No. _____

(CAPITAL CASE)

In the

Supreme Court of the United States

CHARLES DON FLORES,
Petitioner,

v.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

APPENDICES A-C

Respectfully submitted,

/s/ Gretchen Sims Sween

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March 4, 2022

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-64,654-03

EX PARTE CHARLES DON FLORES, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. W98-02133 IN THE 195TH DISTRICT COURT DALLAS COUNTY

Per curiam.

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5.[1]

In April 1999, a jury found Applicant guilty of the 1998 murder of Elizabeth Black in the course of committing or attempting to commit robbery and burglary. *See* TEX. PENAL CODE § 19.03(a). Based on the jury's answers to the special issues submitted pursuant to Article 37.071, the trial court sentenced Applicant to death. Art. 37.071, §

[1] Unless otherwise indicated, all references and citations to Articles in this order refer to the Texas Code of Criminal Procedure.

2(g). This Court affirmed Applicant's conviction and sentence on direct appeal. *Flores v. State*, No. AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (not designated for publication).

Applicant filed his initial state habeas application in September 2000 and timely supplemented that application in December 2000. This Court denied relief on all of Applicant's claims. *Ex parte Flores*, No. WR-64,654-01 (Tex. Crim. App. Sept. 20, 2006) (not designated for publication). Applicant filed his first subsequent state habeas application in May 2016. We concluded that one of Applicant's claims satisfied the requirements of Article 11.071, Section 5, and we remanded that claim to the habeas court. *Ex parte Flores*, No. WR-64,654-02 (Tex. Crim. App. May 27, 2016) (not designated for publication). On remand, the habeas court found and concluded that Applicant was not entitled to relief. We agreed. Therefore, we denied the claim we had earlier remanded and dismissed the remaining claims as abuses of the writ under Article 11.071, Section 5. *See Ex parte Flores*, No. WR-64,654-02 (Tex. Crim. App. May 6, 2020) (not designated for publication).

On February 3, 2021, Applicant filed in the habeas court the instant application, his second subsequent state habeas application. In it, Applicant makes ten claims for postconviction relief. In claim one, Applicant alleges that a new scientific consensus in the field of eyewitness identifications has rendered one eyewitness's in-court identification of Applicant unreliable and further shows that this witness's earlier failure to pick Applicant out of a lineup is exculpatory. *See* Art. 11.073. In claim two, Applicant alleges that the State's trace-evidence expert's trial testimony has been rendered

scientifically unsupportable in light of previously unavailable scientific evidence. *See id.* In claim three, Applicant alleges that he is actually innocent of murdering Elizabeth Black. *See Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996). In claims four and five, Applicant alleges that the State suppressed evidence that was material to his conviction and sentence. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). In claims six, seven, and eight, Applicant alleges that the State knowingly or unknowingly sponsored false testimony. *See Ex parte Chabot*, 300 S.W.3d 768, 770–71 (Tex. Crim. App. 2009). In claim nine, Applicant alleges that his trial lawyers improperly overrode his Sixth Amendment right to assert his innocence at trial. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018). In claim ten, Applicant alleges that his due process right to a fair trial was violated by the State's use of testimony that, according to Applicant, current scientific understanding exposes as false. *Cf. Ex parte Roberson*, No. WR-63,081-03 (Tex. Crim. App. June 16, 2016) (not designated for publication).

Having reviewed Applicant's application, we conclude that it does not satisfy the requirements of Article 11.071, Section 5. Therefore, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised. Art. 11.071, § 5(c).

IT IS SO ORDERED THIS THE 6TH DAY OF OCTOBER, 2021.

Do Not Publish

APPENDIX B

W98-02133-N(C)

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
AND
IN THE 195TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

EX PARTE	§ Texas Court of Criminal Appeals
CHARLES DON FLORES,	§ Cause No. WR-64,654-03
	§
Applicant.	§ 195th Judicial District Court of
	§ Dallas County
	§ Cause No. F9802133-N

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS
(Under Article 11.071 sec. 5(a) and Article 11.073 of the Texas Code of Criminal Procedure)

THIS IS A DEATH PENALTY CASE

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Statutes & Rules

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Tex. Code Crim. Proc. art. 11.073 ..... *passim*

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Mike Ware, Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time,
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RECORD CITATION KEY

In the application below, the following abbreviations are used:

"RR" refers to the Reporter's Record of the 1999 trial. The first number is the volume; the second number is the page.

"SX" refers to an exhibit that was offered into evidence at trial by the State.

"DX" refers to an exhibit that was offered into evidence at trial by the defense.

"EHRR" refers to the Reporter's Record of the 2017 evidentiary hearing in the first subsequent writ proceeding. The first number is the volume; the second number is the page.

"AppX" refers to an exhibit that was offered into evidence by the habeas applicant during the evidentiary hearing in the first subsequent writ proceeding.

"Ex" refers to an exhibit in the Appendix of Evidentiary Proffers filed with this second subsequent habeas application.

Applicant Charles Don Flores is currently confined on death row in the Texas Department of Criminal Justice's Polunsky Unit in Livingston, Texas. His wrongful conviction was obtained in a trial plagued by police and prosecutorial misconduct and where his insistence on his innocence was overridden by trial counsel in closing argument, reputedly in pursuit of a "strategy" that could have accomplished nothing more than guaranteeing a death sentence. Mr. Flores is confined in violation of the Constitution and laws of the State of Texas and the United States. He files this second subsequent application for a petition for writ of habeas corpus, pursuant to Texas Code of Criminal Procedure, Article 11.073 and section 5(a) of Article 11.071, to secure the reversal of his capital murder conviction and death sentence and for his release from confinement. The State has filed a motion seeking to set an execution date. The convicting court, however, has entered an order holding a decision on that motion in abeyance until April 1, 2021.

In support thereof, Mr. Flores respectfully shows the following:

INTRODUCTION

The truth should matter—especially in legal proceedings in which the State seeks to execute someone. But in this case, the truth has been a casualty from the outset—even before **Elizabeth "Betty" Black** was senselessly shot dead, along with the family's dog. On January 29, 1998, Betty Black was shot in her Farmers Branch[1] home by someone who had brought along a potato to use as a silencer. She was shot because she startled some drug addicts seeking to rob the house. The Blacks' drug-addicted, drug-dealing daughter-in-law, **Jackie Roberts**,[2] helped Betty Black's murderers plan their attempt to break into the Blacks' house in search of money (rumored to be $100-200,000) that the Blacks' incarcerated, drug-dealing son, **Gary Black**, had hidden in his parents' home.

Jackie believed her husband's cash was in the walls behind the Blacks' medicine cabinets; and weeks before the murder, she had told several people, including her latest lover, **Richard "Ric" Lynn Childs**, that she believed that money was rightfully hers.

[1] "Farmers Branch" is a small city within Dallas County that is part of the Dallas-Fort Worth metroplex.

[2] Jackie Roberts was previously married to Doug Roberts; they had a son together. When Doug was sent to prison, she got involved with his friend, Gary Black. Gary, in turn, was in prison at the time of Mrs. Black's murder; Jackie then got involved with Ric Childs. 34 RR 250-251. Jackie was the State's star witness at trial.

The day before the murder, the Blacks informed Jackie that Gary had directed them, from prison, to dramatically cut back the monthly "allowance" that they were paying her from his drug money, seemingly because she was neglecting their kids, doing drugs continuously, sleeping with Ric Childs, and selling drugs for someone other than Gary.

On the morning of the murder, witnesses saw two men get out of a distinctive, multi-colored Volkswagen Beetle and enter the Blacks' house through the garage. It is undisputed that one of those two men shot Mrs. Black.

Mrs. Black's neighbor, **Jill Barganier**, was quickly able to identify Ric Childs, Jackie's boyfriend, as the person Mrs. Barganier had seen get out of the driver's side of the Volkswagen. Yet, at that time, she could only describe the Volkwagen's passenger in vague terms—as a white male with long, wavy hair, who looked like Ric:

Notably, ***none*** of the neighborhood witnesses, including Mrs. Barganier, described either of the men in the Volkswagen as looking like **Charles "Charlie"**

Don Flores, a large Hispanic male with short, shaved hair, who could not see well without glasses:

Instead, the other witnesses echoed Mrs. Barganier in describing *two similar-looking white males with long hair*.

Indeed, Mrs. Barganier only decided thirteen months after-the-fact that the other man she had observed—through her miniblinds, getting out of a car in the driveway next door, before sunrise—was Charlie Flores, a heavy-set Hispanic male with short, shaved hair. Mrs. Barganier's "epiphany" came well *after* the police had shown her numerous photographic lineups, including, as it turns out, one that featured Charlie prominently. The identification also came well *after* she had created a composite sketch that looked nothing like Charlie, *after* she had been subjected to an outrageous "hypnosis" session at the police station, conducted by a police officer working on the Black murder investigation, and *after* he had been repeatedly exposed to pictures of Charlie both at the police station and in the news. She only identified Charlie when, thirteen months later, she got to the courthouse to testify for the State and saw Charlie sitting in the courtroom at the defense table.

So, how did police get from these contemporaneous descriptions of the suspects to an investigation focused entirely on implicating Charlie Flores? Sadly, they did not follow where the facts led: towards Ric Childs, Jackie Roberts, and another, still unidentified white male with long hair, who was likely a member of Ric and Jackie's sprawling circle of drug users and dealers.

