IT IS SO ORDERED THIS THE 11th DAY OF SEPTEMBER, 2019.

All Citations

Not Reported in S.W. Rptr., 2019 WL 4318695

Appendix 2

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NORMA FAVELA BARCELEAU
District Clerk
El Paso County
930D03565

IN THE 34TH JUDICIAL DISTRICT COURT
OF EL PASO COUNTY, TEXAS
AND
IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

Ex Parte TONY EGBUNA FORD,	**TRIAL CASE NO. 930D03565**
	CCA NO. WR-49,011-02
Applicant.	

SUBSEQUENT APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

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I. INTRODUCTION

Tony Ford was wrongfully convicted of capital murder and attempted murder in El Paso County in 1993. In this application, he presents evidence showing that he was wrongfully convicted and sentenced to death which supports five claims for relief. Four of the claims require a new trial, and one requires that Mr. Ford's death sentence be set aside. Each claim meets one of the requisites under Article 11.071 § 5 of the Texas Code of Criminal Procedure for consideration on the merits in a subsequent application for writ of habeas corpus.

The underlying crime involved a home invasion and armed robbery in El Paso 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 her teenage son Armando. Myra (the daughter) recognized Van Belton as one of the intruders because she had gone to school with him. During the course of the crime, the person who broke into the house with Van Belton shot and killed Armando and shot and attempted to kill Ms. Murillo and her two daughters. The trial turned on the testimony of Mr. Murillo's two sisters, who claimed to identify Mr. Ford as the other intruder, the shooter. Mr. Ford refused to speak with the police. At trial, however, he testified in his own defense. He told the jury that he had not been involved in the forced-entry but only rode in a vehicle with Victor and Van Belton to the Murillos' house and waited outside for them to return after they forced their way into the house, and that he had no idea that the Beltons were planning to kill or attempt to kill people in the house. Mr. Ford was convicted on all counts; he was sentenced to death for the murder of Armando and sentenced to life 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. A highly-regarded expert in the science of

eyewitness identification, Dr. Roy Malpass, has demonstrated that the Murillo sisters' claimed identification of Mr. Ford was unreliable and mistaken. In addition, counsel for Mr. Ford has uncovered evidence confirming the truthfulness of Mr. Ford's account. The prosecution either knew about and suppressed this evidence, or inexplicably failed to find or take it into account. This evidence includes the following:

(1) The day that voir dire began, an assistant district attorney asked the Murillo sisters to look at Mr. Ford, who was seated in the courtroom with his counsel, to be sure he was the person who shot their family. The Murillos said they were not sure, even though they testified a month later that they had "no doubt" that Ford was the shooter.

(2) Three people who knew Victor Belton heard him admit, sometime between the crime and Mr. Ford's trial, that he had killed Armando Murillo and gotten away with it.

(3) Witnesses have come forward to explain that the men who forced their way into the Murillos' home were acting at someone else's direction in doing so, that the plan did not contemplate that anyone be killed, but only that a resident of the house be deterred from encroaching on someone else's drug trafficking territory, and that the likely target of this message knew in advance that the assault was going to take place.

(4) A witness overheard Myra Murillo (Armando's sister) tell someone on the phone immediately after the crime that she had recognized the two intruders, but she later testified falsely at trial that she did not know the intruder she claimed to identify as Mr. Ford.

(5) Neighbors, along with the mother of Armando Murillo, observed – consistent with Mr. Ford's trial testimony – that three people were involved in the crime, one of whom waited outside in a vehicle.

(6) And finally, a detective testified at trial that even after Van Belton admitted involvement in the crime and pointed to Tony Ford as the other perpetrator, police did not pursue his brother Victor Belton as a suspect – despite knowing, as undersigned counsel have recently learned from other El Paso police officers, that the Belton brothers frequently committed crimes together, were always armed and considered dangerous, and always covered for each other.

We urge the Court to authorize the trial court to consider all the evidence and claims presented in this application.

II. PROCEDURAL HISTORY

Tony 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,[1] 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 appeal. *Ford v. State*, 919 S.W.2d 107 (Tex. Crim. App. 1996). In state habeas corpus proceedings, this Court adopted the trial court's recommended findings of fact and conclusions of law, denying relief on September 12, 2001. *Ex parte Ford*, No. WR-49,011-01.

On July 25, 2002, Mr. Ford timely filed a petition for writ of habeas corpus in federal

[1]References to the statement of facts at trial are to volume and page number(s).

district court. Relief was denied, *see Ford v. Cockrell*, 315 F.Supp.2d 831 (W.D.Tex. 2004), the Fifth Circuit affirmed, and the Supreme 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 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, this Court"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.

On March 6, 2006, the trial court found that Mr. Ford was entitled to the testing he sought and ordered that it begin. Exhibit 1. After several rounds of testing bloodstains on 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." Exhibit 2 (order of the 346th District Court, October 25, 2010). In the same order, the court directed that DNA testing commence on numerous hair fragments connected to the crime scene. Between October 25, 2010, and July 2, 2014, numerous steps in the process of testing these hairs were taken. On July 2, 2014, the testing of these hair fragments concluded, with the court finding thereafter that "none of the [questioned] hair fragments were contributed by Victor Belton, Van

Belton, or Tony Ford." Exhibit 3 (Findings Concerning DNA Testing of Crime Scene Hair Fragments, June 17, 2016).

III. FACTS UNDERLYING THE CLAIMS PRESENTED

A. The 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 claimed to identify 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[2] 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 two lead investigators on the case was El Paso Police Detective Antonio

[2]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.

Tabullo. After the testimony by Myra and Lisa Murillo, he provided "investigation narrative" testimony,[3] in which he deftly informed the jury 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.
>
> 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

[3]The practice of allowing police investigators to narrate the actions they took in investigating a case, without the guidance of proper questioning, has been criticized as unreliable. *See* A. Poulin, "The Investigation Narrative: An Argument for Limiting Prosecution Evidence," 101 IOWA L. REV. 683 (January 2016).

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 needed it to conceal his gun. IX: 295-96.

The remaining prosecution evidence pointed to the Belton brothers as the perpetrators, 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 head). *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's;

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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.

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

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 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. They were in the house for up to 10 minutes. *Id*. at 281. At this point 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.

At punishment, 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 driving the Beltons to the Murillos' house. X: 66-67.

B. The Identity of One of the Two Intruders – the Shooter – Was and Is the Only Issue in this Case

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 claimed 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 serious doubts 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.

C. Evidence Discovered and Developed Since Mr. Ford's First State Habeas Application Was Denied in 2001 Confirms in Multiple Ways That Mr. Ford's Trial Testimony Was Truthful, and that He Was Not One of the Intruders in the Murillos' House

After Mr. Ford's first state habeas proceeding – beginning in federal habeas corpus proceedings, but continuing through the years of DNA testing and thereafter – Mr. Ford's counsel was able to undertake further investigation concerning Victor Belton's involvement in the crimes against the Murillo family. Counsel also gained the assistance of an expert in eyewitness identification. These efforts have borne very significant fruit:

(1) Considerable new evidence has been found to substantiate Mr. Ford's account of his own minimal involvement in the crime and of Victor Belton's role as the shooter.

(2) Expert analysis of the claimed eyewitness identifications of Mr. Ford by Myra and Lisa Murillo, in light of the evolving science pertaining to eyewitness identification, together with newly-discovered direct evidence that on the eve of trial the Murillo sisters expressed uncertainty that Mr. Ford was the shooter, demonstrates that the identifications were mistaken. This analysis and new evidence, viewed against the new facts substantiatingMr. Ford's account of what happened that night, undermines any confidence that the Court might have in the accuracy of the identifications and Mr. Ford's resulting convictions.

Together, these two strands of evidence also demonstrate that Mr. Ford is not eligible for the death penalty under *Enmund v. Florida*, 458 U.S. 782 (1982). Like Earl Enmund, Tony Ford merely drove with two people to someone's house to serve as a lookout while the others committed a non-lethal crime, and was staggered to learn that they had instead committed capital murder. Like Mr. Enmund, Mr. Ford "did not himself kill, attempt to kill, or intend that a

killing take place or that lethal force be employed." *Id*. at 797. He is, for these reasons, constitutionally ineligible for a death sentence.

1. Marvin Dodson's account of the purpose and plan of the forced entry into the Murillos' house that night, together with what he learned after the offense, establishes that Mr. Ford testified truthfully.

The most important evidence that has recently been discovered is the account of Mr. Ford's friend, Marvin Dodson, concerning what was supposed to happen and what did happen before, during, and after the crime. After years of trying to get Mr. Dodson to talk, Mr. Ford's defense team finally succeeded in February and March of 2015. What he has to say is so urgently significant that we have set forth his affidavit, which was sworn to, signed, and notarized on March 7, 2015, in its entirety below.

> 1. My name is Marvin Dodson. I am a resident of El Paso. At present, I am confined in the El Paso County Jail Annex, 12501 Montana, El Paso, Texas 79938.
>
> 2. I have been a close friend of Tony Ford for many years, since at least the mid-to-late 1980's. I know that Tony was convicted of capital murder and attempted capital murder for an incident that occurred December 18, 1991, at the home of the Murillo family on Dale Douglas in El Paso.
>
> 3. I am providing this affidavit to relate what I know about this incident.
>
> 4. In 1990 or 1991, I began working with a man named Ken to sell drugs in east El Paso. I do not know Ken's last name. I know that he was Mexican and I know where I used to meet up with him. I began selling weed and then started selling powder (cocaine).
>
> 5. Things were going well until sometime in 1991 when someone, whose name I cannot remember, began selling in our territory and cutting into our business. I learned from Ken that this person lived at the Dale Douglas address where, I learned later, the Murillo family also lived. My memory is that this person was a woman about my age but I cannot remember for sure.
>
> 6. Ken wanted this person eliminated. I did not want to do that and persuaded Ken to let me and some of my people go to see her or whoever she was

working for and try to bring them in to working with us. Ken agreed to this, and I began planning with Van Belton and Tony to make a visit to this person. The whole purpose was to warn the person off and get her or him not to sell dope in our territory, or to join us. We were not going to hurt anyone.

7. 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.

8. Before the plan was complete, I got arrested for a probation violation on a previous burglary charge. I was arrested on December 13, 1991 and held in the El Paso County Jail until I posted bond on December 24, 1991.

9. When I got arrested, the plan was to wait to do the job. I did not know how much time I was going to do, but I did not think the job needed to be completed or rushed. That's not what happened. Van pushed to do the job before I got out of jail. He wanted a "more status role" with our group, and I heard he was trying to get Ken's group to give him permission to sell in Louisiana, back at school.

10. Van was arrested on December 19, 1991 for what happened at the Murillos' house and was put in the same part of the El Paso County Jail I was in. I met with Van in the recreation area, and we talked about the shooting. Van begged me, "Please, please, please, you need to tell the police, the attorneys or anyone else that asked that Tony did the shooting." Van looked nervous and scared. He wanted me to do this at the same time he was telling me that Victor was the one that did the shooting.

11. I knew all along that Tony did not do the shooting and would have listened to me to stay outside. Tony was not violent and had a good heart. The Belton brothers were different. They were known to get in a lot of fights, scare people when confronted, or when they were doing their "shit," to pull out a piece and threaten people with it all the time. They thought it made them big.

12. The night I got out of jail, I went home and noticed that my .22 gun was not in its hiding place in a hole next to the chimney outside the house. The people that new [sic] about this place were Tony, Dewayne Bonds, and Van.

13. Not long after I got out of jail, I talked with Ken about what happened. He said that after I got arrested, Van got him to OK the hit at the house on Dale Douglas. Van was supposed to be the leader. He took his brother Victor with him and took Tony as the lookout. The plan was to take the narcotics money that was in the house, let the person know that they knew of her or his drug-dealing, and let her or him come clean and join Ken's organization or stay out of their territory. There was no plan to shoot or kill anybody.

14. After the incident went down that night, Van and Tony came back to Ken's place, and Van told him what happened. Ken told me he knew that the shooter was not Tony or Van, but Victor. I told Ken that my gun was missing. He told me that it went to Mexico with the car that was taken from Dale Douglas.

15. After the shooting and I got out of jail, I was called by police detectives to meet with them downtown to give a statement. I was not given a choice. I was told that I was on probation and that I would give a statement or risk going to jail for a very long time. I felt threatened and that I did not have a choice. I met with two male detectives. They were yelling at me that Tony had done the shooting, were showing me pictures of the family that was shot, and that I needed to put it down on paper that he did it, and that I knew he did it. I told them that I was in jail and did not know anything about the shooting myself. I also told tell them that Van Belton had begged me to say that Tony had done the shooting. The detectives kept threatening me because I would not tell them about the location of the car or the gun, and at one time I got so mad I stood up, turned around and told them to handcuff me and take me in because I was not going to put something down on paper that I did not know about. They backed off and had me sign a statement that said I did not know anything about the shooting myself.

16. Sometime after this, I was at a party. Victor Belton was there, too. Victor was being boastful -- saying things like "we did that," and "the way it was done we got away with murder." I knew what Victor was talking about because of what Van told me in jail and what Ken told me after I got out. I told Victor to shut up but he kept on saying stuff like that. He also said he had guns and could use them any time.

17. I have never told Tony or anyone connected with Tony or his lawyers any of the things I have said in this affidavit. I have been worried about the consequences for my family if I did. I still am worried, but I can no longer keep this to myself. People are still asking me about Tony and his case. They are not people interested in helping Tony. They are out to protect themselves. I am very afraid that by saying what I have here, my family will be put in jeopardy of being hurt.

See Exhibit 4.

2. Mr. Dodson's account is credible because it is corroborated by newly-discovered evidence wholly independent of Mr. Dodson.

Before Mr. Dodson ever agreed to talk to us, our investigation uncovered the following evidence, which corroborates what Mr. Dodson would eventually disclose about the events

leading up to and following the crime: Victor Belton admitted to two other people that he murdered Armando Murillo. Joe Chrisman, the live-in boyfriend of Ms. Murillo (the mother) and an apparent drug dealer, was the target of the crime. Mr. Chrisman and Myra Murillo (the daughter) had foreknowledge that the break-in was going to happen, and Myra recognized the perpetrators. The words spoken by the people who broke into the Murillos' home confirmed that the purpose of the break-in was to take money they believed to be in the house. Van Belton was the planner and leader of the crime. Van Belton did all he could to conceal his brother Victor's involvement in the crime and to make his own story to the police credible. Marvin Dodson's account was forecast by his father even before Marvin agreed to tell undersigned counsel what he knew. Police detectives interviewed Marvin Dodson sometime prior to trial. Tony Ford was not violent, but the Belton brothers were, and the police knew the Beltons were violent. The police and others knew that the Belton brothers were usually involved in criminal activity together. Marvin Dodson is to this day fearful of Victor Belton.

a. Victor Belton admitted to two other people that he murdered Armando Murillo.

Two people in addition to Mr. Dodson recount that Victor Belton admitted or boasted to them about getting away with the murder of Armando Murillo.

Approximately one year after the murder – and some seven months before Mr. Ford's trial – Victor Belton admitted the murder to Tammond J. ("T.J.") Brookins. Mr. Brookins recounted that he had known Victor for many years when,

> [i]n December, 1992, I was at a party with several friends at a house near Desert View Middle School in El Paso. Victor Belton was also at the party. A good friend of mine had just been shot by a guy that I knew. I was very upset about this and was thinking about taking some action against this guy. I was discussing this with two friends when Victor joined the conversation. When he learned what I was talking about, he told me that if I was going to do something I had to have

> more than one other person helping me. He explained that with enough help, 'if nothing don't happen, you'll get away with it. I did.'

Exhibit 5 (declaration of Tammond J. Brookins). Brookins "did not think much about this at the time," but thought about it more after he began writing Mr. Ford in prison. As he explained,

> I learned from Tony that Victor had been involved in the shooting that Tony got sentenced to death for. This made me remember Victor's comments about getting away with killing someone. My impression has been ever since then that Victor Belton admitted to me that night at the party that he got away with the killing that Tony Ford was sentenced to death for.

Id.