Police had significant information about the likely motive for the break-in and murder at the very beginning of the investigation. Police records indicate that, within hours of the initial call reporting Mrs. Black's murder, several investigators received information that it was rumored in the neighborhood that Gary Black, Betty Black's son, whom Farmers Branch law enforcement described as a "known narcotics dealer," had hidden large sums of cash in the walls of the house. Law enforcement also knew from the outset that Jackie Roberts, Gary Black's wife, had been a dealer for her husband, and thus had helped him in accumulating this cash (which is why she had been telling people, including Ric, that this money was rightfully hers).

Despite all leads pointing to Ric and Jackie from the outset, law enforcement took an incredibly light hand in investigating them, and did not even move to arrest them, even *after* Mrs. Barganier identified Ric as the Volkswagen's driver. Indeed, after nearly two days had passed, Ric and Jackie were permitted to hole up at Ric's grandmother's house, then under surveillance, for over ***three hours*** during which

they discussed the murder and took actions to destroy evidence. Police only acted when Ric attempted an escape.

Police were quickly presented with very strong evidence that Ric shot Betty Black. When Ric was arrested, he was found with an open box of the *exact* brand of ammunition that had been found at the crime scene, suggesting that Mrs. Black had been killed by a precise bullet shot from a .380. Ric was also known to carry a .380 handgun. Neither the defense nor the jury heard how Jackie had actually told the lead investigator (**Detective Gerald Callaway**) and the lead prosecutor (**ADA Jason January**) early on that Ric had confessed to her that *he* had shot Mrs. Black. The revelation that Ric had confessed to Jackie that he shot Mrs. Black, and that Jackie had told police about this confession very early in the investigation, was buried.

Although overwhelming evidence established Ric as the main perpetrator, once Ric was in custody, the State and its agents worked to push responsibility elsewhere—even though he had perpetrated this horrible crime ***while out on bond*** for a possession-with-intent-to-deliver charge.

But the State never disclosed these facts. Likewise, it never disclosed that Ric was the ***son of a local police officer***—a fact unearthed two decades later. That fact at last sheds some light on why Ric, the actual shooter, now out on parole, was treated so leniently without providing any honest assistance with the investigation

and without having to testify at the travesty of a trial that resulted in convicting and sentencing Charlie to death for Betty Black's murder.

Ric ultimately signed a judicial confession stating that he had shot Mrs. Black. Then he served only 15 years of a 35-year sentence, despite having killed Mrs. Black while out on bond for other crimes. Notably, Ric was rewarded with this exceptionally light punishment *without having to testify*. Ric's stunning plea deal was memorialized in court documents filed well after Charlie had been tried, convicted, and sentenced to death for the same crime.

Similarly, Jackie never received any punishment for her role in her mother-in-law's death, other than a brief revocation of her probation to ensure her ongoing cooperation with the Dallas County District Attorney's (DA's) Office.

Law enforcement also made no meaningful effort to ascertain who the second "white male with long hair" was who had been observed getting out of Ric's Volkswagen outside of the Blacks' house the morning Betty was killed—although several likely perpetrators were obvious at the outset (including Doug Roberts, Jason Clark, Robert Peters, and Ray Graham).

Instead, law enforcement chose to doggedly pursue, contrary to evidence, a claim that Hispanic Charlie Flores, a small-time drug dealer living in Irving and working for his father's roofing busines, was Ric's accomplice because they had been together for a short period the night before Mrs. Black's murder. Notably,

neither Jackie nor any of her intimates whom police interviewed soon after the murder mentioned Charlie (or any Hispanic individuals) being involved, at least until Farmer's Branch police made it quite explicit to Jackie and Ric that they were interested in pursuing Charlie Flores as a suspect. There is a good faith basis to believe that the police were first pointed in Charlie's direction not by anyone with personal knowledge of the crime, but by Ric Childs' brother, Roy Childs Jr., who spoke to Farmers Branch SID investigators soon after the crime for reasons that have never been disclosed.

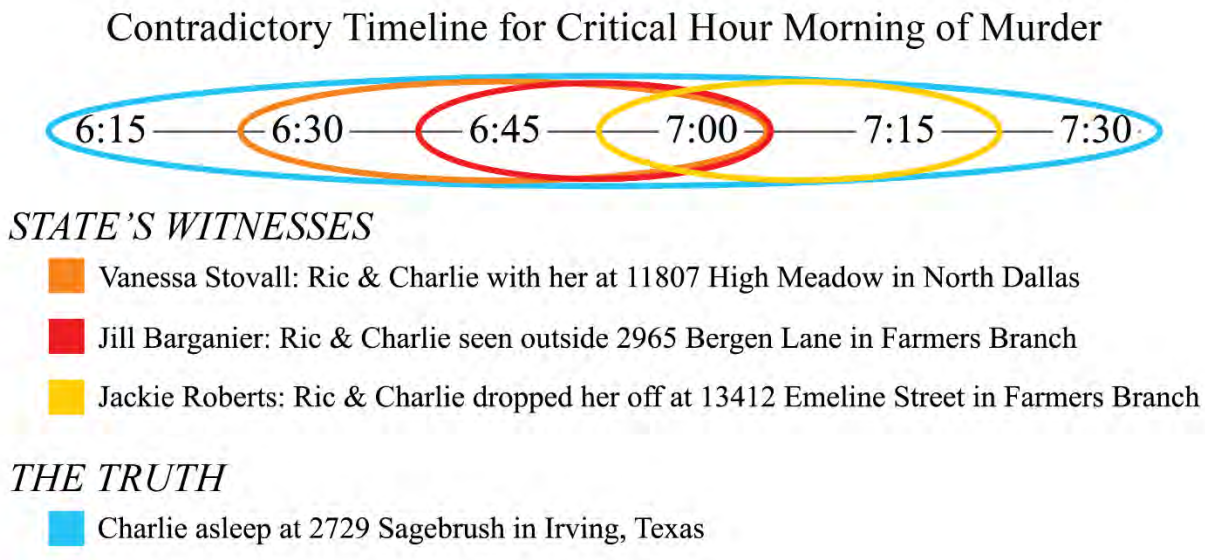
Indeed, as discussed in detail in the Factual Background and Claims below, the evidence that the State offered at trial to try to put Charlie at the scene *with* Ric made no sense. Because there was no physical evidence linking Charlie to the scene, the State concocted a case on the fly—creating a confusing cacophony of lies, half-truths, and contradictions.

For instance, the State at trial relied on three different witnesses to support an inference that Charlie was at the crime scene based on his alleged whereabouts during the hours before the murder. One of these three witnesses, Jackie (an accomplice) admitted to having been up all night engaged in drug-dealing with Ric and telling him that she knew where she could get a bunch of money; the second witness, another one of Ric's girlfriends, **Shelia "Vanessa" Stovall**, admitted to starting her day by snorting methamphetamine for breakfast. The third was Mrs.

Barganier, whose problematic post-hoc identification is noted above and discussed at length in Claim I.

But even putting these credibility issues aside, the State's contorted efforts ultimately succeeded only at putting Ric and Charlie together in *three different places at the same time* on the morning of the murder. Even if Jackie and Vanessa could have been deemed credible, the timelines they offered were mutually contradicting—and also at odds with the timeline provided by Mrs. Barganier. Mrs. Barganier was adamant from the outset that she had observed two men getting out of a Volkswagen Beetle at a precise time, 6:45 a.m., because she kept to a "strict schedule." 36 RR 281.

But if Mrs. Barganier was correct about the timing of her observation, then neither Jackie nor Vanessa could have been correct as well:



Even setting aside these fatal contradictions in the only testimony placing Charlie near the scene of Mrs. Black's murder, the most critical fact in the case, ***Charlie had an alibi***—which the jury never heard. It is discussed at length in Claim III. The jury did not hear about Charlie's alibi because of defense attorneys' incompetence and outright betrayal, discussed in Claim IX. The defense was also overwhelmed by the State's rampant misconduct, including a distorted investigation that resulted in false testimony meant to push responsibility for Mrs. Black's death onto a Hispanic male and away from three white people, Jackie Roberts, Ric Childs, and an unidentified white male with long hair—the basis for Claims IV-VIII.

Apparently not satisfied with merely arguing that Charlie had been present at the scene of the murder, the State concocted a story intended to take the murder weapon out of Ric's hands, and place it into Charlie's, despite knowing that Ric had been found in possession of the exact kind of ammunition that was used to kill Mrs. Black and that Jackie had early on reported that Ric had confessed to shooting Mrs. Black himself. The State conjured up misleading evidence to shift blame from Ric to Charlie by enlisting, mid-trial, the assistance of **Charles Linch**, a disgruntled trace-evidence analyst with the Dallas crime lab known to bend over backwards to assist the prosecution in death-penalty cases. The critical issues with this evidence, and the State misconduct they reveal, are discussed at length in Claim II.

There was never a mountain (or molehill) of evidence corroborating Charlie's alleged guilt, and significant exculpatory and impeachment evidence has come to light after decades of suppression. *See* Claims I-VIII. But the two individuals who were undeniably responsible for the break-in that led to Mrs. Black's death—Jackie Roberts and Ric Childs—received, respectively, no legal punishment at all and an extraordinarily modest sentence. Several other witnesses, all dope addicts looking for deals, were induced to provide testimony to support the State's case at trial—and got get-out-of-jail-free cards in exchange.

The story of the State's misconduct has been pieced together despite resistance from the DA's Office, seemingly to protect those who prosecuted this case over 20 years ago. Lead prosecutor Jason January left the DA's Office under mysterious circumstances not long after spearheading both the wrongful prosecution of Charlie Flores and the astonishingly generous plea deal given to Ric Childs. ADA January had become involved with the investigation at an oddly early stage and cultivated cozy relationships with, and provided favors to, the clique of drug-dealers who had played key roles and who helped him to railroad Charlie Flores. Newly uncovered evidence shows a pattern of prosecutorial misconduct that included undisclosed deals, leaning on witnesses by abusing the judicial system, subornation of perjury, and the suppression of material evidence.

A material deception was perpetrated on a Dallas jury in March of 1999. It is time for the full truth to come out at last—before it is too late.

SUMMARY OF CLAIMS AND SATISFACTION OF SECTION 5(A)

Mr. Flores filed his first subsequent habeas application on **May 19, 2016**; thus that is the date germane to assessing whether his new claims overcome the procedural bar in Texas Code of Criminal Procedure, art. 110.071, sec. 5(a).

A claim in a subsequent habeas application is remanded for further factual development only if "the current claims and issues have not been and could not have been presented previously in a timely [previous] application … because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]" TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1). Mr. Flores can satisfy this procedural requirement as to each claim alleged in this application, as described below.

A claim could not have been presented if either the "factual *or* legal basis" did not exist at the time of the previous application. *Id.* (emphasis added). Upon a threshold showing, the claim is remanded to the district court for plenary consideration. *See Ex parte Brooks*, 219 S.W.3d 396, 400 (Tex. Crim. App. 2007) (illustrating this process with an example of a claim raised in a subsequent application relying on then new law reflected in *Atkins v. Virginia*).

CLAIM I: THE NEW SCIENTIFIC CONSENSUS IN THE FIELD OF EYEWITNESS IDENTIFICATIONS RENDERS MRS. BARGANIER'S IN-COURT IDENTIFICATION OF CHARLIE FLORES NOT JUST UNRELIABLE BUT *EXCULPATORY*.

Mr. Flores meets the requirements of Section 5(a) for consideration of the merits of Claim I. This claim is based on a new scientific consensus in the field of eyewitness identification procedures. Specifically, the claim is based on a scientific consensus in the field that only emerged in **2020** in the wake of concerns first raised by the National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* (2014) (evaluating the practice and announcing recommendations to develop a more scientific approach to, and maximizing the validity and reliability of, eyewitness identifications in law enforcement and the courts). The new consensus establishes that the failure to identify an individual the first time he appears in a lineup is *exculpatory* and that an identification made after the memory has been contaminated by the first exposure is unreliable.

The scientific field of eyewitness identification was still in the early stages of development at the time of the Flores's trial in 1999. When his first subsequent writ proceeding was initiated in May 2016, there was still no science that would have permitted Flores to challenge the reliability of Jill Barganier's in-court identification based on the initial tests of her memory that had been undertaken in 1998 (the facts of then were then not known). Mr. Flores has now adduced evidence in the form of a report by a leading expert in the field of eyewitness identifications, Dr. John

Wixted, explaining how the new scientific understanding emerged and solidified into a consensus only in 2020. *See* Ex. 72 [Declaration of John Wixted, Ph.D.]. Dr. Wixted opines as to how this new consensus is particularly relevant to the Flores case and how the keys facts should be viewed as exonerating him. This new scientific understanding was not available when Mr. Flores's first subsequent state habeas application was filed on **May 2016**. He further demonstrates below that the factual basis for the claim, which makes clear that the new scientific understanding of eyewitness identifications applies to his case, was not available until suppressed evidence was obtained during an evidentiary hearing conducted in October 2017.

This claim is entirely distinct from the claim raised in Mr. Flores's first subsequent habeas application challenging the science of "investigative hypnosis" and its role in this same witness's interactions with police. Importantly, the State convinced both the convicting court and the Court of Criminal Appeals (CCA) in the previous writ proceeding to adopt findings "that there is no reason to deviate from [the trial court's] original findings on the reliability and admissibility of Barganier's identification testimony." Findings of Fact and Conclusions of Law (FFCL) (195th District Court, entered Oct. 3, 2018) at (277). The trial court's original finding that the 2018 FFCL reaffirmed was "that under the totality of the circumstances, … there is clear and convincing evidence that the hypnosis undergone by Ms. [Barganier] did not render her eyewitness, in-Court eyewitness

identification of the Defendant untrustworthy." *Id.* at (63); *see also id.* at (278) ("Accordingly, the Court finds that, under the totality of the circumstances, the State established by clear and convincing evidence that Barganier's post-hypnotic testimony was reliable."). Additionally, in reaffirming the trial court's original finding on hypnosis and rejecting Mr. Flores's challenge to the reliability of Mrs. Barganier's testimony based on the current scientific understanding of the effect of hypnosis on human memory, the habeas court and the CCA expressly found that expert testimony "concerning eyewitness identification procedures [was] ***not relevant*** to the specific claim raised by Applicant in his subsequent writ application." *Id.* at (339) (emphasis added).

In short, the science upon which Mr. Flores relies in Claim I is entirely distinct from the body of science upon which he previously relied in challenging this witness's identification based on her exposure to investigative hypnosis. Moreover, the face of the FFCL demonstrate that the ***distinct scientific field*** related to assessing the reliability of eyewitness identification procedures was not considered in adjudicating the previous hypnosis claim. Indeed, the scientific consensus upon which Claim I relies did not exist until 2020, two years after the FFCL were signed. Therefore, the factual basis for Claim I was not available on May 19, 2016.

CLAIM II: THE STATE'S TRACE-EVIDENCE EXPERT HAS DISAVOWED HIS OWN TESTING AND TRIAL TESTIMONY AS UNRELIABLE; AND CONTEMPORARY STANDARDS FOR FORENSIC LABS DEMONSTRATE THAT THE STATE'S EXPERT'S METHOD AND TEST RESULTS DO NOT REFLECT BASIC SCIENTIFIC COMPETENCY.

Mr. Flores meets the requirements of Section 5(a) for consideration of the merits of Claim II. This claim is based on two significant developments. First, the claim relies on changes in the scientific understanding of quality-control standards for forensic laboratories that have evolved since May 2016 when Flores's first subsequent state habeas application was filed. This evidence is attested to by Janine Arvizu, chemist, quality consultant, and laboratory auditor, in an expert report. *See* Ex. 73. Second, the claim relies on a change in the understanding of the State's expert at trial (Charles Linch) who has now expressly disavowed his 1999 testing and trial testimony. Ex. 74. Additionally, the factual basis that gives rise to this claim was not ascertainable until, over the objection of the State, Mr. Flores was able to obtain key records from the Dallas County crime lab aka Southwestern Institute of Forensic Sciences (SWIFS) and from the Dallas County Conviction Integrity Unit (CIU) related to Mr. Flores's case. The defense did not gain access to the slide, report, and casefile that Mr. Linch created for this case until after his first subsequent habeas application was filed. *See* Ex. 24. Therefore, the factual basis for this claim was not available on May 19, 2016.

CLAIM III: NEWLY AVAILABLE EVIDENCE ESTABLISHES THAT MR. FLORES IS ACTUALLY INNOCENT OF THE CRIME FOR WHICH HE WAS CONVICTED.

Mr. Flores meets the requirements of Section 5(a) for consideration of the merits of Claim III. His execution would violate the United States Constitution because he is innocent. U.S. Const. Am XIV; *Herrera v. Collins*, 506 U.S. 390 (1993); *State ex. rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994). Claim III meets the requirements for a subsequent writ application under two sub-sections (1) and (3). *See* TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a).

This application alleges more than sufficient facts that the new eyewitness identification science upon which he relies in Claim I was not previously ascertainable through reasonable diligence. That, and his own declaration and historical documents related to the alibi defense that his trial lawyers failed to put before the jury, are the basis for this Actual Innocence claim. In *Ex parte Henderson*, this Court found that the applicant stated adequate facts for a threshold showing of innocence because underlying biomechanical scientific evidence was not reasonably available. 246 S.W.3d 690, 691-692 (Tex. Crim. App. 2007). Likewise, in *Ex parte Overton*, the applicant made threshold showing of innocence based on new scientific evidence. WR-75,804-02 (Tex. Crim. App. Feb. 8, 2012) (unpub.). Notably, Overton appeared to make her prima facie showing of unavailability, not by alleging an unforeseen breakthrough in science, but simply because the science at trial "was not

fully informed and did not take into account all of the scientific evidence now available." *Id.* at *6 (Cochran, J., concurring). The new scientific consensus described in Claim I, which emerged only in 2020, is the first time Mr. Flores has had access to an objective basis for proving his innocence, always a Herculean challenge. This compelling new evidence supports his long-standing insistence on his innocence reflected in his own sworn declaration now before the Court. Ex. 4. Therefore, the factual basis for this claim was not available on May 19, 2016.