A similar incident was recounted by David Tucker, who was good friends with both Tony and Victor Belton. Exhibit 6 (affidavit of David Tucker).

> A few months after Tony was arrested, I was at a party with some other people. Vic Belton was at the party, too. I heard Vic and another guy getting into it and went over to see what was going on. I heard Vic say, "I've already murdered one boy. Don't make me murder again and get away with it."
>
> Sometime later, I began to realize that Vic was talking about the murder Tony was charged with. The simple fact of how he said it made me think this. We all knew each other and we did not make idle threats like this. I also knew that Vic's older brother Van was charged with the same murder. Van often covered for Vic for stuff that he did – they were like smoke and fire. I was sure that Vic had told us he was the one who killed the young man on Dale Douglas.

Id.

b. Joe Chrisman, the live-in boyfriend of Ms. Murillo (the mother) and an apparent drug dealer, was the target of the crime.

Joe Chrisman was Ms. Murillo's boyfriend at the time of the crime. He lived with Ms. Murillo at the Dale Douglas house, as did, on occasion, his children, Joe Jr. ("Joey"), Zaira, and Veronica. Exhibit 7 (affidavit concerning interview with Veronica Chrisman). Circumstantial evidence shows pretty clearly that Joe Chrisman was involved in drug dealing or other illegal

activity at that time. Thus, he could well have been the intended target of the crime that night.

From their observations of Joe Chrisman, many of the neighbors on Dale Douglas inferred that he was a drug dealer. *See* Exhibit 8 (affidavit concerning neighborhood canvass), interview with Maria Hernandez ("we were aware of illegal activity at that home but we would mind our own business"), interview with Robert Bryant (1571 Dale Douglas was known "to have vehicle/foot traffic at all hours of the night" involving "shady people and some well dressed people"), interview with John Roger Duncan (Chrisman has a history of vehicle/foot traffic at all hours of the night; Duncan went to work for Southern Pacific Railroad at all hours of the night and would "notice him (Mr. Chrisman) meeting with people and doing odd things – like washing his car at 4 in the morning[;]" "I am not stupid ... I know what he was into[;]" "I knew there were undercover police officers watching him"); and interview with Ms. Encino (the neighbors "knew shady stuff was going on next door[;] Ms. Murillo was a sweetheart, but ... no one trusted the man (Mr. Joe Chrisman)").

Mr. Chrisman's daughter Veronica today suspects that her father was involved in some sort of illegal activity during that time. When asked what she knew about the crime at the Murillos' house, she told Mr. Ford's investigator the following:

> "I know some black guys came knocking on the front door asking for the man of the house. Now that I think about it, maybe they were there looking for my father." I asked her why she would say that. She continued, "My father always had money, I even heard that he might have had ties to the Mexican Mafia, would dress in suits/ties and was always driving a new car. Don't know where the money came from because he was always home. I know that Myra and he (Mr. Chrisman) worked real estate but they never left the house."

Exhibit 7.

Others connected to Mr. Chrisman observed the same things. Horacio Quintanilla, at that time the boyfriend of Chrisman's daughter Zaira, told Mr. Ford's investigator that Chrisman had

a "flamboyant lifestyle of flashing money and having lots of people come by the house at all hours of the night." Exhibit 9 (affidavit concerning interviews with Horacio Quintanilla and Cuca Chrisman). Mr. Quintanilla stated that he could not understand how " he (Mr. Chrisman) had so much money and never worked." *Id*. One of Chrisman's former wives, Cuca Chrisman, knew that Chrisman was "doing shady things, had a lot of money and was always lying about how he got his money." *Id*. A few months before the crime, Horacio Quintanilla stole $10,000 from a briefcase that Chrisman had at the Murillos' house. *Id*.

c. Mr. Chrisman and Myra Murillo had foreknowledge that the break-in was going to happen, and Myra recognized the perpetrators.

Mr. Chrisman apparently had some warning that action might be contemplated against someone at the Dale Douglas address that night. He told his daughter Veronica, who was planning to be with the Murillos at their home that night, not to be there. Exhibit 7 ("I was told by my father not to go by [that night]").

Similarly, Myra Murillo appears to have had some foreknowledge as well. She testified that after she called 911 from the family's house, she could no longer get a dial tone and went to the "neighbors to my right," IX: 73, to use their phone. She called her father, her uncle and grandparents, and her boyfriend. *Id.* These neighbors, John and Marie Duncan at 1569 Dale Douglas, recall the incident vividly. Ms. Duncan, now remarried with the last name of Conover, recalls that in one of the calls, Myra said to the person on the other end, "It was those guys. It was those guys." Exhibit 10 (affidavit of Marie Conover). "It seemed that Myra knew who they were talking about but I never asked her." *Id.* Without questioning Myra (who has refused to speak with the defense), there is no way to know how she knew about the people who committed the crime – whether it was from something Joe Chrisman had anticipated and shared with her, or

from some other source – but her remarks on the night of the crime leave little room for any interpretation other than that the assault was not unexpected, the perpetrators were not unknown, or both.

d. The people who broke into the Murillos' house confirmed by their words that their purpose was to take money they believed to be in the house.

One of the goals of the crime that night, according to Mr. Dodson, was to take the offending drug dealer's money to launch Van Belton's own drug dealing. The trial testimony by Myra and Lisa made clear that the intruders, from the beginning, demanded to see the man of the house and to know where the money was. Myra told the first uniformed officer on the scene, Saul Medrano, that the person she identified as Tony Ford had wasted no time in telling the other assailant,"Look for the money. Look for the money." Exhibit 11 (report of Saul Medrano, 12/19/91, 0300 hours). While this is a subtle difference from the Murillos' testimony at trial, it is more in keeping with what Mr. Dodson has explained was the perpetrators' true aim: they believed they would find money from drug dealing at the house, and their plan, as overheard by Myra, was to look for the money.

e. Van Belton planned and led the crime.

Mr. Dodson reported in his affidavit that, due to his having been arrested, he could not lead the strike on the Murillos' house. He learned later from Ken that when he (Ken) approved the strike even with Marvin in jail, "Van was supposed to be the leader." That Van Belton in fact played that role is confirmed by a person named Brian Hamilton, who recalls the following:

> My best friend during high school was McCarthy Morgan. On the night of the break-in and shooting at the Murillo's house in December, 1991, I heard about what happened on the news. Not long after that, Morgan called me and told me that the night before this, he and Van Belton were together. Van told him "we" were going to go collect a drug debt, and he wanted to borrow Morgan's Atlanta

> Falcons cap and jacket to wear. Van also asked if Morgan would give "them" a ride to the house where "they" were going to collect the debt. Morgan refused to give them a ride but he did give Van his cap and jacket.

Exhibit 12 (declaration of Brian Hamilton).[7]

f. Van Belton did all he could to conceal his brother Victor's involvement in the crime and to make his own story to the police credible.

Mr. Dodson also reported in his affidavit that Van Belton tried to get him to name Tony as the shooter even after acknowledging to Dodson that Victor was in fact the shooter. This attempt to protect his brother is not only consistent with David Tucker's observation that "Van often covered for Vic for stuff that he did," Exhibit 6, but is also consistent with Van's other attempt to protect Victor.

On the day he was arrested, Van admitted that he was one of two people who had broken into the Murillos' house, and claimed that the other man with him was Tony Ford. He said that Tony had begun to demand money from a guy in the house, triggering an argument,and "[t]hings looked like they were getting out of hand." Exhibit 13 (statement of Van Belton to the El Paso police). Thereafter, Van Belton said, "[T]he lady there looked very scared and [was] saying, 'please, please.'" *Id*. He then "told Tony, 'Hey, let's go.'" *Id*. But, "Tony took to[o] long so I just turned around and ran out of the house. From then on, I didn't see or hear anything else. I just went home." *Id*. Belton also noted that Tony had a .22 caliber black revolver and that he was pointing it at the "ladies and the guy in the house." *Id*. He thought "[Ford] was just trying to scare these people." *Id*. He told the police, "This is all I know about what happened on this night." *Id*.

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[7]By the time Mr. Ford's current counsel learned of Brian Hamilton and interviewed him, McCarthy Morgan was deceased. Thus, there was no opportunity to interview Mr. Morgan.

Trying to appear to the police to be credible in his naming of Mr. Ford and his story of what "Tony" supposedly had done, Van took steps to fabricate evidence that would appear to confirm his story to the police that he had used a toy gun that night. In his statement to the police, Van recounted,

> I was asked by Detective Tabullo if I had a gun on this night. I would like to say that I didn't have a real gun, it was a plastic gun and it was not used in a threatening way. The plastic gun was black in color. Tony had a black revolver. It had a long barrel and I think it was 22 caliber.

Exhibit 13. To build support for this aspect of his story, before his arrest on December 19, 1991, Van contacted McCarthy Morgan – the friend referred to in Brian Hamilton's declaration, Exhibit 12, *supra* -- and told him the following:

> Van left a message for Morgan to call him. Morgan and I were together when he got the message. I had a mobile telephone then that was equipped with a speaker phone. Morgan called Van from my phone and was on speaker. Van told Morgan that the man that owed the debt was not at the house that they went to. Van then said that "he" – the other person with him in the house – wigged out and shot a girl he went to high school with and her mother. Van said he, Van, did not do the shooting.
>
> Van then said that for Morgan to get his cap and jacket back, he needed to take a toy gun and break it up and leave it in the neighborhood where the shooting happened in the hopes that the police would think this was the gun used in the crime. I don't know if this is what Morgan did, but I do know he got his cap and jacket back.

Exhibit 12.

g. Marvin Dodson's account was forecast by his father even before Marvin agreed to tell current defense counsel what he knew.

Marvin Dodson's admission that the original plan for the strike against the competing drug dealer at the Murillos' home called for him to be involved has also been confirmed by his own father. Several months before Marvin Dodson met with the defense team, Mr. Ford's

investigator met several times with Marvin's father George. George Dodson said, "You know, Marvin may have been there too that night if he had not been picked up on traffic tickets. You know kids do a lot of stupid things and that group all ran together.... My son hung out with them Belton boys. I never cared for them much. They were always in trouble." Exhibit 14 (affidavit concerning interviews with George Dodson and initial contact with Marvin Dodson).

h. Police detectives interviewed Marvin Dodson sometime prior to trial.

Mr. Dodson explained in his affidavit that he was interviewed by police detectives sometime after her got out of jail on December 24, 1991. The detectives, like Van Belton, tried to get him to name Tony as the shooter. Although nothing in the police department's case file reflects such an interview, the prosecution subpoenaed Mr. Dodson for Tony's trial. *See* Exhibit 17 (prosecution application for trial subpoenas). It is hard to imagine any lawyer issuing a subpoena for a witness she has not interviewed or had interviewed by someone on her behalf.

i. Tony Ford was not violent, but the Belton brothers were, and the police knew the Beltons were violent.

Mr. Dodson's affidavit emphasizes the contrasting characters of Tony and the Belton brothers. Specifically, he describes Tony as "not violent," with "a good heart." Exhibit 4, at ¶ 11.[8] But, Mr. Dodson explains, "The Beltons were different. They were known to get in a lot of fights, scare people when confronted, or when they were doing their 'shit,' to pull out a piece

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[8]A friend, Monica Fisher, described Tony in a similar manner:

> I do not recall how Tony and I became friends but our friendship grew to the point where I considered him my "big brother." In the time that I have known Tony, I have never known him to be violent or argumentative and I trusted him with my heart.... Tony was always welcomed at my home and around my family. At one point, Tony dated a good friend of mine, too. Tony was always the perfect gentleman.

Exhibit 16 (affidavit of Monica Fisher).

and threaten people with it all the time." Exhibit 4, at ¶ 11.

Other people wholly unconnected to Marvin Dodson perceived the Belton brothers the same way. El Paso Police Detective Armando Sosa, for example,

> was quite aware of the Belton Brothers, the Green Brothers, the Dodson Brothers, ... but did not recall Tony Ford as being on the target map.... "We all knew that they 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."

Exhibit 17 (affidavit recounting interviews with Armando Sosa and Pete Lozano). Retired El Paso Police Detective Pete Lozano confirmed this: "[W]e knew of the Beltons, ... they would run from police, were armed – to use caution and they were fighters." *Id*.

Similarly, the Beltons' neighbor at 1613 Vista Real, Arturo Torres, a teacher retired from Eastwood Middle School where the Belton brothers had been students, told Mr. Ford's investigator,

> [T]he 'Belton's terrorized the neighborhood' when they resided at 1616 Vista Real. [They] were notorious for mischief throughout the neighborhood and 'the father protected them.' Mr. Torres further stated that during his teaching career at Eastwood Middle School, he was aware of the Belton's – for their mischief behavior at the school as well. Mr. Torres further stated that 'he was not surprised that one of them was arrested for murder.'

Exhibit 18 (investigative chronology affidavit), July 7, 2014 entry.

j. The police and others knew that the Belton brothers were usually involved in criminal activity together.

Another characteristic of the Belton brothers, not mentioned specifically by Mr. Dodson but noted by others, was their tendency to engage in unlawful activity together. Thus, David Tucker noted that he was certain that Victor had confessed to him about murdering Armando Murillo even though he did not mention Armando's name expressly, because

> I also knew that Vic's older brother Van was charged with the same murder. Van

> often covered for Vic for stuff that he did – they were like smoke and fire. I was sure that Vic had told us he was the one who killed the young man on Dale Douglas.

Exhibit 6. El Paso Police Detective Armando Sosa confirmed this characteristic of the brothers: "'[T]hose two [Nash[9] and Victor] were always together, ... they were inseparable." Exhibit 17. This widely recognized trait of the Belton brothers adds even more weight to Marvin Dodson's account of what took place.

k. To this day, Marvin Dodson fears Victor Belton.

Finally, in the first contact that Mr. Ford's investigator had with Marvin Dodson in recent years, a telephone call on July 8, 2014, Mr. Dodson's voiced only one concern about talking to him concerning the case: he wanted to know where Victor Belton now resides. Exhibit 14. Thereafter, Marvin avoided numerous efforts by the investigator to talk with him again, until the investigator found him in jail on February 12, 2015. *Id*. This concern speaks volumes about what Marvin knows about Victor's guilt in the murder and what he fears Victor might do to him upon learning that Marvin has revealed the truth.

3. Mr. Dodson's account is also credible because it is corroborated by evidence introduced at trial.

Not only is the truthfulness of Marvin Dodson's statement confirmed by much of the investigation done on Mr. Ford's behalf since his first state habeas proceeding, it is also confirmed by the trial record itself.

The trial record demonstrates that the case investigation led to the conclusion that the murder weapon was a .22 caliber gun. Mr. Dodson says that when he got out of jail in December

[9] "Nash" is Van Belton. His full name is Vanjarmar Nash Belton. *See* Exhibit 13 (statement of Van Belton to the police).

1991, he found that his .22 caliber gun was missing. Only Van Belton, Tony, and Mr. Dodson's brother-in-law Dewayne Bonds knew where he kept it hidden. Though Van Belton's statement to the police was not introduced at Tony's trial, Van is the only person to mention that the weapon "Tony" supposedly had was a .22 caliber pistol.[10]

Tony testified that he and Van both went to Ken's house after the incident. Thus, Mr. Dodson's account that Ken learned about what happened from Van is confirmed by an aspect of Tony's trial testimony. There is no reason to believe that Mr. Dodson knew that this fact had been disclosed in Tony's testimony.

Ms. Murillo (Myra Concepcion, the mother) told her daughters that she believed that the black men who came to the door the first time were looking for Joe Chrisman. Indeed, it appears that Joe Chrisman, or perhaps his daughter Veronica, were the intended targets of the offense.[11]

Finally, Myra's car was taken by one of the assailants that night. *See* IX: 69, 73, 76 (Myra testifying that when the person she identified as Mr. Ford asked for her car keys, her sister Lisa threw the keys at him, and she noticed the car was gone after the offense was over). Neither Myra's car nor the murder weapon was ever found. Mr. Dodson says that Ken told him that both his .22 caliber gun and the car "went to Mexico," which explains why neither was ever located.

4. Other evidence – in the trial record or police files, or developed by the defense investigation since the first state habeas proceeding – confirms the truthfulness of Mr. Ford's trial testimony.