CLAIM IV: LONG-SUPPRESSED EVIDENCE, IN VIOLATION OF *BRADY V. MARYLAND*, REVEALS A PATTERN OF RAMPANT MISCONDUCT BY THOSE INVESTIGATING AND PROSECUTING THE CASE AGAINST CHARLIE FLORES THAT WAS MATERIAL TO HIS CONVICTION.

CLAIM V: LONG-SUPPRESSED EVIDENCE, IN VIOLATION OF *BRADY V. MARYLAND*, REVEALS A PATTERN OF RAMPANT MISCONDUCT THAT WAS MATERIAL TO OBTAINING A DEATH SENTENCE.

CLAIM VI: CHARLIE FLORES'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS WERE VIOLATED BY THE STATE'S KNOWING USE OF FALSE TESTIMONY AT THE GUILT-PHASE OF HIS TRIAL.

CLAIM VII: CHARLIE FLORES'S RIGHTS TO A FAIR TRIAL, TO DUE PROCESS, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE STATE'S KNOWING USE OF FALSE TESTIMONY RELEVANT TO HIS PUNISHMENT.

CLAIM VIII: CHARLIE FLORES'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS WERE VIOLATED BY THE STATE'S USE OF FALSE TESTIMONY, EVEN IF UNWITTINGLY, UNDER *EX PARTE CHABOT*.

Mr. Flores meets the requirements of Section 5(a) for consideration of the merits of Claims IV-VIII, all of which are based on suppressed evidence in the possession of the State that was favorable to the defense and/or that exposes the falsity of testimony the State relied on at trial.

Any procedural default or failure to bring a claim or present evidence earlier is excused if that failure is a result of ***the State's*** concealment of that evidence. *See, e.g.*, *Murphy v. Davis*, 901 F.3d 578, 597 (5th Cir. 2018) (discussing procedural default in federal context and explaining that default must be excused if "the reason

for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence.'") (quoting *Banks v. Dretke*, 540 U.S. 668, 691 (2004)).

In the federal context, many cases have held that prosecutorial or state suppression of evidence can establish "cause" for a procedural default even under the strict standards of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *See, e.g., Strickler v. Greene*, 527 U.S. 263, 282, 289 (1999) (finding "cause" for procedural defaults of failing to raise prosecutorial-suppression-of-evidence claim at trial and in state postconviction proceedings because prosecution withheld exculpatory evidence; such conduct "imped[ed] access to the factual basis for making a *Brady* claim...which is precisely the kind of] factor[] that ordinarily [and in this case] establish[es] the existence of cause for a procedural default"); *Dobbs v. Zant*, 506 U.S. 37, 359 (1993) (per curiam) (permitting reopening of proceedings and assert new claim based on transcript not previously discovered because delay in discovering it was primarily due to State's erroneous assertions it was not transcribed); *Amedeo v. Zant*, 486 U.S. 214 (1988) (finding cause is present because evidence revealing violation "was concealed by county officials and therefore was not reasonably available to petitioner's lawyers); *Banks*, 540 U.S. at 691-698 (holding "a petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence ... Banks has shown cause for failing to present evidence in state court capable of

substantiating his...Brady claim'); *Price v. Johnston*, 334 U.S. 266, 289 (1948) (finding allegations of prosecutorial use of perjured testimony establish new facts); *Sanders v. United States*, 373 U.S. 1, 10 (1963) (concluding writ-abuse dismissal was inappropriate when "for aught the record disclose[s] petitioner might have been justifiably ignorant of newly alleged facts").

Texas law does not authorize discovery on subsequent applications unless the CCA first finds that an application meets the requirements of Article 11.071, section 5. In Mr. Flores's previous subsequent habeas application, the CCA only authorized further factual development of his hypnosis junk-science claim. This authorization was made in June 2016. Thereafter, the State actively resisted pursuit of discovery related to any other aspect of the Flores trial—including prosecutorial misconduct. Despite this barrier, Mr. Flores was able to obtain some discovery and begin to ascertain the significance of previous disclosure failures utilizing, as a point of departure, the partial, "permanently" (and heavily) redacted police file produced for the first time in March 2016, when he had an imminent execution date; that belatedly produced, partial file provided clues as to other undisclosed *Brady* material that started to come to light in June 2016.

As explained at length in the Procedural History below, Mr. Flores has long sought and long been deprived of *Brady* material. The *Brady* material at issue here has been wrested from State actors (and other sources) over the years in the face of

pronounced resistance. That resistance only started to change recently due to policy changes in the Dallas County District Attorney's Office (DA's Office). At the time of filing, counsel still has outstanding discovery requests that counsel has a good-faith basis to believe would expose yet more evidence favorable to the defense that was not produced.[3] That is, Mr. Flores was "justifiably ignorant of [the] newly alleged facts," *Sanders*, 373 U.S. at 10, because the State has gone to great lengths to withhold *Brady* material—including since the time when his first subsequent application was filed in 2016. Therefore, any "failure" to bring facts underlying Claims IV-VIII in a previous application must be excused.

Exception 5(a)(3) also applies. Had the jury been aware of the suppressed favorable evidence and the false and misleading nature of testimony sponsored by the State, no rational juror could have found Mr. Flores guilty beyond a reasonable doubt as he is actually innocent.

The factual basis for these claims was not available until after May 19, 2016.

[3] For instance, Mr. Flores has asked for work product in the form of witness interviews, yet the State has withheld it. It is true that "the work product doctrine insulates a lawyer's research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses' statements from an opposing counsel's inquiries." *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991). But "[t]he privilege derived from the work-product doctrine is not absolute." *United States v. Nobles*, 422 U.S. 225, 239 (1975). "Because *Brady* is based on the Constitution, it overrides court-made rules of procedure. Thus, the work-product immunity for discovery . . . prohibits discovery . . . but it does not alter the prosecutor's duty to disclose material that is within Brady." *See* 2 Charles Alan Wright, FEDERAL PRACTICE AND PROCEDURE § 254.2 (3d ed. 2000); *see also Dickson v. Quarterman*, 462 F.3d 470, 479 n.7 (5th Cir. 2006) (quoting Wright § 254.2). Mr. Flores keenly hopes that, once his meritorious claims arising from prosecutorial misconduct are remanded, and in light of his allegations of actual innocence and the new science supporting it, the DA's Office will refer this matter to its Conviction Integrity Unit for further investigation.

CLAIM IX: DEFENSE COUNSEL IMPROPERLY OVERRODE CHARLIE FLORES'S SIXTH AMENDMENT RIGHT TO MAINTAIN THAT HE WAS INNOCENT OF BETTY BLACK'S MURDER, RESULTING IN A STRUCTURAL ERROR UNDER *MCCOY V. LOUISIANA* THAT REQUIRES A NEW TRIAL.

Mr. Flores meets the section 5(a) requirements for the Court to reach the merits because Claim IX, his "McCoy claim," has not been, and could not have been, presented in a previous, timely-filed habeas application. The legal basis of the claim was unavailable on the date of the initial application.

The Supreme Court of the United States decided *McCoy v. Louisiana* on May 14, 2018, nearly two decades after Mr. Flores filed his initial habeas application in which he challenged the jury's guilt-phase verdict and two years after his first subsequent habeas application was filed on May 19, 2016. The Supreme Court's opinion in *McCoy* acknowledges that it provides a new pronouncement of the Sixth Amendment, setting out at the start that it emerges from circumstances that put it "in contrast to [*Florida v.*] *Nixon* [543 U.S. 175 (2004)]," the 2004 ruling from which it departs. 138 S.Ct. at 1505. *McCoy* is the first case in which the Supreme Court has held that the defendant's Sixth Amendment rights include the personal right to "decide on the objective of his defense" at trial. *Id.*; *see also id.* at 1517-18 (Alito, J., dissenting) (observing that the Court "discovered a new right" and "decide[d] this case on the basis of a newly discovered constitutional right").[4]

[4] There is no "Teague problem" associated with a *McCoy* claim in this procedural posture. *See Teague v. Lane*, 489 U.S. 288 (1989) (setting forth federal nonretroactivity doctrine). The state

Article 11.071 provides for unavailability where "the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date" the previous application was filed. TEX. CODE. CRIM. PROC. art. 11.071, §5(d). Before *McCoy*, no U.S. Supreme Court, federal court of appeals, or Texas appellate court case had recognized or laid the groundwork for the claim that the defendant possessed a Sixth Amendment right to decide upon the objective of the defense. Instead, the statutorily-relevant cases treated claims about a defendant's trial objectives under the rubric of ineffective assistance of counsel rather than the individual defendant's autonomy.

For instance, the Fifth Circuit held in 1990, "the raising of such defenses is a matter of trial strategy." *McInerney v. Puckett*, 919 F.2d 350, 353 (5th Cir. 1990). This put the emphasis on counsel's role—not the defendant's wishes—and explains why the relevant courts' decisions consistently analyzed claims arising from a defense lawyer's choice to override a client's trial—objective using the ineffective-assistance standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See,*

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statute governing subsequent applications does not reference retroactivity. Whether a claim raised in a subsequent application is to receive consideration of its merit will "depend exclusively upon whether it fits the criteria of Article 11.071, Section 5." *Ex parte Blue*, 230 S.W.3d 151, at 156 (Tex. Crim. App. 2007).

e.g., *Haynes v. Cain*, 298 F.3d 375, 379-82 (5th Cir. 2002); *Darden v. United States*, 708 F.3d 1225, 1228-33 (11th Cir. 2013); *United States v. Flores*, 739 F.3d 337, 339-40 (7th Cir. 2014).

McCoy broke new ground, holding that "[b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." *McCoy*, 138 S.Ct. at 1510-11. Because *McCoy* "was the first case in which [a relevant court] explicitly recognized" this type of Sixth Amendment violation, Mr. Flores's claim "was unavailable" under the terms of Article 11.071. *Ex Parte Chavez*, 371 S.W.3d 200, 205 (Tex. Crim. App. 2012).

The legal basis for this claim was not available on May 19, 2016.

CLAIM X: CHARLIE FLORES'S DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR TRIAL WAS VIOLATED BY THE STATE'S USE OF TESTIMONY THAT CURRENT SCIENTIFIC UNDERSTANDING EXPOSES AS FALSE.

Mr. Flores meets the requirements of Section 5(a) for consideration of the merits of Claim X. This federal constitutional Due Process claim relies on: a new scientific consensus in the field of eyewitness identification that did not emerge until 2020; on new quality-control standards for forensic laboratories, including requirements of validation, impartiality, and recordkeeping, adopted to promote basic scientific competency; the recent (2020) disavowal by the State's trial expert of his own trace-evidence testing and testimony; and on material facts relevant to assessing the reliability of both Mrs. Barganier's and Mr. Linch's testimony that were not available until *after* the last habeas application was filed. *See* Ex. 24. In short, this Due Process claim has not been, and could not have been, presented in a previous, timely-filed habeas application.

The factual predicate of the Due Process claim was unavailable when the previous habeas application was filed on May 19, 2016.

PROCEDURAL HISTORY

I. PRE-TRIAL

Betty Black was murdered on January 29, 1998 in Farmers Branch, Texas. About three months later, on May 1, 1998, Charlie Flores was apprehended in Irving, Texas and thereafter arraigned for capital murder. Six months later, voir dire began on January 8, 1999—less than a year after the offense. 2 RR.

While potential jurors were filing out questionnaires, the State produced, for the first time, a small volume of discovery. 2 RR 88-89. The lead prosecutor, Jason January, marked the discovery as an exhibit (SXR1) and represented to the trial court that it was "an exact copy" of the discovery he had just given the defense. 2 RR 89. Defense counsel objected on the record to the inadequacy of the production. ADA January suggested that he was still "looking through" a "big stack" but had not decided whether it was "in the State's best interest" to produce anything more to the defense. 2 RR 90-99.

Meanwhile, voir dire proceeded.

On January 19, 1999, ADA January showed up 30 minutes late for a hearing and without any additional discovery. Ex. 44. In the hearing, ADA January agreed to turn over various things that had not yet been produced. He made multiple promises that the following would (eventually) be produced:

- criminal records for State's witnesses "if it's impeachable;"

- "any promise or benefit to any other witness, we'll let that be known to the Defense;"
- "if I learn of any inducement or pressure on a witness to testify, I'll certainly let the Court and the Defense know;"
- "any exculpatory or mitigatory" evidence that existed;
- "any agreement entered into between the State and any prosecution witnesses that could conceivably influence their testimony."

3 RR 5-6, 14, 24. With respect to confessions, ADA January represented that, as of that date (January 19, 1999): "We don't know of any at this point."[5] 3 RR 4.

The trial court expressly ordered the State, with "[a]ny witness that the State interviews," to inquire "whether any individual has coerced, forced, or threatened" "in any way in order to procure the witness's testimony" as the defense requested. 3 RR 6-7.

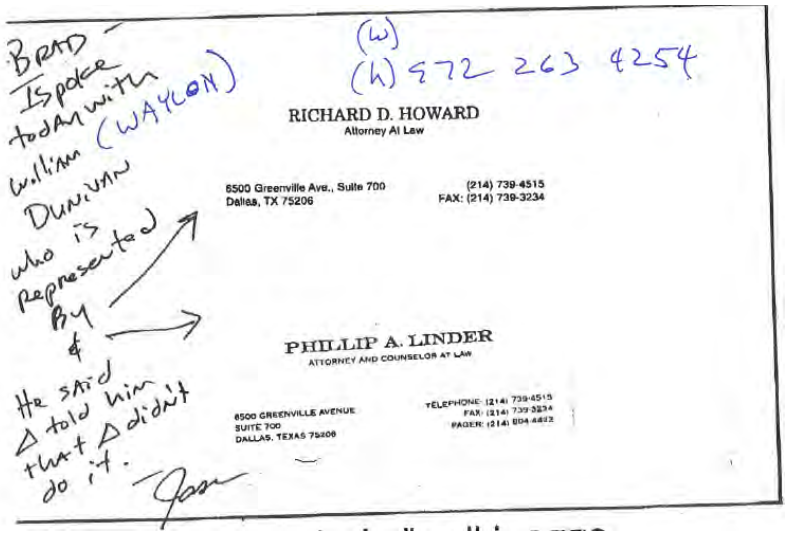
As for deals—including with co-defendant Ric Childs and co-conspirator Jackie Roberts—ADA January insisted "there hadn't been any deal with either at this point." 3 RR 25. ADA January then insisted that there "wasn't enough evidence to indict [Jackie] as a coconspirator so there's not really a deal[.]" *Id*. The court ordered: "If any deals are made, make them known to the Defense." *Id*.

[5] That statement was patently false because, ***eight months before***, the State had obtained an Affidavit signed by Homero Garcia while in FBI custody, purporting that Charlie Flores had confessed to Homero that he had "shot the dog." *See* Ex.45.

As voir dire continued, the State still failed to produce basic discovery. Therefore, on February 10, 1999—with five jurors already seated and the presentation of evidence set to begin in a month—the defense filed a Motion to Compel Discovery in which counsel told the court:

> Despite repeated requests by the Defense, and despite previous Court Order, the State of Texas has refused to comply with reasonable discovery. The State has tendered to the Defense some limited discovery, but among the items that the Defense knows exists and yet have not been tendered to Defense are the following:
>
> 1. **Copies of crime scene photographs and other photographs the State intends to offer into evidence.**
> 2. **A videotape of the crime scene.**
> 3. **Witness Statements taken by the FBI and various law enforcement agencies.**
> 4. **Tape recordings and transcripts of co-defendant's statements.**
> 5. **Co-defendant's and co-conspirator's written statements.**
> 6. **The lead Police Investigator's investigation file.**

The only indication in the record of additional disclosures is sparse. On March 12, 1999—during the brief window between the end of voir dire and the beginning of the presentation of evidence—ADA January sent a "Fax Transmittal Form" to defense counsel Brad Lollar upon which January had scribbled "exculp. ev." and purported that he had spoken that day with "William (Waylon) Dunivan" and "[h]e said Δ told him that Δ didn't do it."



The name of this potential witness was misspelled.

When trial began, Charlie Flores's parents, Lily and Caterino Flores were under indictment for allegedly "hindering the apprehension of a fugitive," *i.e.*, their son; and ADA January had made multiple attempts to indict Charlie Flores's common-law wife Myra Wait for the same. Unbeknownst to the defense, ADA January had also had several witnesses (including Vanessa Stovall and Jason Clark) testify before the Grand Jury convened in the case pending against co-defendant Ric Childs; but those transcripts were not produced before trial.

II. TRIAL

At the start of trial, the State had no physical evidence linking Charlie Flores to Mrs. Black's murder: no DNA, no firearm, no fingerprints, no fibers. The State also had no eyewitnesses (other than the co-defendant Ric Childs, who did not testify and, unbeknownst to the defense, had already been promised a deal).

The presentation of the State's evidence began on March 22, 1999. It was uncontested that two men entered the Blacks' house the morning of January 29, 1998, and tore up the walls in search of something (and failed to find the $39,000 that was, in fact, hidden in the house). One of these two men had shot Mrs. Black with a .380 pistol. One of the other uncontested facts was that one of these two men was Ric Childs.

Among the witnesses whom the State had subpoenaed to appear at trial was the Blacks' next-door neighbor, Jill Barganier. After seeing Charlie Flores in the courtroom at the defense table, she told the prosecutors that she could *now* identify him as the passenger she had seen getting out of a Volkswagen Beetle before dawn the day Mrs. Black was murdered. 36 RR 85-86, 92.

Later that day, after Mrs. Barganier started to testify, defense counsel asked for the jury to be excused then formally objected to her testifying about the identification—which she was making for the first time thirteen months after-the-fact. Defense counsel also raised the fact that Jill Barganier had been put through a hypnosis session conducted by law enforcement. The prosecution argued that the hypnosis session had made no difference but agreed to move on to another witness until they could have a "full blown Zani hearing" in the morning. 35 RR 161. A "Zani hearing" was necessary because that is what Texas law required: that the trial court assess whether "procedural safeguards" outlined in a 1988 case, *Zani v. State*,

758 S.W.2d 233 (Tex. Crim. App. 1988), had been complied with such that testimony from a hypnotized witness could be deemed admissible.