Not only has the investigation that followed the first state habeas proceeding led to

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[10]Mr. Ford urges the Court find that, based on all the evidence, of course, that Van was actually referring to Victor, not to him (Tony), and that Van procured the weapon.

[11]When Veronica was informed by Mr. Ford's investigator that someone living at Dale Douglas might have been an intended target of the offense that night and was then asked if she had any idea who that might be, "[w]ithout hesitation, Ms. Chrisman stated, 'Me. The Murillos were squeaky clean. She (Ms. Murillo) had them on a short leash, always questioning them about where they were going and how they dressed.'" Exhibit 7.

Marvin Dodson and all the information that confirms the truthfulness of his account, Mr. Ford's current counsel has also identified other evidence – some introduced at trial or found in police records, some found through new investigation -- that provides substantial corroboration for the truthfulness of Mr. Ford's trial testimony. In sum, we have found the following: The testimony of Mr. Ford and Myra Murillo was consistent in a critical respect, and there is independent confirmation of the accuracy of Mr. Ford's testimony. The Murillo sisters' description of the clothing worn by the shooter matched Victor Belton's clothing, not Tony Ford's. Independent sources confirm that a third person was connected to the crime who did not enter the Murillos' house. The Belton brothers' violence and explosive tendencies, as well as their tendency to join forces with each other, further confirm the truthfulness of Mr. Ford's testimony. Victor Belton admitted to three people that he killed Armando Murillo.

a. The testimony of Mr. Ford and Myra Murillo was consistent in a critical respect, and independent evidence confirms the accuracy of this aspect of Mr. Ford's testimony.

According to Myra's trial testimony, two black men knocked on the door and asked for the man of the house. Ms. Murillo 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. This is precisely the sequence of events that Tony in his testimony described having observed from the truck. After going to the Murillos' house and knocking on the door, "a couple of minutes later, Van and Vic returned and sat down on the wall that was over to the side of the truck." IX: 279-80.

Further confirmation of this aspect of Tony's testimony comes from photographs taken in 2014 of the vicinity where the truck was parked on Dale Douglas. The "wall that was over to the side of the truck" where Van and Victor sat is plainly visible. *See* Exhibit 19 (photograph taken from the Murillos' house in the direction of the spot where the truck was parked – small wall by

sidewalk still visible).

b. The Murillo sisters' description of the shooter's clothing matched Victor Belton's, not Tony Ford's.

Both Myra and Lisa noted that the man who was the shooter was wearing dark pants and a dark shirt. Myra did not recall this when she testified, but she said this quite clearly in her statement to the police. Exhibit 20 (witness statement by Myra Magdalena Murillo, 12/19/91, 2:20 am), at 2.[12] Lisa testified to it. IX: 138 (the person she identified as Mr. Ford was in "[d]ark clothing, dark coat"). Tony testified that Victor was wearing jeans and a dark blue shirt, and he (Tony) was wearing a black sweater and light brown pants that night. IX: 274-75. As between Tony and Victor, Victor's clothing came much closer to matching the description given by Myra and Lisa.

c. Independent sources confirm that a third person was connected to the crime but did not enter the Murillos' house.

Consistent with the account Tony gave at trial, Ms. Murillo (the mother) apparently observed that there were three people involved in the crime. In August, 2002, Mr. Ford's investigator interviewed Ms. Murillo's boyfriend Joe Chrisman. Chrisman was not home when the offense occurred but was questioned immediately thereafter by the police. Exhibit 21 (affidavit concerning interview with Joe Chrisman). After Ms. Murillo began to recover from her gunshot wound, she told Chrisman, "[T]here were three people involved in the crime. Two men came inside and one stayed outside as a lookout." *Id*.

This observation was not only confirmed but amplified by the observations of two

[12]"I then saw a black man dressed in a black shirt, black pants, black trench coat and wearing a black knit cap with a RAIDERS logo on it, hitting my brother with a gun in his hand and pulling on my brother's hair. [This is the person later identified as the shooter.] I then saw a second black guy that I later recognized from school.... [This was Van Belton.]"

neighbors across the street from the Murillos' house, whom the defense discovered in 2014 in the course of conducting a neighborhood canvass. Robert Bryant lived at 1568 Dale Douglas – across the street and one house to the south of the Murillos' house. Mr. Bryant recounted the following occurrences from the evening of the incident:

> Mr. Bryant states he heard a "commotion across the street – loud voices and dogs barking. l looked out to see what appeared to be one dark skinned Hispanic with wavy hair and one Black guy run from the house.[13] I do not remember where they went but immediately after a truck took off down Dale Douglas." Mr. Bryant saw a truck (described as dark colored) drive southbound on Dale Douglas from the residence. Mr. Bryant does not know nor did he see the Murillo vehicle leave the residence. Mr. Bryant stated that after seeing the truck leave the residence, he walked inside his residence to inform his wife of what was going on.... Mr. Bryant was questioned about the people running out of the house and could not identify them.

Exhibit 8 (affidavit concerning neighborhood canvass) (entry for 1568 Dale Douglas, June 23, 2014). The second neighborhood witness, Albert Munoz, lived directly across from the Murillos' house, at 1570 Dale Douglas. Exhibit 8 (entry for 1570 Dale Douglas, June 4, 2014). Mr. Munoz recalls that on the night of the incident, he

> heard "gun shots – what appeared to sound like a car backfiring – maybe twice."... Upon looking outside to investigate, Mr. Munoz sees a dark colored mid-size car driving away north on Dale Douglas towards Vista Del Sol Street (believed to be the Murillo vehicle). When questioned the make or model of vehicle, Mr. Munoz could not recall. Mr. Munoz did not see driver of the vehicle nor did he see another vehicle drive away from residence.

Id.

Together, the observations of Mr. Bryant and Mr. Munoz describe precisely what Tony testified happened as he approached the Murillos' house from the truck that night: Before Tony

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[13]The person Mr. Bryant referred to as a "dark skinned Hispanic with wavy hair" is how one might fairly describe Van Belton at night running at some distance from the observer. *See* Exhibit 22 (photograph of Van Belton). Van's biological mother is Hispanic. The "Black guy" is a fair description of Tony Ford. *See* Exhibit 23 (booking photograph of Tony Ford).

got to the house, Van came running out, then he and Van ran toward the truck and drove off. Victor ran to Myra's car and drove off.

d. The Belton brothers' violence and explosive tendencies, as well as their tendency to join forces with each other, further confirm the truthfulness of Mr. Ford's testimony.

Information concerning the trouble-making character, violence, and explosive tendencies of the Belton brothers – in stark contrast to the non-violent character of Tony Ford – together with the Belton brothers often engaging in criminal conduct together, provides very strong confirmation of the truthfulness of Tony's testimony. Given the Beltons' widely observed tendency to join forces with each other, it is very unlikely that Tony would have gone into the house with Van. This likelihood was even greater because of friction that existed between Tony and Van. Adrian Licon, a close friend of Marvin Dodson's who knew of Van Belton and Tony only from their association with him, had the opportunity to observe Van and Tony "on several occasions" while visiting Marvin. Exhibit 18 (investigative chronology affidavit, first July 22, 2014 entry). Licon could see that "[Van] Nash Belton and Tony Ford did not like each other and would always get into verbal arguments." *Id*.

Two other aspects of the circumstances surrounding the crime show that the crime was more in keeping with Tony's account and reflects the violence and explosiveness associated with the Beltons.

The first is that the shooting spree was apparently 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. No one ever knew Tony Ford to behave in any way like that. Victor Belton, by contrast, had both a reputation and a record of criminal charges for engaging in just such violent outbursts. Two incidents in Victor's background in particular bear the hallmarks of such sudden,

relatively unprovoked violence.[14]

On March 12, 1993, Victor was charged with a Class A Assault based on the following complaint by a woman named Shirley Gilchrist:

> On 3-12-93 at about 11:30 pm I was at home and I heard music playing outside. I thought that it was my friend Daniel Davis and Victor Belton. The two guys were supposed to come by earlier and visit with me, but they hadn't come by until then. I went outside to talk with Daniel and Victor and I was outside the car and I said hello to Victor and then I went to talk with Daniel about his girlfriend. I know Daniel and Victor from school and I have known both Daniel and Victor for several years. I got into the car into the back seat and Victor and Daniel sat in the front and I started to talk to Daniel about his girlfriend. Victor then reached into the back seat and grabbed my chest area and I told him to stop. Victor then started to try to grab my crotch and he was grabbing me in an unwanted sexual way. I was holding Victor's arm away from myself and I couldn't get out of the car because the car is a two door and the handle was too far away from me. I hit Victor to get him away from me and then he said that no girl was going to hit him. Then Victor tried to punch me in the face and I moved so he missed me. Victor then jumped into the back seat and he started to pull my hair and grabbed my shirt and started to choke me with the shirt collar because he was holding it so tightly. I was feeling pain from what Victor was doing. Daniel was trying to stop Victor and Daniel was telling me to get out of the car. I was half way out of the car and Victor still had a hold on me and then Victor kicked me in the head. I got loose some how and I ran into the house and I told the two that if they didn't leave that I was going to call the police....

Exhibit 24 (statement of Shirley Gilchrist).

On January 6, 1994 at about 5:00 pm, sisters Yvonne and Alma Anderson likewise had an encounter, outside a third sister's workplace, with Daniel Davis and Victor Belton and a third

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[14] As the Court explained in *Ford (Guy) v. State*, 484 S.W.2d 727, 730 (Tex. Crim. App. 1972), when an extraneous offense is offered against a criminal defendant, it may be admissible "to prove identity, when identity is in issue, only if there is some distinguishing characteristic common to both the extraneous offense and the offense for which the accused is on trial...." (Citations omitted). Thus, "[t]he evidence of the other crime must be relevant on some theory other than the general proposition that one who commits one crime is prone to commit another...." *Id*. (citations omitted). "The evidence of the other crime is offered as circumstantial evidence of the identity of the accused as the perpetrator of the principal case." *Id*.

Here, of course, Victor Belton is not an accused on trial, so the Rules of Evidence do not apply with respect to extraneous offenses he has committed. Nevertheless, if he were on trial, these offenses would likely be admissible to establish identity because of the distinguishing characteristic common to the shootings at the Murillos' house and these other offenses – Victor's sudden eruption into violence upon only slight provocation.

man named Jerry Boyd. During the conversation between Yvonne and Daniel, the following took place:

> Daniel sorta started coming on to me, and I told him to leave me alone because I all [sic] ready have a boyfriend. After that he just started calling me a bitch and insulting me. That's when Daniel came right up to me. He was cussing at me and just using nasty words. He was right up in my face and told me, "I want to hit you." When Daniel said that, Victor came over and said I was lying. I guess he was talking about me having a boyfriend. Both Daniel and Victor were high on drugs, and just kept talking trash. When Victor got involved, Daniel backed off. Victor came up to me and grabbed me by the sweater and started jerking me around. He was trying punch me but Daniel and Jerry were pulling him back. *Victor told me, I'm going to kill you bitch.* He kept jerking me around and then pushed me back into the door handle of the car. Victor also grabbed me by the arm and all over.... *While I was struggling with Victor, my daughter came out of the car. Victor looked at her and said, "I'm gonna cut her throat."* That upset me, and I was afraid he was going to do something to my daughter.

Exhibit 25 (emphasis supplied). The incident ended when Ms. Anderson's sister and a colleague came out of the office building and told the men that the police were on the way. The men then left. *Id*. The emphasized portions of the report describing this incident – even the threatening language Belton used – describe events that are similar to those surrounding the unprovoked shooting of the Murillos. In particular, the words, "I'm going to kill you bitch," are nearly the same as the words Lisa Murillo recounted, "I'm going to blow you all away."

The second aspect of the circumstances surrounding the crime showing that the crime was more in keeping with Tony Ford's account is that when the police were arresting Van at the Beltons' home, Victor (the son, not the father) attacked the police. *See* Exhibit 26 (report of Officer J. A. Kalnas, December 19, 1991). There could be no more vivid illustration of a brother conditioned to come to the aid of his brother and of engaging in explosive violent behavior. The person who launched that unprovoked attack, Victor Belton, is much more likely than Mr. Ford to have been the person who, after having car keys thrown in his face, reacted by shooting the

Murillos.

e. Victor Belton admitted to three people that he killed Armando Murillo.

Finally, Victor Belton admitted to "getting away with murder" in conversations with T.J. Brookins (Exhibit 5, discussed *supra*), David Tucker (Exhibit 6, discussed *supra*), and Marvin Dodson (Exhibit 4, discussed *supra*). In each instance, the circumstances of Victor's boast left no doubt in the minds of Mr. Brookins, Mr. Tucker, or Mr. Dodson that Victor was referring to the murder of Armando Murillo. *See* Exhibits 4, 5, and 6.

5. Expert analysis of the claimed eyewitness identifications of Mr. Ford by Myra and Lisa Murillo, together with the discovery of evidence suppressed by the prosecution, has demonstrated that the purported identifications of Mr. Ford were inaccurate.

After Mr. Ford's trial, direct appeal, and first state habeas proceeding – in federal habeas corpus proceedings – Mr. Ford's counsel were provided funding to obtain the assistance of an expert in eyewitness identification. Expert analysis of the claimed eyewitness identifications of Mr. Ford by Myra and Lisa Murillo, along with the discovery of evidence concerning their ability to identify Mr. Ford that was suppressed by the prosecution, has demonstrated that the purported identifications were mistaken and inaccurate. These strands of evidence further demonstrate that Mr. Ford is not guilty of capital murder or attempted capital murder and is ineligible for the death penalty.

a. The trial-record facts concerning Myra and Lisa Murillo's claim to have identified Mr. Ford.

On December 19, 1991, at 4:10 pm, Myra Murillo was shown a photo spread that included Mr. Ford's photograph, but not Victor Belton's. She picked out Mr. Ford as the second intruder. I-C: 25-26. At the time the photo spread was shown to Myra, Lisa was in the hospital

being treated for the gunshot wound she had suffered in the attack. Thus, Lisa did not go to the police department to view the photo spread until December 27, 1991. I-C: 42. Between the time she was released from the hospital and December 27, when she viewed the photo spread, Lisa saw in the local newspaper "the photographs of the people they had arrested," including Mr. Ford. I-C: 51-52. Lisa also learned that her sister had seen two photo spreads and had picked out someone from each spread. I-C: 47-48. Lisa was presented the same photo spread on December 27, 1991 that Myra had seen eight days earlier, I-C: 6, 11, and she, too, picked out Ford's photograph. I-C: 43-44.

When Myra and Lisa Murillo testified at trial that Mr. Ford was the shooter, both stated that they had "no doubt" that Ford had been present in their mother's house and was the shooter. IX: 100, 113. Myra explained why she was so certain that Ford was the person who had killed her brother:

> [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.[15]

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[15]In an interview on behalf of Mr. Ford's trial lawyers with the jury foreman after trial, the foreman reported that Myra's certainty about her identification of Mr. Ford was the critical evidence in both phases of the trial. This juror and another were holding out for a life sentence when they gave in and voted for the death penalty. They "decided that if this decision was wrong, the responsibility lay with Myra, because she was the one who had been so sure of Tony's identity." Exhibit 27 (memo of July 15, 1993 to Norbert Garney) (document barely legible). He then added, "Two of the other jurors who had also been shot at stated that they would never forget the face of the person who shot them." *Id*.

The extent to which Mr. Ford's jury was vulnerable to being swayed by the kind of emotion conveyed by Myra is revealed by three incidents that jurors reported prior to the beginning of the penalty phase – obscene phone calls from someone who identified himself as "Tony," rocks being thrown at another juror's window, and someone knocking at another juror's door late at night and then disappearing. X: 1-14. The jurors' concerns about these

b. Expert analysis of the Murillos' claimed identifications demonstrate that they are unreliable.

Expert analysis of eyewitness identifications generally, and specifically in Mr. Ford's case, is based on the following scientific principles:

- The acute stress often associated with the circumstances in which an eyewitness observes a crime diminishes the accuracy of observation and distorts memory, rather than causing the witness to perceive and remember more accurately as most people believe.

- An eyewitness's degree of confidence in the accuracy of the identification has no correlation with whether the identification is actually accurate, even though people intuitively believe that eyewitness confidence is a valid predictor of eyewitness accuracy.

- 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. This occurs – contrary to most people's intuitions – with witnesses who are not prejudiced against people of the perpetrator's race and with witnesses who have considerable social contact with people of the perpetrator's race. This phenomenon is thus not merely a racist myth exemplified by the derogatory remark, "they all look alike to me."

- A misidentification is more likely if the eyewitness sees a photograph of the suspect between the crime and a subsequent identification procedure.

- A misidentification is more likely to occur if the witness is the victim of the crime and is threatened with a weapon.

The expert funded for Mr. Ford in federal habeas proceedings, Dr. Roy Malpass, demonstrated in federal habeas proceedings that *all* of the foregoing information was relevant to an assessment of the accuracy of the purported identifications of Mr. Ford by Myra and Lisa Murillo. *See* Exhibit 28, at 6-7 (Report of Dr. Roy Malpass, November 14, 2001). The Murillos viewed their assailants in the acute stress of a terrifying crime, in which they themselves were victims and were threatened by a weapon, and their assailants were of a different race. In

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incidents reflected the emotional turmoil they were experiencing.

addition, Lisa Murillo saw Mr. Ford's photograph in the newspaper, identified as one of the suspects, prior to seeing the photo array. Moreover, Myra and Lisa Murillo both expressed absolute certainty that they had made an accurate identification, conveyed with the added emphasis of spiritual purpose from the witness stand. Without an eyewitness expert, Mr. Ford was unable to point out to the jury that these factors significantly *decreased* – rather than, as the jury likely would have thought, *enhanced* – the reliability of the Murillos' claimed identifications. With an eyewitness expert like Dr. Malpass, Mr. Ford could have demonstrated that the Murillos' testimony was so likely inaccurate that the jury should not rely on it.[16]

In addition, Dr. Malpass has addressed advances in the science of the reliability of eyewitness identification since the late 1990's, and how those apply to Mr. Ford's case. He has identified four advances relevant to Mr. Ford's case and reported them in Exhibit 29.

The first advance has to do with instructions to witnesses. Witness instructions "were not widely known to the law enforcement community until the 1999 publication of a report from the National Institute of Justice (a part of the U. S. Department of Justice)." Exhibit 29, at 1. Thereafter law enforcement agencies began adopting policies on instructions to be given to eyewitnesses drawn on the 1999 Department of Justice report and further scientific studies. In the wake of 2011 legislation, Art. 38.20 of the Code of Criminal Procedure, Texas recommended the following instructions for the use of photo arrays:

In a moment, I am going to show you a series of photos. The person who

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[16]Dr. Malpass would have testified, for example, that studies of eyewitness identifications have consistently shown that cross-race identifications are much more likely to be mistaken than accurate. In a study in El Paso, when a Latino eyewitness identified a Black suspect, the eyewitness was mistaken *two-thirds of the time*, compared to less than one-third of the time when the suspect was also Latino. Dr. Malpass would also have testified that studies of eyewitness identifications have consistently shown that a eyewitness confidence levels are *not* correlated with the degree of reliability of the identification. In fact, eyewitnesses who are certain that they have identified the right person are mistaken *50% of the time*. Exhibit 28, at 5-6.

committed the crime may or may not be included. I do not know whether the person being investigated is included.

Even if you identify someone during this procedure, I will continue to show you all photos in the series.

The investigation will continue whether or not you make an identification.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different in photographs.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.

The photos will be shown to you one at a time. Take as much time as you need to look at each one. After each photo, I will ask you "Is this the person you saw [insert description of act here]?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"

Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the photo array procedure will be conducted and the other instructions I have given you?

Exhibit 29, at 2.[17]

Dr. Malpass noted the following about the instructions given to the eyewitnesses in Mr. Ford's case:

The officer who conducted the identification process in Mr. Ford's case, Lilia Lowe, testified that she instructed the two eyewitnesses, Myra Murillo and Lisa Murillo, that "she may or may not recognize" anyone in the photo array. The witnesses testified that they both understood this to mean that the person who committed the crime may or may not be in the array. None of the other instructions deemed necessary to enhance the reliability of the identification process were provided.

[17]These instruction are part of a model eyewitness identification policy developed by the Bill Blackwood Law Enforcement Management Institute at Sam Houston State University, pursuant to the directive in Art. 38.20, Sec. 3(b). *See* http://www.lemitonline.org/resources/pubs-ewid.html (last visited May 24, 2017) ("Final Policy").

Id.

The second advance in the science of the reliability of eyewitness identification is in the construction and evaluation of lineups and photo arrays. In the early 1980's, Dr. Malpass and his UTEP eyewitness laboratory colleagues developed new procedures for both constructing lineups and photo arrays and evaluating whether the goals of lineup construction had been met. *Id*. However, these procedures were "essentially unknown" in the law enforcement community until the release of the 1999 Department of Justice report. Exhibit 29, at 3. In the wake of the 1999 Department of Justice report, "This method of measuring the similarity of people depicted in a photo array has become the standard in the field." *Id*.

With respect to Mr. Ford's case, Dr. Malpass found a significant deficiency in the construction of the photo array shown to Myra and Lisa Murillo:

> [T]he filler photographs did not include people who were similar in appearance. In my report of November 14, 2001, I summarized an experiment that I conducted to determine whether the array included people similar enough in appearance to Mr. Ford that the array was not weighted toward Mr. Ford. The results showed that observers of the array were nearly four times more likely to pick out Mr. Ford. If the array had been properly composed, each of the six people depicted would have been picked out in roughly the same proportion.

Id.[18]

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[18]Dr. Malpass actually conducted two studies concerning the photo array viewed by the Murillos. The first study – the one referred to by Dr. Malpass in the excerpt from Exhibit 29, *supra* -- 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. Exhibit 28, at 1-3. 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. Exhibit 28, at 4-5.

On the basis of these studies, the defense could have shown the jury how the similarity in the appearance of Victor Belton and Ford led the Murillo sisters to mistakenly identify Ford even though Victor Belton was the shooter. Since Ford looked much more like Victor Belton than anyone else in the photo array the Murillos were shown, and in the photo array Ford looked much more like the suspect described by the Murillos than anyone else,

The third advance in the science of the reliability of eyewitness identification is in the use of "double blind lineup administration" of lineups and photo arrays. This procedure calls for the administration of the lineup or photo array by a person who (1) is trained in the proper administration of lineups and photo arrays and is not part of the team investigating the case, and (2) does not know who the suspect is – hence, "double blind" administration. Dr. Malpass identified two different concerns that led to the development of this technique. First,

> [I]nformation about the lineup choice desired by the administering officer may be conveyed to the witness in some unwitting and subtle ways. After all, witnesses desire to be cooperative, but since they are normally novices at the identification task, they may look to the administering officer to guide them. This would be a problem when the person who administers the identification procedure knows which member of the lineup is the suspect and has a vested interest in obtaining an identification of the suspect/defendant: when the person administering the procedure is part of the investigation team for the case in question.

Exhibit 29, at 4. Second, "identification policy and procedure may be disregarded through lack of training, inattention or by intent to control the procedure." *Id*. The science underlying the need for double blind administration first "appeared in the literature in the late 1990's." "More recently, many jurisdictions have placed the identification procedure into the hands of trained personnel who do not know the identity of the suspect or his position in the lineup (Smith & Cutler, 2013)." *Id*. With respect to Mr. Ford's case,

> [T]he investigators did not employ a blind or double blind procedure. The person who composed the photo array, who was also the person who showed the array to the eyewitnesses, was one of the lead case investigators, Detective Lilia Lowe. She knew that Mr. Ford was the suspect in the array. Because of this, there was a risk that she inadvertently, or purposefully, suggested to the eyewitnesses that the photo of Mr. Ford was the target photo.

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the Murillo sisters were drawn to identify Ford, even though he was not in the Murillos' home. Without Victor Belton's photograph to allow the Murillos to differentiate between him and Ford, the Murillos settled on Ford as the second intruder. And once they made that identification, the Murillos were extremely likely to identify Mr. Ford in court as the shooter.

Id. at 5.

The investigator working with undersigned counsel recently interviewed two retired El Paso Police Department homicide detectives, David Samaniego and Tury Ruiz, about the advent of double blind administration of lineups and photo arrays. They both agreed that the system of lineup administration that preceded double blind administration, which was first adopted in El Paso about five years ago, "could be easier manipulated and witness assistance was possible." Exhibit 30.

The fourth advance in the science of the reliability of eyewitness identification is in the recognition that in-court identifications destroy the reliability, if any, of previous out-of-court eyewitness identifications. Dr. Malpass notes that with respect to the first 250 cases involving exonerations by DNA evidence where there was eyewitness testimony, *every single case* had an in-court identification of the defendant by an eyewitness or eyewitnesses. "The presence of a court-room ID is therefore the single factor most strongly associated with the first 250 cases of wrongful conviction undertaken by the Innocence Project of NY." Exhibit 29, at 7. Dr. Malpass then explains why in-court identifications so undermine any reliability that might underlie a pretrial, out-of-court identification:

> The implications for the importance of court-room identification are direct. Court-room identifications strip the defendant of each and every protection afforded them since the middle of the 19th century.
>
> - No "fillers" are provided as alternative persons to identify in case his/her identification is made on the basis of a desire to be cooperative (or some other motive) apart from having a clear memory image of the original criminal event for which the defendant is being tried.
>
> - All protections related to the construction of a fair lineup are absent.
>
> - All of the protections afforded a suspect at a confrontation or show-up are negated, especially the idea that a suspect should not appear to be in

custody.

- The situation is suggestive because of the presence of the defendant at the defense table -- a person the State obviously believes is a good candidate for conviction in this matter.

- The prosecutor is free to preface the request for identification with a summation of the many reasons why the witness should be able to make the identification.

- The admonition that the actual offender may or may not be present is undermined.

- The admonition that the person administering the identification does not know who is the suspect is obviously false.

- The admonition that the witness is not required to make an identification is undermined.

When courtroom identification has been preceded by pre-trial identification procedures involving the same *defendan*t, memory for the *offender* will have been contaminated and is unlikely to be available in the witness' memory in its original form so that a courtroom identification can be reliable. The idea of "independent source" for memories -- the idea that a person can make a court-room identification based on a pristine memory for the perpetrator, untouched by and independent from previous identification attempts with the suspect or a facial image of the suspect -- is largely illusory, as is the idea that the witness can know whether or not s/he can accomplish or is accomplishing this "independent source" maneuver. The discussion of repeated identifications and associated carryover effects applies to courtroom identifications where there has been any pre-trial identification or exposure of witnesses to any image of the defendant.[19]

Exhibit 29, at 9.

In connection with this advancement in science, Dr. Malpass was provided an affidavit from the court reporter in Mr. Ford's trial, Robert Thomas, in which Mr. Thomas recounts the

[19]This aspect of in-court identification, in which the in-court identification is more likely an expression of the memory of the person previously identified from a photo array or lineup rather than the memory of the offender, was given special emphasis in the pretrial hearing to suppress the identifications of Mr. Ford. In that hearing, both Myra and Lisa Murillo had the photo array that included Mr. Ford laying in front of them on the witness stand, they each then identified the photo of Mr. Ford that they picked out, and then – with the photo array still in front of them – they each identified Mr. Ford in person in the courtroom. *See* I-C: 24-26, 43-44. This is so meaningless that it would be humorous if the consequences were not so grave.

following:

> 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.'

Exhibit 31.

Dr. Malpass found that the expressions of uncertainty by Myra and Lisa under these circumstances demonstrated concretely the unreliability of in-court identifications:

> In Mr. Ford's case, both eyewitnesses made two courtroom identifications of Mr. Ford, once during a pretrial hearing on May 14, 1993, to suppress their identifications, and again when each of them testified at trial, on July 7, 1993. The identifications were unequivocal. Notably, however, between these two courtroom identifications, on June 7, 1993, the court reporter for Mr. Ford's trial, Robert Thomas, overheard both eyewitnesses expressing substantial uncertainty about whether Mr. Ford was involved in the crime when the prosecutor asked them to look at Mr. Ford through the window in the courtroom door at the outset of jury selection. Apparently, the witnesses' equivocation was not revealed at trial. This is a prime example of how courtroom, witness-stand identifications cannot be taken as providing assurance of reliability or accuracy.

Exhibit 29, at 10.

c. The fact that the Murillo sisters on the eve of trial equivocated about their "identification" of Mr. Ford was not revealed at trial or disclosed to defense counsel by the prosecution.

As the foregoing affidavit of court reporter Robert Thomas demonstrates, despite their expressed certainty in trial testimony that Mr. Ford was the shooter, at the very beginning of the trial Myra and Lisa Murillo were *still uncertain*, as Mr. Thomas personally observed. This information was not disclosed to defense counsel at trial. *See* Exhibit 32 (affidavit of trial counsel Greg Anderson). As a result, the jury remained unaware of key evidence that would

have fundamentally called into question the Murillo sisters' certainty that Tony Ford was the person who killed their brother and shot their mother.

D. The State's Investigation Was Deeply Flawed, Either Designed to Convict and Condemn Mr. Ford Despite Contrary Facts or So Superficial That It Failed to Account for Contrary Facts

The only evidence supporting Mr. Ford's conviction of capital murder and attempted murder was his identification as the shooter by the Murillo sisters. However, the process by which these identifications were made was extremely unreliable, and the identifications were mistaken. The only other evidence that tended to connect Mr. Ford to the capital murder and attempted murders was his overcoat. However, the forensic evidence collected from it – *possibly* a small blood stain and fibers that *might* have come from Armando Murillo's clothing – provided an insufficient basis upon which to convict Mr. Ford of capital murder or attempted murder. In addition, Mr. Ford testified that Victor Belton was wearing the coat when Victor and his brother forced their way into the Murillos' house.

In the face of such problematic evidence, the investigation that produced this evidence must be examined. Reconstruction of the investigation process and examination of the evidence that was available to the State's investigators, but either ignored or suppressed, demonstrates that the State's investigation was so flawed that it "produced a trial lacking the rudiments of fairness." *Ex parte Brandley*, 781 S.W.2d 886, 894 (Tex. Crim. App. 1989).

1. The police investigation hastily settled on Tony Ford as the shooter.

At the outset of the investigation – just minutes after the crime – Myra Murillo told Officer Saul Medrano at the scene of the crime that "she could recognize one of the individuals from a picture of [sic] a high school yearbook." Exhibit 11, at 2. Detective Lowe then interviewed Ms. Murillo at a neighbor's house, where Ms. Murillo told her

> she had recognized one of the subjects as someone that she had attended Eastwood High School with. The witness did not know the subject's name nor what year he had graduated in but was sure that she could identify him out of a school yearbook. The witness had three yearbooks in her possession and believed that one of the subject's pictures should be in the book.

Exhibit 33, at 1. Detective Lowe then transported Ms. Murillo to the police department where she continued looking through her yearbooks. She recognized English Belton as the sister of the intruder she knew. *Id*. at 2. Another detective checked the name Belton in the computer "and located a VAN NASH BELTON, DOB: 1/24/71, who fit the general description of the subject involved." *Id*. Detectives then procured a photograph of Van Belton, assembled a photo array, and showed it to Ms. Murillo. She identified Belton "as one of the subject's [sic] involved in the murder of her brother." *Id*. In a signed statement shortly thereafter, at 2:20 am on December 19, 1991, Ms. Murillo described Van Belton as the person "who hit my brother several times with the gun on his head and who pointed a gun at all the members of my family," but not as the shooter. Van Belton was, instead, the "person [who] helped the man that killed my brother." Exhibit 20, at 4.

Officers then went to the Beltons' house to arrest Van early in the morning of December 19, 1991. In the course of Van's arrest, his brother Victor assaulted the arresting officers, leading to his own arrest on charges of aggravated assault on a police officer. Exhibit 26.