In the morning, outside the presence of the jury, defense counsel informed the court that they intended "to object to her testimony on the grounds that her in-Court identification is tainted by the hypnotic episode that she had undergone." 36 RR 15-16. In the Zani hearing that followed, the State had the burden and presented four witnesses: Officer Jerry Baker (a lead investigator in the Black murder case who sat in on the hypnosis session), Officer Roen Serna (the police officer hypnotist), Dr. George Mount (the State's hypnosis expert), and Mrs. Barganier. Dr. Mount, who had been contacted the night before, opined that he saw no problems with the hypnosis session that Officer Serna had conducted and endorsed Officer Serna's use of the "movie theater technique" with Mrs. Barganier as common, permissible, and appropriate for memory-retrieval. 36 RR 69-84.

The defense presented no witnesses during the Zani hearing but argued that all of the *Zani* procedural safeguards had been violated thus Mrs. Barganier should be barred from testifying regarding her identification. The defense also emphasized that "419 days" had passed since Mrs. Barganier's observation, and yet now she was "saying she's 100 percent positive that the Defendant who sits here today is the person that she saw." 36 RR 111. The State argued that (1) "the hypnosis had little or nothing to do with her in-Court identification at all" and (2) "if it had any effect,

it certainly was proper under any of the *Zani* guidelines." ADA January also argued that there was considerable evidence to corroborate her identification. 36 RR 111-13. Based on the representation made by ADA January about the existence of corroborating evidence, the trial judge denied the defense's motion to suppress the identification testimony. 36 RR 117.

After the Zani hearing, the State continued with its presentation, putting on Charles Linch as a trace-evidence expert, who claimed to have found potato fiber inside a .44 Magnum gun (which had been recovered from Ric Childs' grandmother's house after his arrest fourteen months before); his testing had been done the day before he testified. 36 RR 208. The State also presented Homero Garcia, who had signed an Affidavit during a custodial interview with the FBI, after being awake "for four days," stating that Flores had confessed to him that he had "shot the dog." 36 RR 229, 221. The State ended that day by calling Jill Barganier. She testified that Flores was the passenger she had seen get out of the Volkswagen and pointed him out in court. 36 RR 283. She testified "I thought we made eye contact. They knew someone was there watching them," which made her "real nervous." 36 RR 285. She repeated "I saw him look at me, and I thought he was watching me."[6] 36 RR 286. Her testimony concluded with an assurance "I'm

[6] In the evidentiary hearing in the first subsequent writ proceeding, Mrs. Barganier admitted that she may just have "imagined" making eye contact with this man who she saw through her

positive" when asked again if Flores was the man she had seen and added that her certainty was "[o]ver 100 percent. He's the man I saw that morning." 36 RR 294.

The State devoted the next day, March 25, 1999, to the presentation of extraneous-offense evidence, mostly Flores's efforts to avoid being apprehended. 37 RR.

The defense was supposed to start its presentation the next morning but did not do so. Nothing on the record indicates why the court took a recess on Friday, March 26, 1999. But on Monday, March 29, 1999, the defense began putting on its case by recalling Jill Barganier. 38 RR 13. She was not asked about the hypnosis session. Through her testimony, the defense established only that: the sun had not yet come up when she had made her observation because the sunrise was recorded at 7:25 a.m. the day of the murder; the lights were on inside her house but not outside; and she was positive she had looked out her window at 6:45 a.m., a timeline that conflicted with the testimony of other State's witnesses. 38 RR 13-19. Other than Mrs. Barganier, the defense put on: Doug Roberts (ex-husband and friend of the State's star witness, Jackie Roberts) recalled for cross-examination; Allen Jariwak (manager of a Howard Johnson where Jackie Roberts had hidden under an assumed name after the murder); Raymond Cooper (SWIFS ballistics analyst who explained

mini-blinds from the length of her house away when she was inside and he was outside 4 EHRR 132.

that a .380 pistol admitted into evidence had actually been excluded as the murder weapon); Jackie Roberts recalled for cross-examination; Deborah Howard (one of Ric Childs' girlfriends); Sgt. Ashabranner of the Farmers Branch SID unit; and lead detective of the Betty Black case, Gerald Callaway.[7] Defense counsel did not call Mr. Flores's alibi witness, Myra Wait, although she was present in the courthouse through trial.

The evening of March 29, 1999, the trial court held an unreported charge conference. 39 RR 12. The next morning, the trial court asked the parties if they had any objections to the charge to put on the record. Defense counsel stated: "the one objection we have is the Court has not given us the Independent Impulse Charge, which we talked [about] at great length yesterday afternoon." *Id.* But none of that discussion had been captured by a court reporter. The record is clear, however, that the trial court overruled the objection; and the charge that was given to the jury did not include an "Independent Impulse" instruction.

The next day, March 30, 1999, the State was granted a motion to reopen the record so that ADA January could put on one more witness: Elaine Dixon. The goal was to "clear up" testimony that the State's star witness, Jackie Roberts, had given, denying previous admissions that she had drawn a map for Ric Childs showing how

[7] His name is misspelled in the trial record as "Calloway."

to get from her house on Emeline Street to the Blacks' house in the same neighborhood on Bergen Lane. 39 RR 12.

In its Closing Arguments, the State downplayed the testimony of several of its own witnesses who had been caught in lies, instead highlighting the seemingly credible, unbiased testimony of Mrs. Barganier. 39 RR 54, 55, 93, 106. Then, without obtaining Mr. Flores's consent, defense counsel stood up and conceded in the defense Closing Argument that he had been present at the scene. 39 RR 68-85. This concession amounted to a concession of guilt to capital murder under the law of parties, one of the State's theories in the charge.[8] Defense counsel also invited the jury to find his client "guilty of murder; find him guilty of whatever you want[.]" 39 RR 86. The jury returned a guilty verdict. 39 RR 113. The punishment-phase presentation began immediately afterwards.

The next day, March 31, 1999, the State's sentencing evidence continued. At a break in trial, outside the presence of the jury, the defense explained that they had planned to call Charlie's parents (Lily and Carter Flores) and Myra Wait as punishment-phase witnesses but were not going to do so because they were still either under indictment or threat of indictment. 40 RR 139-140.

[8] This "strategy" is inexplicable as it guaranteed a conviction of the client who was maintaining his innocence.

On April 1, 1999, the defense rested without putting on *any* punishment-phase witnesses. 41 RR 25. Moments before the jury returned with its punishment-phase verdict, ADA January marked two exhibits and said: "The State would like to offer State's Exhibit R100 and R101, which are copies of some of the discovery given to Defense prior to trial." 41 RR 99. When asked if the defense objected, Brad Lollar made clear that he would need to review the material first. ADA January's response was: "Yeah, if the Defense has any objection to that, they don't have some of that, let us know. I'm representing to the Court that's what I gave them." *Id.* But before the defense had the chance to review these materials, the jury was brought in, its punishment verdict was announced, and Mr. Flores was sentenced to death. 41 RR 100-102.

III. DIRECT APPEAL

Appointed counsel pursued a direct appeal. Among the issues raised were the sufficiency of evidence to support the guilty verdict, as well as prosecutorial misconduct in Closing Argument, and whether the trial court had erred in its ruling under *Zani* that sufficient procedural safeguards had been followed in the hypnosis session that police conducted on Mrs. Barganier. The direct appeal was decided on November 7, 2001. *See Flores v. State*, AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (unpub., not available on Westlaw or Lexis). The opinion, which focused on the sufficiency-of-evidence point of error, included a number of misstatements

regarding the evidentiary record. *See* Factual Background, Section VII. Seemingly, an untimely motion for rehearing was filed, but the mandate issued the same day, overruling all points of error and affirming the judgment.

IV. INITIAL WRIT PROCEEDING

After trial, the issues of trial counsel's ineffectiveness and the prospect of prosecutorial misconduct were never investigated—although the face of the record illustrated the fundamental unfairness of this trial and plenty of fodder for developing extra-record claims. For instance, the complete failure to put on a punishment-phase case—and thus no mitigation whatsoever—should have been an obvious basis for an ineffectiveness claim in the initial state habeas proceeding. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) ("the fundamental respect for humanity underlying the Eighth Amendment … requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); *Wiggins v. Smith*, 539 U.S. 510 (2003). But Flores received patently ineffective representation in state habeas too—thus no extra-record evidence was adduced to support his claims, and most of the claims that were raised were not cognizable in state habeas. Former federal counsel tried to address this core failure in Flores's first subsequent application (WR-64,654-02). Unfortunately, the

claim regarding trial counsel's abject failure to present a case in mitigation was deemed procedurally barred.

Mr. Flores's initial state habeas counsel had spent most of his limited time on the case trying to withdraw—and the lawyer who was supposed to replace him (Steve Rosen) never even picked up the record until he was held in contempt by Judge Nelms. The initial habeas application that was filed, after a rare extension in response to a desperate *pro se* plea for more time, consisted mostly of large block-quotations from cases. No competent evidentiary proffers were attached, and most claims, as pled, were not cognizable in habeas.

In the initial writ proceeding, there was never a written motion or any proceeding in which an oral motion could have been made, to introduce evidentiary proffers as evidence consistent with the Rules of Evidence. The State filed an Answer, to which evidentiary proffers were attached but they were never admitted into evidence. These proffers consisted of affidavits from the four principle lawyers involved in trying the case: Jason January, Greg Davis, Brad Lollar, and Doug Parks. *See* Ex. 25. Neither these affidavits nor the State's Answer were served on Mr. Flores, who had been abandoned by counsel at that point. According to the Certificate of Service, service was made only on an attorney (Steve Rosen) who had never appeared on Mr. Flores's behalf and never did any work on the case.

Mr. Flores did not even know that his trial counsel had filed affidavits in support of the State until years later when he was appointed federal habeas counsel. Ex. 4. At that time, he had no means to rebut the assertions in those affidavits. The convicting court and then the CCA had long since denied relief. *See Ex parte Flores*, WR-64,654-01, 2006 Tex. Crim. App. Unpub. LEXIS 744 (Tex. Crim. App. Sept. 20, 2006).

Thereafter, Mr. Flores was denied relief in federal court as well, with the State relying on long quotations from the decision in the direct appeal purporting to describe the evidence of guilt that had been adduced at trial and also quoting the 2001 attorney affidavits that had not been before the jury and had never been admitted into evidence. *See Flores v. Stephens*, Case 3:07-cv-00413-M, 2014 U.S. Dist. LEXIS 97028 (N.D. Tex. July 17, 2014) (denying certificate of appealability); *Flores v. Stephens*, 794 F.3d 494 (5th Cir. 2015) (affirming denial of certificate of appealability); *Flores v. Stephens*, 2016 U.S. LEXIS 913 (2016) (certiorari denied in initial federal habeas proceeding).

V. FIRST SUBSEQUENT WRIT PROCEEDING

In 2016, Mr. Flores learned that the State had set a date for his execution. With an execution date pending, the investigative file that former ADA January had promised to produce before trial was finally produced—in part. What remained of

the file was obtained directly from the Farmers Branch Police Department on March 28, 2016.

Soon thereafter, Mr. Flores filed his first subsequent application for a writ of habeas corpus relying in part on Article 11.073, which provided a vehicle to bring claims, without being procedurally barred, challenging the reliability of science that the State had used to obtain a conviction. *See* TEX. CODE CRIM. PROC. art. 11.073. Mr. Flores's 11.073 claim was that he was entitled to a new trial because the State had relied on discredited "science" to put an unreliable, hypnotically induced identification before the jury, which violated his constitutional rights to due process and to be free from cruel-and-unusual punishment.

The State filed an Answer. The State argued that Mr. Flores could not show "that the trial court would have excluded Jill Bargainer's testimony as a result of … new scientific evidence[.]" Answer at 26. Alternatively, the State argued that, even if new scientific evidence shows that the testimony of the hypnotized witness, Ms. Bargainer, who purported to identify Mr. Flores, was unreliable, "he certainly cannot show that he would not have been convicted even if the trial court had excluded her testimony." *Id.*; *see also id.* at 29. With this alternative argument, the State placed the integrity of the entire trial in issue.

On April 12, 2016, counsel for Mr. Flores sent a query to the Dallas County Conviction Integrity Unit (CIU) asking if a slide that the State's expert, Charles

Linch, had created during trial still existed. The query was forwarded to SWIFS, which prepared a report on April 21, 2016, indicating that the slide was still in storage. Counsel for Mr. Flores then filed a motion seeking access to the slide. ***The State opposed the motion.***

On May 27, 2016, the CCA granted a stay of Mr. Flores's execution and remanded his hypnosis junk-science claim for further factual development. *Ex parte Flores*, WR-64,654-02, 2016 Tex. Crim. App. Unpub. LEXIS 1151 (Tex. Crim. App. May 27, 2016) (unpub.). In a concurrence, Justice Newell noted: "I cannot imagine that the concerns regarding suggestive eyewitness identification evaporate when eyewitness testimony is enhanced through hypnotism…. [G]iven the subject matter, by granting a stay this Court acknowledges that whatever we do, we owe a clear explanation for our decision to the citizens of Texas." *Ex Parte Charles Don Flores*, No. WR-64,654-02, 2016 Tex. Crim. App. Unpub. LEXIS 1151 (Tex. Crim. App. May 27, 2016), *1 (Newell, J., concurring).

Because a stay of execution had been granted, on June 6, 2016, a defense expert was allowed to inspect the slide that Mr. Linch had created (back in March 1999) at SWIFS, in the presence of counsel for the State.

On August 11, 2016, the Office of Capital and Forensic Writs (OCFW) was appointed as substitute counsel to represent Charlie Flores going forward. When OCFW was appointed, it did not yet have access to any of Mr. Flores's file. Soon

thereafter, OCFW acquired the voluminous file from Mr. Flores's former federal habeas counsel. Some of the file was available in electronic form, some of it was only available in paper. The latter included numerous boxes that contained what constituted trial counsel's files from nearly two decades before, then in the possession of attorney Bruce Anton. After obtaining these materials, OCFW scanned and began trying to organize the materials while also learning the case. Ex. 24.

Among the voluminous materials in the file was the Farmers Branch police file, which had been produced for the first time to Mr. Flores's former federal counsel, Bruce Anton, on or around March 28, 2016. This file, of approximately 4,000 pages, had been obtained directly from the police department. Because the file was heavily redacted and facially incomplete, on April 5, 2017, OCFW sent its own request directly to the police department for the file. Thereafter, the OCFW received a duplicate copy of the same materials that Mr. Anton had received. *Id.*

On April 10, 2017, OCFW sent a Public Information Act (PIA) request to the DA's Office seeking personnel files for former prosecutors Jason January and Gregory S. Davis who had tried the case against Mr. Flores. Thereafter, the DA's Office, which represented the State in the writ proceeding, sent a letter to the Office of the Attorney General, arguing that the requested information "may be subject to the following exceptions" contained in the PIA, listing sixty-three potentially applicable exceptions. The DA's Office ultimately convinced the Office of the

Attorney General that the DA's Office could permissibly withhold most of the requested information under the PIA because that information could be obtained through discovery in the writ proceeding instead. *Id.*

On April 28, 2017, an agreed order was entered permitting OCFW access to the DA's Office's file for Mr. Flores case. A file review took place on or around that date. The DA's Office represented in a pleading that it was withholding "work product and confidential information protected from disclosure under Texas law." No privilege log was provided. Further investigation led OCFW to believe that additional material existed, or had once existed, that should have, but had not yet, been disclosed. *Id.*

On June 30, 2017, the DA's Office turned over some materials in the personnel files of the two former prosecutors in response to the PIA request that had been made over two months earlier. After reviewing those materials, OCFW realized that relevant materials, such as information related to the termination of ADA January's employment, had not been disclosed. *Id.*

On August 22, 2017, the OCFW filed a Motion to Compel Discovery seeking full discovery of the personnel files of former ADAs January and Davis, utilizing the State's argument that although these materials existed and were relevant to the pending litigation, they were not discoverable under the PIA because they were instead discoverable in the pending habeas proceeding. *Id.*

On July 26, 2017, in response to a different PIA request, OCFW received from SWIFS the contents of the personnel file of its former employee, Charles Linch, released for the first time. *Id.*

On September 5, 2017, the OCFW received a response to a FOIA request that had been sent to the FBI five months earlier seeking materials related to Mr. Flores. The documents that the OCFW received were heavily redacted. On information and belief, a journalist had been able to obtain more documents making a similar FOIA request. *Id.*

On September 6, 2017, the OCFW sent a PIA request seeking all documents related to Mr. Flores's case that were in the possession of the CIU. OCFW received a partial response to its request on September 26, 2017. The State had previously objected to the disclosure of any materials from the CIU. *Id*.

On September 28, 2017, the OCFW filed an Emergency Motion for Disclosure of Favorable or Impeachment Evidence, *i.e.*, a *Brady* motion seeking the following materials, which had, as of that date, never been produced and most of which have still not been produced:

- All conversations with and notes taken by Farmer's Branch Police Department officers in relation to this case, including, but not limited to, notes taken by Det. Callaway, Det. Koehler, Det. Ashabranner, Det. Stanton, Det. Stephens, Det. Baker, Lt. Porter, Officer Serna, and any other officers or detectives who investigated the underlying crime. This should include any witness statements.

- Any and all notes or other documents regarding the preparation and presentation of photo line ups to potential eyewitnesses.

- Any and all transcripts of custodial interviews conducted with potential witnesses, conducted by Farmers Branch Police Department, the FBI, or any other law enforcement representatives in the course of investigating the murder of Elizabeth Black.

- Any and all witness statements, affidavits, or declarations made by potential witnesses and provided to law enforcement or representatives thereof.

- All communications with and notes taken by SWIFS analyst Charles Linch in relation to this case.

- Expert reports inconsistent with the State's case or tending to support the defense case.

- All deals or "consideration" or promises of "consideration" given to, or on behalf of, all State witnesses or evidence that such consideration was expected or hoped for by any State witnesses, including, but not limited to, Jackie Roberts, Doug Roberts, Homero Garcia, Johnathan Wait, Johnny Wait, Vanessa Stovall, Terry Plunk, Alan Weaver and Rick Childs. Upon information and belief, no such information was ever provided to trial counsel.

- Knowledge of police intimidation of witnesses, including but not limited to Homero Garcia, Johnathan Wait, Myra Wait, Lily Flores, and Carter Flores.