When Van was thereafter interrogated, he admitted his involvement in the crime and said that the other person involved was Tony Ford. Exhibit 13. After procuring a photograph of Mr. Ford from his high school (Mr. Ford had no criminal record and thus did not have a photo in police files), an officer located Mr. Ford and arrested him without incident. Exhibit 34. By 2:15 pm on December 19, 1991, Mr. Ford was booked and photographed. Exhibit 35. Immediately thereafter, officers composed a photo array that included Mr. Ford's photograph and turned the

array over to Detective Lowe. *Id*. Shortly thereafter, still in the afternoon of December 19, 1991, Myra Murillo identified Mr. Ford from the photo array as the person who had shot her family. Exhibit 36.

Other than the identification of Van Belton and Mr. Ford by Lisa Murillo on December 27, 1991, *see* Exhibit 37, the files of the El Paso Police Department reflect no additional investigation into the identity of the two people who broke into the Murillos' home on December 18, 1991.

2. The evidence that was available to the State's investigators, but either ignored or suppressed, supports both Marvin Dodson's and Tony Ford's accounts of the crime.

The hasty and superficial police investigation settled over the case like a low-hanging cloud. On January 18, 1993, thirteen months after the crime, one of Mr. Ford's attorneys, Greg Anderson, wrote to then-First Assistant District Attorney Luis Aguilar "as a follow-up to the discussion we had on January 12." Exhibit 38 (Anderson to Aguilar, 1/18/93).[20] Mr. Anderson recalled, "You stated that you were *somewhat unsure* about the Ford case. You thought that *the case wasn't worked thoroughly* and were willing to work with me to get to the bottom of the matter and determine whether Mr. Ford actually did it." *Id*. (emphasis supplied) Mr. Anderson then went on to note, "Tony was arrested based upon the statement of Van Belton, whom I think is a notorious liar[,] ... [and] was then picked out of a photo-spread by two witnesses." *Id*. "We know that these witnesses, when faced with the prospect of picking out the guilty party at trial, will point to the only black man in the courtroom – the one sitting next to the defense attorney. Of course, that does not mean that Tony committed the crime." Mr. Anderson then went on to

[20]Aguilar was then the lead prosecutor on Mr. Ford's case but he left the office for private practice before trial. *See* Exhibit 39 (declaration concerning interview with then-Judge Aguilar in May, 2003).

ask that Mr. Aguilar pursue several matters, including the fact the "[t]here is no question that Victor [Belton] looks like Tony." *Id*.

Aguilar followed-up in two respects that he could still recall more than ten years later in an interview with one of Mr. Ford's attorneys in the federal habeas proceedings. *See* Exhibit 39.[21] First, he recalled that

> [h]e viewed the book-in photos of both Mr. Ford and ... Victor Belton. Judge Aguilar was impressed by the striking physical resemblance of Mr. Ford and Victor Belton. He then viewed each man in person and believed that the two men were strikingly similar in appearance.

Id. Second, Aguilar ascertained through a confidential informant "that indeed a new drug dealer had emerged in El Paso from Los Angeles and had been looking for 'muscle,' someone who could provide both physical protection and an intimidating presence for his business." *Id*.

These independent inquiries by the then-First Assistant District Attorney should have led to additional investigation and/or to more critical consideration of information the police already had in their possession. His perception that Mr. Ford and Victor Belton were "strikingly similar in appearance" when viewed in person should have shaken any confidence that the police had in the claimed identifications of Mr. Ford by Myra and Lisa Murillo. His learning that a new drug dealer in El Paso was looking to establish "an intimidating presence for his business" should have caused the police to investigate whether the crime at the Murillos' house had anything to do with that, particularly since the intruders mentioned the name of Joey Chrisman whom the police interviewed just hours after the crime. The police interviewed not only Joey Chrisman but also his father Joe, who was the live-in boyfriend of Myra Concepcion Murillo (the mother of

[21]By this point, Mr. Aguilar had become the presiding judge of the 120th Judicial District Court of El Paso County. Because the Canon of Judicial Ethics prohibited a Texas judge from providing testimony or a statement by affidavit without being subpoenaed, federal habeas counsel recounted Judge Aguilar's statements in his own declaration, Exhibit 39.

Armando, Myra, and Lisa), and his (Joey's) sister (Joe's daughter) Veronica. We do not know what the police learned in these interviews, because the memoranda concerning the interviews are not in the police department files, but they likely learned that the forced entry into the Murillos' home was a part of the new drug dealer's effort to establish "an intimidating presence."

Mr. Aguilar's inquiries should also have resonated with another lead that the police received but may or may not have followed up on. On December 20, 1991, the day after Tony Ford was arrested, the police secured a search warrant for the house where Tony lived. Exhibit 36. That house, owned by Marvin Dodson's family, was also where Marvin lived, as the officers who executed the search warrant noted. *Id*. Indeed, Marvin and Tony shared a room in the house. Exhibit 56 (supplemental affidavit of Marvin Dodson). Having learned this in the course of executing the search warrant, the police found that Marvin was in jail for a probation violation, *see* Exhibit 56 (supplemental affidavit), and sent two detective to the jail to see Marvin. *Id*. Marvin told the detective that he did not know what had happened in connection with the incident at the Murillos' house, but he told the detective that "Ken" – the drug dealer at whose behest the intrusion into the Murillos' house took place – would know. *Id*. While Marvin no longer remembers Ken's last name or where he lived, Marvin did remember in 1991 and provided both a full name and location where the police could find Ken. *Id*. The police file contains nothing about this lead or any effort to follow it up.

Mr. Aguilar's inquiries, of course, would have also required police investigators to let go of the notion that they had already solved the case based on Van Belton's fingering of Tony Ford and the Murillos sisters' claim to have identified Mr. Ford in a suggestive lineup that *did not* include his look-alike, Victor Belton. Had police let go of their hasty conclusion that Mr. Ford

was the shooter, they would have undertaken standard police investigative procedures like a canvass of the Murillos' neighbors to learn what they observed on the night of the crime, a critical review of any motive Van Belton might have had to accuse Tony Ford falsely, and an actual investigation into the possible involvement of both Belton brothers. Such an investigation would have led them at every turn away from Tony Ford and toward Victor Belton as the other person who forced his way into the Murillos' house.

Had the police undertaken the work that Judge Aguilar's inquiries called for – further investigating and reconsidering information they had already developed that did not fit neatly into the theory that Mr. Ford was the shooter – they would have found the following:

First, a third person was involved in the crime, and during the home invasion remained outside the Murillos' house in the vehicle in which all three had arrived. In August 2002, Joe Chrisman – the boyfriend of Myra Concepcion Murillo (the mother) – told undersigned counsel's investigator that, as she recovered from her gunshot wound, Ms. Murillo told him that three men had been involved, two of whom came into the home while the third remained outside as a lookout. Exhibit 21. Detectives Tabullo and Lowe interviewed Ms. Murillo in the hospital on December 31, 1991, *see* Exhibit 40 – within the same time frame that she would have recovered sufficiently to have told Joe Chrisman there were three people involved in the crime. Ms. Murillo's doctor and communications therapist told the officers when they went to visit Ms. Murillo that "she was conscious and fairly alert and that she was recovering at a rate which was surprising to the staff." *Id.* Nevertheless, the report by Detective Lowe noted, "Mrs. MURILLO apparently has some difficulty in communicating at this time, therefore all additional information reference this offense will be obtained from her at a later date." *Id.* Notwithstanding this report, it is very likely that Ms. Murillo told the police during this interview

or in a subsequent conversation the same thing she told Joe Chrisman: that three people were involved in the crime. However, there is no report in the files of the El Paso Police Department reflecting that she passed on this information or that the police conducted a subsequent interview with her.[22]

Had the police conducted a reasonable investigation, they would have gained access in yet another way to evidence that three people were involved in the crime. It is standard police procedure to interview neighbors when a crime like this occurs. This was either not done in this case, or the results of it were suppressed. As already noted, undersigned counsel's investigator conducted interviews of neighbors in 2014. Many people who were the Murillos' neighbors in 1991 still lived in the same houses in 2014. The observations of two of these neighbors, Robert Bryant and Albert Munoz, established that there were three people involved in the crime. *See* Exhibit 8 (affidavit concerning neighborhood canvass), entry for 1568 Dale Douglas, June 23, 2014 (Bryant interview), and entry for 1570 Dale Douglas, June 4, 2014 (Munoz interview). The El Paso Police Department either failed to conduct such routine neighborhood interviews, or interviewed these same neighbors and did not disclose their observations.

Second, the police also either knew or should have known that the two people who broke into the Murillos' home were not completely unknown to the Murillos. Myra Magdalena Murillo (Armando's sister who was not wounded) used the telephone at her neighbor's house shortly after the crime, and her neighbor overheard Myra telling someone, "It was those guys. It

[22]Undersigned counsel has not been able to interview any of the Murillos. Efforts to interview Myra (the daughter) and Lisa in late 2005 were rejected. Counsel again tried to interview the sisters in 2014, beginning with Lisa. No direct contact was made, but Lisa's father learned of our efforts and complained vehemently to the district attorney's office in El Paso, who then asked that we desist. We honored that request. Thus, we have not been able to ask Ms. Murillo whether she informed the police that there were three people involved and that one stayed outside.

was those guys." Exhibit 10. The neighbor had the impression that Myra knew who the intruders were. The police interviewed Myra numerous times, but there is no indication in the file that Myra ever mentioned this, yet the police would have learned this had they conducted a neighborhood canvass. Joe Chrisman, the live-in boyfriend of Myra's mother, was also interviewed by the police and may well have known who the intruders were, too, since he apparently knew that this incident was going to occur. *See infra*, at p. 52. Indeed, Joe Chrisman may have been the conduit through which Myra knew the intruders' identity, since Chrisman lived in the same house. However, the police file contains no notes reflecting what Joe Chrisman told them in his interview.

The fact that Myra knew who the intruders were confirms that her identification of Tony Ford was mistaken. Based on what is in the police file, Myra never told the police that she knew who the intruders were. When she was then shown a photo array that included a look-alike of Victor Belton – Tony Ford – but not Victor Belton himself for comparison, she naturally picked out Mr. Ford. She picked out Mr. Ford, not because he was there, but because he looked like Victor Belton, one of the intruders with whom she was apparently familiar. From that point on, she was locked into her identification of Mr. Ford and could testify at trial that she had never had any prior dealings with or knowledge of Mr. Ford, because she hadn't. She could not have said this about Victor Belton, because he was "one of those guys."

Third, the police either knew or should have known that Joe Chrisman had reason to believe that the confrontation at the Murillos' house was going to take place when it did. Veronica Chrisman, Joe Chrisman's daughter who was 16 years old at the time of the crime, told undersigned's investigator in 2015 that her father warned her ahead of time not to go by the Murillos' house that night. Exhibit 7. On December 19, 1991, Joe Chrisman gave the police

permission to "to accept a written and notarized statement" from Veronica, , *see* Exhibit 41, but the police files contain no such statement. In addition, the police interviewed Joe Chrisman's son Joey, who also occasionally stayed at the Murillos' house. Indeed, when Lisa Murillo was interviewed by an officer at the hospital the night of the crime, she reported that the intruders were looking for money from "HOME BOY," and mentioned the name of Joey Chrisman. Exhibit 42. That officer, Detective Ramirez, then located Joey Chrisman and took him to the police department "where he was interviewed regarding his knowledge in the case." *Id.* Since Joe Chrisman warned Veronica to stay away from the Murillos that night, it is likely that he also warned Joey. Nevertheless, as with all interviews of the Chrismans, the police files contain no statement from Joey Chrisman or memorandum about his interview.[23]

This failure to investigate or suppression of known information with respect to the Chrismans' knowledge about the crime is all the more inexplicable in light of Luis Aguilar's own investigation in 1993 that led him to believe that there may have been a motive to intimidate competing drug dealers living at the Murillos' house. The intruders were looking for Joey Chrisman by name. Veronica Chrisman believed that her father may have been involved with the Mexican Mafia. Indeed, Joe Chrisman had all the behaviors of a person dealing in drugs – living a "flashy" lifestyle with no visible work to support it, receiving visits from people in the middle of night while he was awake and doing things outside the Murillos' house, keeping large quantities of cash in the Murillos' house. Moreover, the police learned from interviewing Marvin Dodson in the downtown jail shortly after the crime that there was a drug dealer, "Ken,"

[23]Not long after the crime, Joe Chrisman showed up at the Murillos' house. Exhibit 43 (police report). He was taken to police headquarters where "Det. Tabullo interviewed Mr. Christman [sic]." *Id.* However, there is no memorandum of the interview with Chrisman in the police file.

behind the crime. That the police did not investigate this possibility, or did investigate it but suppressed what they learned, is extraordinary evidence of how flawed their investigation was.

Fourth, the police also turned a blind eye to the possible involvement of Victor Belton in the crime. Long before this crime, the Belton brothers were well known to the police. *See* Exhibit 17. The police were

> quite aware of the Belton Brothers, the Green Brothers, the Dodson Brothers, ... but did not recall Tony Ford as being on the target map.... We all knew that they 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. Moreover, "those two (Nash and Victor) were always together, ... they were inseparable." *Id*. In light of this institutional knowledge, it is remarkable that, when Van Belton became a suspect there was apparently no suspicion that Victor was also involved. As if to confirm and remind officers of this knowledge, Victor assaulted officers when they were arresting Van for capital murder.

Even in the face of these circumstances, when Van Belton named Tony Ford as his accomplice, the police did not hesitate to go after Mr. Ford, and apparently never considered or investigated Victor Belton as a possible suspect. Thus, Detective Lowe testified at trial that the police never "develop[ed]" Victor Belton as a suspect in the case. IX: 242. This admission is stunning in light of the known history of the Beltons committing crimes together, and Victor's arrest for aggravated assault on a police officer at the same time of the arrest of his brother for capital murder. Indeed, after Victor arrived at the El Paso Police department, his clothing and shoes were taken as evidence *in the Murillo murder case*. *See* Exhibit 44 (chain of evidence form, noting the murder case number as the case involved). Thus, the officer who filled out the chain of evidence form believed that Victor was being investigated for capital murder, yet no

investigation was ever undertaken.

Critically, the photo array that was shown to Myra and Lisa Murillo – which included Tony Ford – omitted Victor Belton. The police file reveals absolutely no effort to investigate whether Victor, rather than Tony, was the person accompanying Van – despite Victor's and Van's known history of committing crimes together, Van's obvious incentive to name someone other than his brother as the shooter inside the Murillos' house, and Luis Aguilar's judgment (which must also have been obvious to others involved in developing and prosecuting the case) that Tony and Victor were "strikingly similar in appearance," Exhibit 39.

This deliberate indifference to the possible involvement of Victor Belton became even more remarkable as time went on. Rumors began circulating within law enforcement circles that Victor was bragging about getting away with Armando Murillo's murder. As the court reporter in Mr. Ford's trial recalled,

> [A]bout a week or a week and a half after trial, I was chatting with the two sheriffs deputies who served as Mr. Ford's escort officers during the trial. They told me that 'the word on the street and the word in the jail' was that Victor Belton was bragging that he got away with the Murillo murder.

Exhibit 31. We have found three of the people "on the street" to whom Victor Belton made those admissions. *See* Exhibits 4 (Marvin Dodson), 5 (T.J. Brookins), and 6 (David Tucker). All three of these people heard Victor Belton make these statements long before Tony Ford's trial. They were all acquaintances of Victor Belton. But the police quit investigating when Van Belton named Tony Ford and the Murillo sisters identified Mr. Ford in a suggestive lineup that omitted Victor Belton, within 24 hours of the crime.[24]

[24]The deliberate indifference to Victor Belton as a possible suspect despite all the evidence that should have made him a suspect, raises the question whether Victor was an informant for the police or had some other relationship with the police that made the police disregard the evidence of his involvement in the crime against the Murillos. The handling of Victor's various criminal charges over the years add considerable weight to this question.

As time went by, the police and the prosecution apparently became worried about whether the claimed identifications by the Murillo sisters would be sufficient to convict Mr. Ford. Not only were the identifications obtained through an unreliable procedure that could have caused a misidentification of Mr. Ford, the prosecution had reason to worry that the Murillo sisters might vacillate about their identification of Mr. Ford. Indeed, we now know that on the eve of trial, Myra and Lisa told one of the prosecutors after looking at Mr. Ford through a courtroom door that Mr. Ford "kind of" looked like the person who shot their brother. Exhibit 31. The prosecution took two steps to bolster their case.

First, two detectives pressured Marvin Dodson to say that Mr. Ford had done the shooting, Exhibit 4, and then the prosecution subpoenaed Mr. Dodson as a prosecution witness. Exhibit 15. Though Mr. Dodson did not tell the detectives that Tony Ford was the shooter, Exhibit 4, the police and prosecution continued to hold sway with Mr. Dodson since he was on supervised release. *Id*. Issuing a subpoena for him was an effort to continue to keep him under their control, and may have been intended to deflect interest from Mr. Ford's trial lawyers in talking to Mr. Dodson themselves.

Second, after Myra and Lisa Murillo testified at trial and purported to identify Mr. Ford as the shooter, the prosecutor directed a question to her next witness, Detective Tabullo, that called for him to disclose that when Van Belton was arrested, he not only confessed to involvement in the crime but more importantly *named Mr. Ford* as the person who had been

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Thus, Victor's aggravated assault against the officers who arrested Van on the Murillo case was dismissed, as were all of the other seven charges Victor had in El Paso County between 1987 and 1995, except for his first juvenile charge in 1987, which was referred to an informal first offender program. *See* Exhibit 45 (research into Victor Belton's criminal record by the Assistant District Attorney currently handling Mr. Ford's case and an investigator for undersigned counsel).

with him. *See* IX: 157.[25] The prosecutor then emphasized this information in a question thereafter. *See* IX: 158.[26] The prosecution had to know that this testimony was not only hearsay, but directly violative of the Sixth Amendment's Confrontation Clause. *See Lee v. Illinois*, 476 U.S. 530, 541 (1986) (the Court has consistently "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants"). *See also Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting) (such statements "have traditionally been viewed with special suspicion"); *Bruton v. United States*, 391 U.S. 123, 136 (1968) (such statements are "inevitably suspect"). Nevertheless, the prosecution got away with this improper bolstering of their case, because the defense failed to object.[27]

In sum, the investigation into who committed the crime against the Murillo family was deeply flawed. Because of a hasty identification of Tony Ford as the second person who broke into the Murillo's house and did the shooting – based entirely on Van Belton's self-serving confession and an identification process by which the Murillo sisters were led to identify Mr. Ford mistakenly – the police failed to take into account or suppressed information that:

- Myra Murillo knew who both perpetrators were and, for this reason, likely knew that Tony Ford was not one of them,

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[25]The question was, "[D]uring 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?"

[26]This question was, "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?"

[27]The apparent ineffectiveness of Mr. Ford's trial counsel in failing to object to this testimony and moving for a mistrial was not raised on direct appeal or in the previous state habeas application. The subsequent habeas application restrictions of Article 11.071 § 5(a), Texas Code Of Criminal Procedure, prevent that issue from being raise now as a ground for relief. This incident of prosecutorial misconduct is made note of here as part of the factual circumstances demonstrating that the prosecution was, as Luis Aguilar admitted to trial counsel, "*somewhat unsure* about the Ford case," Exhibit 38.

- Joe Chrisman knew in advance when the crime was going to occur,
- Joe Chrisman or one of his children was the target of the crime due to competition with another drug dealer,
- Myra Concepcion Murillo and her neighbors knew there was a third person involved, and
- Victor Belton – not Tony Ford – was the likely other person in the house with Van Belton that night, based on the Belton brothers' known history and on Victor's admissions to a number of people about getting away with murder in the weeks and months after the crime.

IV. THE CLAIMS SUPPORTED BY THESE FACTS REQUIRE A NEW TRIAL

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.

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

> .... I turned around, a complete turnaround out my [bedroom] doorway to tell everybody to hurry up.
>
> And ... I looked to my right and my mom was backing up as if she was in fear of her life, kind of crouching down like that.
>
> And extremely to my left I could see Mando go over to the corner and he was holding his head as if he was hit, as if he was in pain. And he just huddled straight into the corner.
>
> 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:

> 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.'

Exhibit 31. 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.

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); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011); *Ex parte Chabot*, 300 S.W.3d 768, 770–71 (Tex. Crim. App. 2009). It does not matter that the falsehood goes to an issue of credibility. *Duggan v. State*, 778 S.W.2d 465, 469 (Tex. Crim. App. 1989) (citing *Napue*, 360 U.S. at 270). When false testimony is knowingly presented by the State, the *State* must "'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Ghahremani*, 332 S.W.3d at 478. When, on the other hand, false testimony is unknowingly presented by the State, the

applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment. *Ghahremani*, 332 S.W.3d at 482; *Chabot*, 300 S.W.3d at 771. Because the State knew that the testimony of Myra and Lisa Murillo was false, the State has the burden of proving beyond a reasonable doubt that their false testimony did not contribute to the verdict.

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.

Exhibit 32.

B. Mr. Ford's Right to Due Process Was Violated by Myra Murillo's False Testimony that She Did Not Know the Intruder She Misidentified as Mr. Ford.

Myra Murillo (Armando Murillo's sister) testified that she did not know Tony Ford before the home break-in and had no idea why he and Van Belton were in her house that night:

> Q. (BY MS. BRADLEY) Now, Ms. Murillo, did you know Tony Ford at all prior to December 18th, 1991?
>
> A. No, I didn't.
>
> Q. You had never had any dealings with him?
>
> A. No, I hadn't.
>
> Q. Did you or anybody else have any idea why he or Mr. Belton came to your house that evening?
>
> A. I have no idea.

RR, IX, at 99.

The investigator working with undersigned counsel in 2014 interviewed the neighbor whose telephone Ms. Murillo used immediately after the crime. She told a very different story about whether Myra knew the person she misidentified as Mr. Ford. Marie Conover, the neighbor, overheard Ms. Murillo repeatedly say to one of the people she called, "*It was those guys*," in reference to the intruders. Exhibit 10 (affidavit of Marie Conover) (emphasis supplied). Ms. Conover had the distinct impression "that Myra knew who they were talking about...." *Id*.

Despite her testimony, therefore, Ms. Murillo did have at least some familiarity with *both* of the people were who forced their way into her family's home on December 18, 1991. She told the police she was familiar with Van Belton and testified to this, but she did not tell the police she was familiar with the other man as well. It also appears that she had some

foreknowledge that there would be a confrontation with "those guys," and very likely why. Her knowledge likely was gained from her mother's boyfriend, Joe Chrisman, who also had foreknowledge of what was going to happen. Most importantly, had she communicated her knowledge to the police at the outset, it is likely that Mr. Ford would not have been misidentified as the second person who forced his way into her family's house and killed her brother and attempted to kill everyone else.

Based on what is in the police file, it appears that Myra never told the police that she knew who both intruders were. She told the police she was familiar with only one of them, Van Belton. That led the police to arrest Van, who then named Mr. Ford, not his brother, as the second person in the Murillos' house that night. Van's fingering Mr. Ford is what led the police to arrest Mr. Ford and put his photo into the array shown to Myra. While the police were at fault for not questioning Van Belton's naming of Mr. Ford, Myra's failure to disclose to the police that she had some familiarity with *both* intruders was a significant factor in the police decision to go after Mr. Ford instead of considering Victor as a suspect along with his brother. When Myra was then shown a photo array that did not include Victor Belton but did include Mr. Ford – who was, in the view of First Assistant District Attorney Luis Aguilar, a look-alike of Victor Belton – she naturally picked out Mr. Ford. She picked out Mr. Ford, not because he was in her house, but because he looked like one of the intruders with whom she was apparently familiar, Victor Belton.

Dr. Malpass's studies of the photo array shown to Myra confirm that Myra would have picked out Tony Ford even though he was not in her house and even though she had some familiarity with Victor. The studies show that Tony looked more like the person she described as the shooter than anyone else in the photo array and looked far more like Victor Belton than

anyone else in the array. *See* Exhibit 28. As Dr. Malpass explained, because of the similarity in their appearance, the mistaken identification of Victor Belton as Tony Ford was nearly inevitable, because "there [was] no identification procedure providing a direct comparison of Tony and Victor. That is the only way a choice between the two could have occurred." Exhibit 50.

Once Myra identified Tony Ford as the second intruder, she was locked into her identification of Mr. Ford and could testify at trial that she had never had any prior dealings with or knowledge of Mr. Ford, because she hadn't. She could not have said this about Victor Belton, had the misidentification not occurred, because Victor Belton was "one of those guys."

Undersigned counsel has no reason to believe that the prosecution knew that Ms. Murillo had some familiarity with both intruders. Thus, the analysis of this claim must proceed under *Chabot* and *Ghahremani*, requiring Mr. Ford to prove by a preponderance of the evidence that the error contributed to his conviction or punishment. *Ghahremani*, 332 S.W.3d at 482; *Chabot*, 300 S.W.3d at 771. There can be no question that evidence that Myra Murillo knew who the intruders were and why they were there would have changed the evidentiary picture. At the outset of the investigation, this information would have led the police to question whether Van Belton's naming of Tony Ford was simply an effort to cover for Victor. This would likely have led to the inclusion of photos of both Victor and Tony in the photo array shown to Myra and Lisa. And with both photos in the array, Myra and Lisa likely would have picked out Victor as the second intruder, not Tony.

Accordingly, Mr. Ford has shown by a preponderance of evidence that Ms. Murillo's false testimony contributed to the verdict.

C. Mr. Ford Is Entitled to Relief Under Texas Code of Criminal Procedure

Article 11.073.

Texas Code of Criminal Procedure Art. 11.073 was enacted to provide a remedy for persons who would not have been convicted if certain scientific evidence had been available and presented in their trials. As the Court explained in *Ex parte Robbins*, 478 S.W.3d 678, 690 (Tex. Crim. App. 2016), "Article 11.073 provides a new legal basis for habeas relief in the small number of cases where the applicant can show by the preponderance of the evidence that he or she would not have been convicted if the newly available scientific evidence had been presented at trial."

The scientific evidence at issue in Mr. Ford's case is expert evidence pertaining to the eyewitness identifications of him by Myra and Lisa Murillo. Relief under Article 11.073 requires that Mr. Ford meet the following criteria:

1. The previously unavailable evidence is scientific.

2. The evidence could not have been presented at trial or at the time of a previously filed habeas corpus application because the evidence was not ascertainable through the exercise of reasonable diligence. Article 11.073 (b)(1)(A) and (c).

3. In determining whether relevant scientific evidence "was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge ... has changed since ... the date on which the original application or a previously considered application, as applicable, was filed...." Article 11.073(d)(2).

4. The scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the current habeas corpus application. Article 11.073 (b)(1)(B).

5. Had the scientific evidence been presented at trial, by a preponderance the person

would not have been convicted.

Mr. Ford's claim under 11.073 meets these criteria.

1. The unavailable evidence is scientific.

The "field of psychology pertaining to the reliability of eyewitness identifications is a 'soft science.'" *Tillman v. State* , 354 S.W.2d 425, 435 (Tex. Crim. App. 2011). As the Court further observed, "[P]sychology is a legitimate field of study and ... the study of the reliability of eyewitness identification is a legitimate subject within the area of psychology." *Id*. at 436. Accordingly, the evidence at issue in Mr. Ford's case is scientific evidence and is within the scope of Article 11.073.

2. The unavailable evidence was unascertainable through the exercise of reasonable diligence at the time of trial and at the time the previous habeas application was filed, and the field of scientific knowledge has materially changed since the date on which the original habeas application was filed.

At trial and in his first state habeas proceeding, Mr. Ford moved for funds to obtain the services of an expert in the science of eyewitness identification. The trial court denied the pretrial motion on May 21, 1993. Exhibit 46 (motion and order). Thereafter, Mr. Ford moved twice for funds to obtain the services of such an expert in connection with his state habeas application – in the Court of Criminal Appeals on January 2, 1998, prior to filing his state habeas application, Exhibit 47 (motion and order), and in the trial court on February 2, 1998 in the body of the state habeas application that he filed that day. Exhibit 48 (excerpt from state habeas application). The Court of Criminal Appeals denied the motion on January 16, 1998, Exhibit 47, and the trial court never acted on the motion in habeas proceedings. In the course of federal habeas proceedings, Mr. Ford was provided funding for the assistance of an expert in the science of eyewitness identification, Dr. Roy Malpass.

With the assistance of Dr. Malpass in federal habeas proceedings beginning in October 2001 and continuing long after the conclusion of federal habeas proceedings in 2006, Mr. Ford developed two categories of scientific evidence relevant to the reliability of the eyewitness identifications in his case:

(a) Evidence that could have been presented at trial in 1993 had the funding been made available for an expert. This evidence includes the following:

- The acute stress often associated with the circumstances in which an eyewitness observes a crime diminishes the accuracy of observation and distorts memory, rather than causing the witness to perceive and remember more accurately as most people believe.

- An eyewitness's degree of confidence in the accuracy of the identification has no correlation with whether the identification is actually accurate, even though people intuitively believe that eyewitness confidence is a valid predictor of eyewitness accuracy.

- 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. This occurs – contrary to most people's intuitions – with witnesses who are not prejudiced against people of the perpetrator's race and with witnesses who have considerable social contact with people of the perpetrator's race. This phenomenon is thus not merely a racist myth exemplified by the derogatory remark, "they all look alike to me."

- A misidentification is more likely if the eyewitness sees a photograph of the suspect between the crime and a subsequent identification procedure.

- A misidentification is more likely to occur if the witness is the victim of the crime and is threatened with a weapon.

(b) Evidence that was unavailable at trial or at the time Mr. Ford filed his original state habeas application in February, 1998, but which has since become available due to advances in the science pertaining to the reliability of eyewitness identification. This category includes the evidence of two experimental studies that Dr. Malpass conducted to evaluate the reliability of the photo array shown to the Murillo sisters. *See* Exhibit 28. Dr. Malpass noted

that while he and his colleagues at UTEP had developed the methods for conducting these studies prior to the date of Mr. Ford's trial in 1993, these "method[s] of measuring the similarity of people depicted in a photo array [did not] become the standard in the field" until at least 1999. Exhibit 29, at 3. One of these studies examined whether the photo array was composed in a manner that drew the Murillos' attention to Mr. Ford. That study determined that the array was suggestive in that the Murillos' attention was four times more likely to be drawn to the photograph of Mr. Ford than to the other photographs in the array. Exhibit 28. The other 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. *Id*.

This category also includes the development, beginning in 1999, of instructions to eyewitnesses designed to enhance the reliability of the identification process when photo arrays are shown to the witnesses. Exhibit 29. The category also includes the development of "double blind lineup administration" of lineups and photo arrays, which require that a person administer the lineup or photo array who (1) is trained in the proper administration of lineups and photo arrays and is not part of the team investigating the case, and (2) does not know who the suspect is (hence, "double blind" administration) – thus guarding against intentional or unintentional efforts by police officers to influence the witnesses' identification of a specific suspect. *Id*. Finally, this category includes the recognition that in-court identifications destroy the reliability of previous out-of-court eyewitness identifications, thus rendering the entire eyewitness identification process, including the in-court identifications, wholly unreliable. *Id*. Dr. Malpass found that neither the witness instructions nor double-blind administration were utilized with the

Murillo sisters, further diminishing the reliability of their identifications, and that the in-court identifications of Mr. Ford were strong evidence of the *unreliability* of the identifications. *Id*.

Plainly, this latter category of evidence – evidence derived from advances in the science pertaining to the reliability of eyewitness identifications – could not have been ascertained by the exercise of reasonable diligence even at the time the original state habeas application was filed. This category of evidence was not established as a scientific matter at that time.

The former category – evidence that was established as a scientific matter even by the time of trial – was plainly ascertainable. However, it was not available to Mr. Ford at trial or in the original state habeas proceeding through the exercise of reasonable diligence because the courts denied funding for an expert in this field of science. The denial of necessary funding to an indigent defendant or prisoner is not addressed in Article 11.073 as a factor in determining the availability or ascertainability of scientific evidence. Nevertheless, the statute must be construed to allow consideration of this factor. Otherwise, the entire purpose of the statute – to correct wrongful convictions based on incorrect or unavailable science and to "restor[e] liberty to an innocent person," *Ex parte Robbins*, 478 S.W.3d at 713 (Keasler, J., dissenting) (referring to and quoting from the legislative history of Article 11.073) – risks being defeated for an indigent prisoner who had the misfortune of being denied funding for the necessary expert in the relevant field of science. As the Court explained in *Faulk v. State*, 608 S.W.2d 625 (Tex. Crim. App. 1980),

> It is the duty of this Court to construe statutes so that the legislative intent of enacting constitutional statutes will be carried out. *Ex Parte Groves*, 571 S.W.2d 888 (Tex. Crim. App. 1978). Thus, when construing a statute, its subject matter, reason and effect must be looked to, and when literal enforcement would lead to consequences which the Legislature could not have contemplated, courts are bound to presume that such consequences were not intended and adopt a construction which will promote the purpose for which the legislation was passed.

Newsom v. State, 372 S.W.2d 681 (Tex. Crim. App. 1963).

See also Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) ("[t]here is, of course, a legitimate exception to this plain meaning rule: where application of a statute's plain language would lead to absurd consequences that the Legislature could not *possibly* have intended, we should not apply the language literally"); *Ex parte Perry*. 483 S.W.2d 884, 902 (Tex. Crim. App. 2016) (same); *Ex parte White,* ___ S.W.3d ___, 2016 WL 6496674 *2 n.7 (Tex. Crim. App. November 2, 2016) (same).

Accordingly, the courts should consider all the relevant science pertaining to the reliability of the eyewitness identifications of Mr. Ford, regardless of the reason for its unavailability at trial or in the original habeas proceeding.

3. The scientific evidence would be admissible.

In *Jordan v. State*. 928 S.W.2d 550, 556 (Tex. Crim. App. 1996), the Court held that expert testimony pertaining to reliability of eyewitness identification is admissible under Rule 702 of the Texas Rules of Evidence. The Court reaffirmed and further amplified this holding in *Tillman v. State*, 354 S.W.3d at 435-42, noting that the testimony of Dr. Malpass in that case was not only reliable under the test of Rule 702 but also relevant because his analysis "tied the relevant facts of the case to the scientific principles about which he testified." *Id*. at 439. The Court went on to note that Dr. Malpass's testimony would "assist the trier of fact." *Id*. at 441. As the Court explained,

> [I]t is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country....
>
> Awareness and concern surrounding mistaken identifications and wrongful convictions has impacted the public to the point where it has become an obvious concern in jury selection....

> [T]he jury in this case should have had the benefit of Malpass's testimony here because eyewitness identification was crucial to the State's case....

Id. at 441-42.

4. Had the scientific analysis of Dr. Malpass been presented at trial, by a preponderance Mr. Ford would not have been convicted.

Had Dr. Malpass's full present-day analysis of the eyewitness identifications of Mr. Ford been available to the defense at trial, by a preponderance of evidence Mr. Ford would not have been convicted of capital murder or attempted murder.

As noted throughout this application, the prosecution's case against Mr. Ford relied critically on the Murillo sisters' identifications. If Dr. Malpass had been available to testify that (1) the accuracy of their identifications was significantly compromised by the acute stress they experienced during the crime,[28] by being victims of the crime and threatened by and shot with a weapon, by being assaulted by people whose race was different from theirs, and by, for Lisa, having seen a photograph of Mr. Ford in the newspaper and having talked with her sister about her having identified a person before she (Lisa) viewed the photo array; and (2) that the Murillos' confidence in the accuracy of their identifications was not related to whether the identifications were accurate, Mr. Ford likely would not have been convicted of capital murder or attempted murder. Moreover, had Dr. Malpass been available to demonstrate by a scientific study that the reliability of the procedure by which the Murillos identified Mr. Ford was fundamentally compromised by a highly suggestive photo array, by the omission of Victor Belton's photograph from the array, by the absence of instructions to the Murillos designed to enhance the reliability of the identification process, and by the failure to use a double-blind

[28]Lisa Murillo testified, for example, that she wet her pants during the course of the crime and was so frightened that she buried her head in a pillow and never looked up once the shooting began. IX: 111, 119-21.

administration identification procedure, Mr. Ford almost certainly would not have been convicted of capital murder or attempted murder. Finally, had the trial court known that allowing in-court identifications was extraordinarily unreliable and would decimate any possible reliability of the pretrial identifications, *see* Exhibit 29, at 7, the trial court likely would not have allowed in-court identification of Mr. Ford.

To be sure, Mr. Ford likely would have been convicted of participation as a party to aggravated robbery. He has never denied – indeed, he testified – that he accompanied the Belton brothers to the Murillos' house, gave Victor Belton his overcoat so that Victor could conceal the gun he took into the house, waited for the Beltons to return to the vehicle that he stayed in as a lookout, and helped effectuate the Beltons' escape from the Murillos' house. On that basis, the jury reasonably could have convicted him of aggravated robbery as a party. *See* IX: 351, 353. However, without the testimony of Myra and Lisa Murillo identifying Mr. Ford as one of the intruders and the one who shot them – or even with their testimony but with all the scientific evidence Dr. Malpass could have presented as to why their identifications were unreliable and likely mistaken – the jury likely would not have convicted Mr. Ford of capital murder or attempted murder.

This simple truth cannot be avoided, as it was in Mr. Ford's original state habeas proceeding, *see* Exhibit 49 (Findings of Fact and Conclusions of Law of the 346th District Court), by an argument that Tony Ford was guilty as a party to capital murder and attempted capital murder even if what he testified to was true. Mr. Ford's admission that he transported the Beltons to the Murillos' house and gave Victor his coat to conceal Victor's gun was a legally insufficient basis for the jury to convict Ford of capital murder or attempted capital murder under Texas' law of parties.

Under Texas law,

> (a) A person is criminally responsible for an offense committed by the conduct of another if: ...
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense....

TEX. PENAL CODE § 7.02(a)(2). The jury was instructed on this aspect of party liability. IX: 351. However, there was no evidence from which the jury could have inferred that Ford intended to promote a capital murder under the instruction derived from § 7.02(a). Mr. Ford's driving the Beltons to the Murillos' house and giving his coat to Victor Belton supported *at most* the inference that Mr. Ford intended to promote an aggravated burglary or robbery. *See* IX: 381-382 (argument of defense counsel making this concession). No reasonable juror could have inferred from these facts that Mr. Ford intended to assist or promote a capital murder.

In addition, had the jury heard testimony from Marvin Dodson and Brian Hamilton, or had he still been alive, Hamilton's friend McCarthy Morgan, there would have been affirmative evidence that there was no plan to shoot or kill anyone at the Murillos' house. The plan was, as Dodson explained in his affidavit, "to take the narcotics money that was in the house, let the person know that they knew of her or his drug-dealing, and let her or him come clean and join Ken's organization or stay out of their territory. There was no plan to shoot or kill anybody." Exhibit 4, at 2. *Accord* Exhibit 12 (Hamilton declaration recounting information from McCarthy Morgan) (the plan was "to go collect a drug debt," but the person with Van Belton in the house "wigged out" and shot people).[29]

[29]Indeed, the testimony of Myra Murillo supports this view of the crime – that the shooting happened only when one of the intruders "wigged out" – because the person who shot everyone did so only because he got angry when Lisa Murillo threw car keys at him. IX: 69-72.

Critically, the *jury was not instructed* on the provision of TEX. PENAL CODE § 7.02(b) – making a person liable for any felony ultimately committed by a coconspirator if that crime was foreseeable, even though the party did not intend to assist the ultimate crime.[30] The only party instruction was taken from § 7.02(a). *See* IX: 351. That instruction limited the party's liability to an offense committed by another only if the party actually intended to promote that offense. Under these instructions, the jury could not have found Mr. Ford guilty of capital murder as a party.[31]

Morever, even if the §7.02(b) instruction had been given, it would not have permitted the jury to find that Mr. Ford was a party to capital murder, because there was no evidence that Mr. Ford should have known that such a crime was going to be committed. Under § 7.02(b), a conspirator is liable for the crime actually committed by another conspirator if that crime was the "foreseeable, ordinary and probable consequence[] of the preparation or execution of the unlawful act." *Thompson v. State*, 514 S.W.2d 275, 276 (Tex.Crim.App. 1974). Being a party to an aggravated burglary and robbery as the getaway driver and the provider of a coat to another conspirator to conceal his weapon, does not put that person in a position to anticipate that the crime would evolve into a capital murder. As the Supreme Court noted in a similar context,

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[30]TEX. PENAL CODE § 7.02(b) provides:

> (b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

[31]Reviewing courts are bound by the instructions given and are not free to expand their analysis by utilizing instructions that might have been given but were not. *Presnell v. Georgia*, 439 U.S. 14, 16-17 (1978), *citing and quoting Cole v. Arkansas*, 333 U.S. 196, 201-202 (1948) ("[t]o conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court").

"there is no basis in experience for the notion that death so frequently occurs in the course of a [robbery] for which killing is not an essential ingredient," *Enmund v. Florida*, 458 U.S. at 799, that the person who participates in the robbery – Enmund was also the driver of the getaway vehicle, as Ford admitted he was here – should be held to have intended or anticipated the killing that actually occurred in the course of the robbery. *Id*. As the Court noted at the time of its decision in *Enmund*, "only about one-half of one percent of robberies resulted in homicide." *Id.*

For these reasons, this Court has never held that a party to a robbery can automatically be held liable for a murder committed in the course of it, unless the murder happened in the presence of the non-killing party who was actively involved in the robbery or as a natural consequence of flight from the robbery. *See, e.g., Skidmore v. State*, 530 S.W.2d 316, 317-318 (Tex. Crim. App. 1975). Unlike assaults or attempts to break people out of jails – in which murders are "foreseeable, ordinary and probable consequence[] of the preparation or execution of the unlawful act," *Thompson v. State*, 514 S.W.2d at 276, *see Curtis v. State*, 573 S.W.2d 219 (Tex. Crim. App. 1978) (assault of a police officer who was eventually killed); *see also Blansett v. State*, 556 S.W.2d 322 (Tex. Crim. App. 1977) (attempt, with weapons drawn, to break someone out of jail); *Gordon v. State*, 640 S.W.2d 743 (Tex. App.-San Antonio 1982) (assault) – a robbery in which the party in question was involved in the manner in which Mr. Ford admitted he was involved here does not make that person liable for the capital murder that was actually committed by another person.

One other matter appears in Mr. Ford's trial record that might be used to argue that the unavailability of Dr. Malpass's testimony made no difference in the outcome of Mr. Ford's trial. The prosecution presented evidence that on March 1, 1993, nearly fifteen months after Myra Murillo identified Mr. Ford as the shooter from a photo array, Ms. Murillo viewed a live lineup

that included Victor Belton but not Mr. Ford. IX: 241-42. Ms. Murillo did not "identify anyone as being involved in the offense that killed her brother." IX: 242 (testimony of Detective. Lowe). The prosecution then argued in closing,

> So she looks at Victor Belton. [S]he looks him over live and in person, and she doesn't pick him out. Who does she pick out live and in person, in this courtroom, in front of you? Tony Ford.

IX: 402.

Dr. Malpass has assessed the scientific validity of this argument and has found that "[t]he prosecution's contention cannot be credited for these reasons:

> 1. Who is the person in the Murillos sisters' memory of the offender following their mistaken identification of Tony in late December 1991? It is very likely to be Tony. The photograph of Tony would have been viewed deliberatively, under good illumination, in the absence of stress and events competing for their attention – resulting in a more clear and vivid memory image than that which would likely have been made of Victor at the original criminal event. So now they possess a clear and stable memory of the "offender," which is fairly fresh, that they believe is the shooter.
>
> 2. For this reason, when they are subsequently shown a live lineup containing Victor, the identification question really is, does this lineup contain the person you identified 15 months ago in the photospread? And the correct answer is, *no*.
>
> 3. The prosecution cannot appropriately make their argument because there is no identification procedure providing a direct comparison of Tony and Victor. That is the only way a choice between the two could have occurred. All the rest is supposition and speculation.
>
> 4. Given that the first identification of Tony was incorrect, all the rest of the identification pattern was foreordained.
>
> There are many reasons why witnesses do not identify an offender after delays of more than a year. Among them are that the person's appearance has changed, that the memory has decayed or has been modified by interposed experiences, that the nature of the live lineup made identification difficult, or that the eyewitnesses were affected by some aspect of the circumstance of having the lineup containing actual people who might learn of their presence and identity following an identification.

> Finally, for the reasons I explained in my report of March 27, 2015, the courtroom identifications provide no assurance that the original photospread identifications were accurate. The courtroom identifications interjected even greater unreliability into the identifications of Tony Ford.

Exhibit 50 (letter of Dr. Malpass, January 27, 2017).

Accordingly, by a preponderance of the evidence, Mr. Ford would not have been convicted of capital murder or attempted capital murder if Dr. Malpass's full present-day analysis of the eyewitness identifications of Mr. Ford had been available to the defense at trial.

D. Mr. Ford's Right to Due Process Was Violated Because the State's Investigative Procedure Produced a Trial Lacking the Rudiments of Fairness.

In *Ex parte Brandley, supra*, this Court held that the State's investigative procedure was so flawed that it denied Mr. Brandley's right to due process. 781 S.W.2d at 891. As we have set forth in the statement of facts, *supra*, the investigative procedure in Mr. Ford's case was also deeply flawed. Under the analysis the Court utilized in *Brandley*, this procedure violated due process.

In *Brandley*, the Court noted at the outset of its legal analysis,

> Although our review of the record supports the trial court's finding that the State's investigation was flawed, we must now determine whether these facts support the trial court's conclusion of law that the investigation lead to a denial of applicant's right to due process and fundamental fairness. We look to the "totality of the circumstances" to make that determination.

Id. at 892 (citations omitted). The totality of the circumstances included the following in *Brandley*:

1. The State suppressed evidence indicating that a prosecution witness who denied being near the crime scene in fact was near the crime scene. The Court noted that Brandley alleged that this was a violation of due process under *Brady v. Maryland*, 373 U.S. 83 , 87

(1963), *Brandley*, 781 S.W.2d at 892, but then went on to say, "Whether [the suppressed] statements to the police are analyzed pursuant to applicant's broader due process claim based upon the entire investigation, or regarding applicant's more specific due process claim under *Brady,* we are compelled to look further and consider the totality of the circumstances of the trial." *Id*. at 893.

2. The Court then noted that a "walk through" of the crime scene with others who later testified against Brandley "creat[ed] false testimony." *Id*.

3. The Court next noted that a law enforcement officer's coercive tactics against "the State's star witness ... taints the reliability of [his] testimony." *Id*.

4. Finally the Court noted that the failure to obtain hair and blood samples from three other possible suspects, coupled with the loss of a "Caucasian hair" found on the victim (Brandley was African American) and the loss of blood taken from the victim's clothing that did not match Brandley's blood, "resulted in a lack of direct evidence in this case." *Id*. at 894. Even though this was not an independent violation of due process since there was no "showing of bad faith on the part of the police" in connection with the loss of the evidence, *id*., the inability to develop direct evidence resulting from this "buttresses applicant's claim that the error resulting from the State's other improper conduct affected the outcome of his trial." *Id*.

The Court then concluded,

> Although any of these incidences alone might not support applicant's claim, there can be no doubt that the cumulative effect of the investigative procedure, judged by the totality of the circumstances, resulted in a deprivation of applicant's right to due process of law by suppressing evidence favorable to the accused, and by creating false testimony and inherently unreliable testimony. Accordingly, applicant's conviction must be reversed.

Id.

The "cumulative effect of the investigative procedure" in Mr. Ford's case similarly "resulted in a deprivation of applicant's right to due process of law by suppressing evidence favorable to the accused, and by creating false testimony and inherently unreliable testimony." *Id*. As demonstrated in the statement of facts, *supra*, the investigation into who committed the crime against the Murillo family was deeply flawed. There was a hasty identification of Tony Ford as the second person who broke into the Murillo's house and did the shooting – based entirely on Van Belton's self-serving confession and an identification process by which the Murillo sisters were led to identify Mr. Ford mistakenly. Thereafter, when the First Assistant District Attorney and lead prosecutor in the case questioned the accuracy of the Murillo sisters' identification of Mr. Ford and further questioned whether the crime was connected to an attempt at intimidation by a drug dealer who believed that someone in the Murillos' house was in competition with him, no further investigation took place. To the contrary, it appears that the police instead took measures to conceal any information that contradicted their theory that Tony Ford was the shooter and that the crime was connected to competition among drug dealers.

Because of this, the State failed to take into account or suppressed information that:

- Myra Murillo knew who both perpetrators were and, for this reason, likely knew that Tony Ford was not one of them;
- Joe Chrisman knew in advance when the crime was going to occur;
- Joe Chrisman or one of his children was the target of the crime due to competition with another drug dealer;
- Myra Concepcion Murillo and her neighbors knew there was a third person involved who remained outside as a lookout,

- Victor Belton – not Tony Ford – was almost certainly the other person in the house with Van Belton that night, based on the Belton brothers' known history and on Victor's admissions to a number of people about getting away with murder in the weeks and months after the crime.

In addition, the prosecution created false testimony when they put the Murillo sisters on the stand to testify that they were certain that Tony Ford was one of the intruders and the shooter, even though the Murillos told them one month before they testified that they were not sure Mr. Ford was the shooter.

Just as in *Brandley*, "The State's investigative procedure produced a trial lacking the rudiments of fairness. The principles of due process, embodied within the United States Constitution, must not, indeed cannot, countenance such blatant unfairness." 781 S.W.2d at 894. For these reasons, the Court's perspective on the events underlying the *Brandley* case is equally applicable here:

> The violent end to Cheryl Ferguson's young life is both senseless and tragic. The end of a life so full of promise is a loss not only to her loved-ones, but also to our society as a whole. Our outrage over her murder, however, cannot justify the subversion of justice that took place during the investigation, which ultimately affected the trial of her accused perpetrator.

Id. Mr. Ford's conviction should be set aside just as Clarence Brandley's conviction was.

E. <u>The Eighth Amendment Categorically Exempts Mr. Ford from the Death Penalty, Because His Participation and Culpability Are Too Minimal to Warrant the Death Penalty.</u>

The Eighth Amendment prohibits a sentence that is disproportionate to the offense. In *Enmund v. Florida*, *supra*, and *Tison v. Arizona*, 481 U.S. 137 (1987), the United States Supreme 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.

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 had 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 Supreme Court explained why under these facts the death penalty would be disproportionate:

> 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*, we have alleged facts demonstrating that Mr. Ford's 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 Supreme Court held the defendants were not categorically ineligible 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 offered by the Supreme Court in *Tison*, we have alleged facts demonstrating that Mr. Ford, 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 *threshold* showing of evidence that would be sufficient to show by a preponderance of evidence after a hearing, *cf. Ex parte Blue*, 230 S.W.3d at 163, 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.

V. EACH OF THE FOREGOING CLAIMS MEETS ONE OF THE REQUISITES UNDER ARTICLE 11.071 § 5 OF THE TEXAS CODE OF CRIMINAL PROCEDURE FOR CONSIDERATION ON THE MERITS IN A SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

Article 11.071 § 5(a) of the Texas Code of Criminal Procedure provides as follows:

> 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.

Mr. Ford's Claims A, B, C, and D meet the criteria of § 5(a)(1). Mr. Ford's Claim E meets the criteria of § 5(a)(3).

A. Claim A Is Based on Facts That Were Unavailable When the Previous Habeas Application Was Filed.

The factual basis for Claim A is the information obtained from the trial court reporter, Robert Thomas. *See* Exhibit 31. When Mr. Ford's previous habeas application was filed on February 2, 1998, no one had any reason to believe that Mr. 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, states 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." Exhibit 51 (affidavit of William Juvrud). Mr. Juvrud was not there to interview Mr. Thomas because we 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 had told Mr. Thomas that they had heard that the "word on the street" was that Victor Belton had gotten away with the Murillo murder. *Id*. and Exhibit 31 (Thomas affidavit). Thereafter, when co-counsel in federal habeas proceedings followed up on Mr. Juvrud's chance conversation with Mr. Thomas, we 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 Claim A is eligible for consideration on the merits by the trial court.

B. Claim B Is Based on Law That Was Unavailable When the Previous Habeas Application Was Filed.

Claim B – concerned with Myra Murillo giving false testimony that Tony Ford was one of the intruders even though she knew but did not reveal who the intruders were and that Mr. Ford was not one of them – relies on the legal basis that the unknowing use of false testimony by the prosecution violates due process. *Ex parte Chabot*, 300 S.W.3d 85 768, 770–71 (Tex. Crim. App. 2009). *Chabot* was the first case in which the Texas Court of Criminal Appeals recognized an unknowing-use of false testimony due process claim. *Ex parte Chavez*, 371 S.W.3d 200, 205 (Tex. Crim. App. 2012). "[T]herefore, that legal basis was unavailable at the time applicant filed his previous application." *Id.* Mr. Ford was in the same procedural position as Mr. Chavez because Ford's previous habeas corpus application was filed in 1998. Accordingly, the claim

could not have been presented previously in Mr. Ford's initial application because its legal basis was unavailable. The "legal basis" criterion for § 5(a)(1) has been met with respect to Claim B.

C. Claim C Is Based on Facts and Law That Were Unavailable When the Previous Habeas Application Was Filed.

Claim C is the claim based on previously unavailable science – from the field of psychology concerned with eyewitness identification – under Article 11.073 of the Code of Criminal Procedure. In connection with pleading the claim, at pp. 65-77, *supra*, Mr. Ford has demonstrated the ways in which the factual basis of this claim was wholly unavailable to the most diligent of applicants when he filed his previous habeas application in February, 1998.

In addition, as the Court noted in *Ex parte Robbins*, 487 S.W.3d 678 (Tex. Crim. App. 2016), the legal basis for Claim C was unavailable until the enactment of Article 11.073:

> Article 11.073 was enacted on September 1, 2013.... Prior to the enactment of article 11.073, newly available scientific evidence *per se* generally was not recognized as a basis for habeas corpus relief and could not have been reasonably formulated from a final decision of this Court or the United States Supreme Court, unless it supported a claim of "actual innocence" or "false testimony."...
>
> Article 11.073 provides a new legal basis for habeas relief in the small number of cases where the applicant can show by the preponderance of the evidence that he or she would not have been convicted if the newly available scientific evidence had been presented at trial.

Id. at 689-90 (citations omitted).

Accordingly, both the unavailable legal basis and the unavailable factual basis criteria for § 5(a)(1) have been met with respect to Claim C.

D. Claim D Is Based on Facts That Were Unavailable When the Previous Habeas Application Was Filed.

Claim D concerns the denial of due process by the flawed police investigation. As the Court explained in *Ex parte Brandley*, a court reviewing this kind of claim must "look to the

'totality of the circumstances' to make that [due process] determination." 781 S.W.2d at 892. Most of the factual circumstances that make up the "totality of the circumstance" in Mr. Ford's case were unavailable to Mr. Ford even with the exercise of due diligence at the time he filed his previous habeas application in 1998. These circumstances and the reasons for their unavailability in 1998 are the following:

(1) Mr. Ford has demonstrated that the Murillos' identifications of him were mistaken and were the result of unreliable police procedures. *See* statement of facts, at pp. 34-44, and Claim C, *supra*. However, as we have demonstrated in connection with Claim C, when Mr. Ford file his previous habeas corpus application in 1998 the scientific support for this claim was either unavailable as a matter of science or unavailable because sought-after funding for expert assistance was denied. Thus, he could not have developed the facts for this part of his *Brandley* claim through due diligence.

(2) Mr. Ford has set forth facts demonstrating that Myra Concepcion Murillo's boyfriend, Joe Chrisman, was aware beforehand that someone was going to confront people at the Murillos' house the night of the crime, and that either he or one of his children was the target of the crime because of their involvement in drug dealing. These facts were developed by chance. In 2015, an investigator for undersigned counsel met with Veronica Chrisman, Joe Chrisman's daughter. During this interview, Ms. Chrisman revealed (a) that her father told her beforehand to stay away from the Murillos' house the night that the crime took place and (b) that either she or her father was the target of the crime. Exhibit 7. This interview took place on February 24, 2015, and Ms. Chrisman agreed to meet again "soon" with the investigator. *Id*. Three days later, an El Paso lawyer contacted undersigned's investigator and told him not to have any further contact with Ms. Chrisman, noting that he had been retained as counsel for the

entire Chrisman family. *Id*. No one working on behalf of Mr. Ford has been able to ask Ms. Chrisman any further questions since then. Accordingly, that Mr. Ford was able to obtain any information from Ms. Chrisman was due to luck, not due diligence. Anyone who had tried to approach her any other time may well have been blocked by her father and her father's lawyer, as has been the case since the initial contact with Ms. Chrisman. *See also* Exhibit 18, second and third entries for 7/21/14, second and third entries for 7/22/14 (investigative notes concerning futile efforts to interview Joe Chrisman in 2014 due to Chrisman's apparent paranoia and overt hostility).

(3) The overarching narrative about what was planned with respect to the events at the Murillos' house, how that plan became modified, and who was involved and in what way he was involved the night of December 18, 1991, was provided by Marvin Dodson. Until he gave his statement to Mr. Ford's counsel in March, 2015, however, Mr. Dodson had been very reluctant to talk with, or provide any information to, anyone representing Mr. Ford. Undersigned talked with Mr. Dodson initially in June, 2002. Exhibit 52 (declaration of Richard Burr concerning Marvin Dodson). After that, despite diligent efforts, counsel was unable to locate Mr. Dodson to have him sign a declaration, so counsel prepared his own declaration on December 21, 2002, concerning the very limited information that Mr. Dodson had provided to that date. *Id*. Finally, on September 15, 2006, Mr. Dodson was located, and he signed a declaration concerning the information he had provided counsel in 2002. Exhibit 53 (declaration of Marvin Dodson, September 15, 2006). The information he provided then was very sparse, stating only the following:

> When Van Belton and Tony Ford were arrested for the murder on Dale Douglas, I was already locked up in the El Paso County Jail. Not long after he was arrested, Van Belton contacted me in the jail. He asked me to finger Tony Ford for the

> murder. He wanted me to tell the police that Tony admitted to me that he was involved. I told him I couldn't do this because it wasn't true, but he kept after me to do this. I never did what he asked me to do.

Not until March 2015 was Mr. Dodson willing to disclose much, much more about what he knew about the crime that took place at the Murillos' house. *See* Exhibit 4, quoted in full at pp. 13-16, *supra*. Accordingly, due diligence did not, and could not have, gained access to the information in Marvin Dodson's possession until 2015.

(4) The final aspect of the totality of circumstances pertaining to the investigation of the crime that occurred at the Murillos' house is the failure of the police to investigate Victor Belton's central involvement in the crime. The critical evidence of Victor's involvement is his admissions to Marvin Dodson, T.J. Brookins, and David Tucker that he had gotten away with the murder of Armando Murillo. *See* Exhibits 4, 5, and 6. While undersigned tried from the beginning of his representation of Mr. Ford to find friends and acquaintances of Victor Belton to determine whether Belton had made such admissions, counsel's diligence is not what uncovered this information.

a. The effort to persuade Mr. Dodson to talk with Mr. Ford's counsel has been chronicled above. Mr. Dodson's change of mind after thirteen years, not due diligence on the part of Mr. Ford's counsel, is what led Mr. Dodson to reveal what Victor Belton had admitted to him.

b. Counsel learned of Mr. Brookins, because he happened to correspond with Mr. Ford after undersigned began representing Mr. Ford, and Brookins learned from Ford of the crime that Ford was convicted of. Exhibit 5. Mr. Ford passed this information on to undersigned counsel, who then talked with Mr. Brookins and had him sign a declaration on

December 10, 2002. No one knew of this information until Mr. Brookins and Mr. Ford happened to correspond in 2002.

c. Counsel learned from Mr. Ford early on that David Tucker was a friend of Victor Belton. Early efforts to find Mr. Tucker failed. In 2003, undersigned counsel tried to locate Mr. Tucker with the use of an internet-based search service. *See* Exhibit 54 (search information developed for Mr. Tucker). Mr. Tucker was not then living at any of the listed addresses. Thereafter, counsel had no success finding Mr. Tucker until 2014. Mr. Ford's sister happened to get in touch with Mr. Tucker through social media and, because she knew we had been trying to find him, she passed on to us that he was then living near Galveston, Texas. Even with this information, only with the help of the El Paso District Attorney's Office, *see* Exhibit 55, was undersigned able to find, interview, and obtain an affidavit from Mr. Tucker.

Accordingly, the foregoing facts – which include most of the facts that make up the totality of circumstances pertaining to the investigation of the crime – were not and could not have been found with the exercise of due diligence at the time the previous state habeas corpus application was filed on February 2, 1998. Only two of the facts composing the totality of circumstances could have been found with the exercise of due diligence prior to the filing of the previous habeas application: that neighbors observed three people involved in the crime and that one of the neighbors overheard Myra Murillo exclaiming to someone on the telephone that "it was those guys" who committed the crime. These facts were obtained when undersigned counsel had his investigator conduct a neighborhood canvass in 2014, and there is no reason this information could not have been obtained earlier. However, these facts alone would not have been sufficient to show that under the totality of circumstances the police investigation of the case was so flawed that it denied Mr. Ford due process. Only when the facts that could not have

been obtained by the exercise of due diligence are added to the totality of circumstances does Mr. Ford's *Brandley* claim have merit.

E. Claim E Satisfies Article 11.071 § 5(a)(3) Because the Claim Is That the Eighth Amendment Absolutely Prohibits the Death Penalty for a Person Whose Role in the Capital Crime Was the Role Mr. Ford Played.

As we have demonstrated, Mr. Ford is constitutionally *ineligible* for the death penalty, because he testified truthfully that he (1) did not actually kill Armando Murillo, (2) did not intend that lethal force be used, (3) did not intend to kill, (4) was not a major participant in the underlying felony offense of aggravated robbery, and (5) did not show a reckless indifference for human life.

The Court of Criminal Appeals 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 v. Florida* and *Tison v. Arizona*. The *Blue* court surely 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, Claim E is eligible for consideration on the merits under Section 5(a)(3).

PRAYER FOR RELIEF

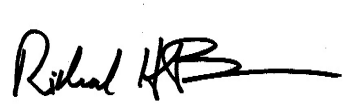
For these reasons, Tony Egbuna Ford respectfully requests:

1. That the Court of Criminal Appeals determine that the requirements of Article 11.071, § 5(a), Tex. Code of Crim. Proc., have been satisfied with respect to each of the five claims for relief presented herein, and remand these claims to the trial court for consideration;

2. That, on remand, the trial court hold an evidentiary hearing with respect to these claims; and

3. That, after such hearing, the trial court enter proposed findings of fact and conclusions of law vacating Mr. Ford's convictions for capital murder and attempted capital murder and precluding a sentence of death on any retrial for capital murder.

Respectfully submitted,



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VERIFICATION

STATE OF TEXAS)
) ss:
COUNTY OF POLK)

Affidavit of Richard H. Burr

BEFORE ME, the undersigned authority, on this day personally appeared Richard H. Burr, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas.

2. I am one of the duly authorized attorneys for Tony Egbuna Ford and have the authority to prepare and verify his Subsequent Application for Post-Conviction Writ of Habeas Corpus.

3. I have read the Subsequent Application for Post-Conviction Writ of Habeas Corpus, and I believe all the allegations therein to be true and correct.

4. I am signing this verification on behalf of my client Tony Egbuna Ford.

Richard Burr

Subscribed and sworn to before me this 2 day of August, 2018.

Notary Public

My commission expires: 4/6/21

KENNETH HIGHTOWER
Notary Public State of Texas
My Commission# 126860244
My Comm. Exp. Apr. 06, 2021

CERTIFICATE OF SERVICE

I certify that the foregoing application, along with the separately bound exhibits, was served on the State of Texas through electronic filing to John Davis, Assistant District Attorney, JDavis@epcounty.com, this 2d day of August, 2018.

Richard H. Burr