- Evidence or information indicating the untruthfulness of witnesses, including, but not limited to, Detective Jerry Baker, Officer Roen Serna, Charles Linch, Jackie Roberts, Doug Roberts, Homero Garcia, Johnathan Wait, Johnny Wait, Terry Plunk, Vanessa Stovall, and Doug Roberts.

- Contradictory or inconsistent statements made by any of the State's witnesses regarding any matter at issue at trial or in this cause.

On or around October 3, 2017, the State filed a response opposing the *Brady* motion. The State also filed a "Motion to Exclude the Testimony of Witnesses Not

Relevant to the Proceedings," seeking to strike most of the witnesses that Mr. Flores had subpoenaed for the upcoming evidentiary hearing.

On October 4, 2017, a hearing was held on Mr. Flores's *Brady* motion and on the State's motion asking to exclude most of Mr. Flores's witnesses. 3 EHRR. Mr. Flores's counsel outlined reasons to suspect that *Brady* material existed that had not yet been disclosed, including a reference in the partial police file to an Affidavit that Jill Barganier, the subsequently hypnotized witness, had completed the day of the crime. 3 EHRR 7-17. State's counsel insisted that there was nothing more to disclose and then asked that most of the witnesses on Mr. Flores's witness list be struck. Mr. Flores's counsel explained that, to show how significant the identification made by the hypnotized witness had been to the State's conviction, Flores planned to call as witnesses several of the investigators who had worked on the case, the two lead prosecutors (Jason January and Brad Davis), lead trial counsel (Brad Lollar), and several of the heavily compromised witnesses whom the State had relied on at trial (including Jackie Roberts and Homero Garcia). The court made an oral ruling granting the *Brady* motion but also granting the State's motion, expressly limiting the witnesses that Mr. Flores would be permitted to call in the evidentiary hearing to those who had participated in the hypnosis session and experts relevant to litigating the hypnosis issue. 3 EHRR 44.

On October 10, 2017, an evidentiary hearing on the hypnosis claim commenced. At the beginning of the hearing, State's counsel asked the court to take "judicial notice of the record from [Mr. Flores's] original writ proceeding[.]" 4 EHRR 10. Mr. Flores's counsel objected to the extent that the State intended to rely on evidentiary proffers attached to pleadings in the previous writ proceeding as substantive evidence, since no evidentiary hearing had been conducted in the original writ proceeding and nothing was ever "admitted" into evidence during a hearing of any kind. 4 EHRR 10-11; *see also Ex parte Flores*, No. WR-64,654-01, 2006 WL 2706773 (Tex. Crim. App. 2006) (per curiam). Moreover, Mr. Flores had just been denied the opportunity to call any of the affiants (January, David, Lollar, Parks) as witnesses so that their credibility could be assessed.

Thereafter, OCFW continued to seek discovery because its ongoing investigation indicated that additional records might exist relevant to assessing whether Mr. Flores would be able to raise additional cognizable claims under, for instance, *Brady v. Maryland*, at some future date. Ex. 24.

On November 28, 2017, OCFW received a disc from SWIFS with materials reflecting its work performed during the Elizabeth Black murder investigation. This production included materials that had *not previously been disclosed*, including Charles Linch's casefile and records of contacts between members of the DA's Office and SWIFS in advance of and during Mr. Flores's trial. *Id.*

On December 11, 2017, applicant's counsel filed a Memorandum of Law Regarding the Proper Scope of Judicially Noticed Materials, explaining that "judicial notice" is a legal term of art defined in the Texas Rules of Evidence that cannot be used to treat as settled fact the substance of highly contested affidavits never subjected to adversarial testing—as the State was urging the Court to do. Moreover, those materials were never before the jury in the underlying trial and thus could not be construed as "corroborating evidence" relevant to deciding any element of the hypnosis claim at issue in the writ proceeding.

On December 18, 2017, Closing Arguments were held in the writ proceeding. 7 EHRR. Thereafter, both parties submitted proposed Findings of Fact and Conclusions of Law (FFCL).

While awaiting the trial court's recommendation on the hypnosis claim, the OCFW continued to investigate. Ex. 24.

In October 2018, OCFW received, via email, a copy of the trial court's FFCL, which adopted the State's proposal wholesale. *Id.* The FFCL had been signed on October 3, 2018. Counsel for Mr. Flores filed lengthy objections to the FFCL with the CCA, but those were not ruled on. *See Ex parte Flores*, No. WR-64,654-02, docket entry Oct. 16, 2018.

On or around August 15, 2019, after having obtained a release from Jackie Roberts, who was then incarcerated, OCFW filed an ex parte motion, under seal,

seeking an order to compel the Dallas County Community Supervision and Correction Department (CSCD) to produce documents related to Jackie Deneice Roberts, who had been the State's star witness in the 1999 trial. The court denied the motion. Ex. 24.

On or around August 15, 2019, the OCFW also filed an ex parte motion, under seal, seeking an order to compel the release of Texas Board of Pardons and Parole records related to Mr. Flores's co-defendant, Richard Childs. The court denied the motion. *Id.*

On or around October 1, 2019, the DA's Office produced materials from former ADA Greg Davis's personnel file for the first time. *Id.*

On or around October 24, 2019, OCFW filed two ex parte motions, under seal, asking the trial court to reconsider OCFW's requests for an order to compel the Dallas County CSCD to produce documents related to Jackie Deneice Roberts, and for an order to compel production of Richard Childs' parole records. *Id.*

In November of 2019, OCFW was again granted access to the District Attorney's file on the Flores case. During the file review, OCFW obtained additional materials that did not seem to have been previously disclosed. *Id.*

On May 6, 2020, the CCA issued an opinion denying relief on Mr. Flores's hypnosis claim. *Ex parte Flores*, WR-64,654-02, 2020 Tex. Crim. App. Unpub. LEXIS 215 (Tex. Crim. App. May 6, 2020) (denying relief).

On May 20, 2020, the State filed a "Motion to Set Execution Date." After further litigation, the court decided to hold the motion in abeyance.

On June 11, 2020, the OCFW filed Charles Don Flores's Renewed Motion for Disclosure of Brady Evidence. The State responded that it was not aware of any *Brady* material that had not yet been disclosed. The trial court granted the motion on July 9, 2020.

On July 10, 2020, the DA's Office released some pages from Richard Childs's parole records for the first time. Based on Bates numbers on the documents, the total file would seem to be at least 468 pages long. The DA's Office later produced additional, but not all, of the parole records and additional parts, but not all, of former ADA January's personnel file. The latter does not reveal why his employment was suddenly terminated in late 2000, soon after the plea deal with Ric Childs was formalized.

On October 21, 2020, the State filed another Motion to Set Execution Date. The trial court thereafter determined that the motion should be held in abeyance until April 1, 2021.

The instant second subsequent application for writ of habeas corpus follows.

CAST OF CHARACTERS

The scope of the false, misleading, and confusing testimony underlying this wrongful conviction is difficult to grasp in part because of the complexity of the facts and the number of "characters" involved in the case. Therefore, the following "Cast of Characters" is provided to assist the reader in processing the Factual Background that follows. Photos from near the time of trial are included where available.

Convicted Defendants

Charles Don Flores

"Charlie"

Texan of Mexican descent who resided in Irving, Texas and worked for his father's roofing business; sold drugs to Ric Childs; accused of the capital murder of Elizabeth "Betty" Black as Ric's co-defendant; pled not-guilty; convicted and sentenced to death.

Richard Lynn Childs

"Ric"[9]

Intravenous drug user who resided with several different girlfriends in the Dallas metroplex; son of former Irving police officer; knew Charlie a few years before the murder and resurfaced again soon before it, wanting to acquire drugs; sexually involved with Jackie Roberts at time of murder; owner of a

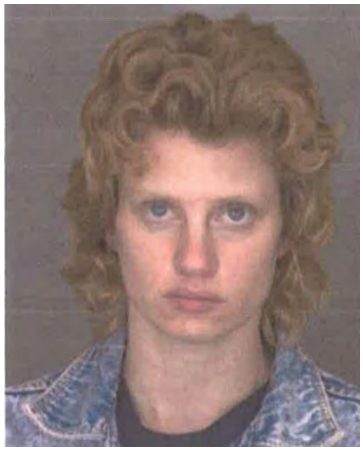
[9] In various documents, including the trial Reporter's Record, Childs' first name is often spelled "Rick" or "Ricky," but he seems to have spelled it "Ric." Therefore, that is the approach adopted here.

psychedelic Volkswagen Beetle seen outside the victim's house shortly before murder; pled guilty to shooting Betty Black as part of a plea agreement reached after Charlie Flores was convicted and sentenced to death.

Co-Conspirator

Jackie Deneice Roberts

"Jackie"



Estranged daughter-in-law of victim Betty Black; drug dealer and user; sexually involved with Ric Childs prior to murder; common-law wife of Gary Black; ex-wife and friend of Doug Roberts; resided in Farmers Branch at 13412 Emeline (her mother's house) with three children; State's star witness at trial.

Victim and Immediate Family

Elizabeth Black

"Betty"

Resided in Farmers Branch at 2965 Bergen Lane with husband Bill Black; mother of Gary Black and his sister Shelia; grandmother to Gary's and Shelia's children; murder victim.

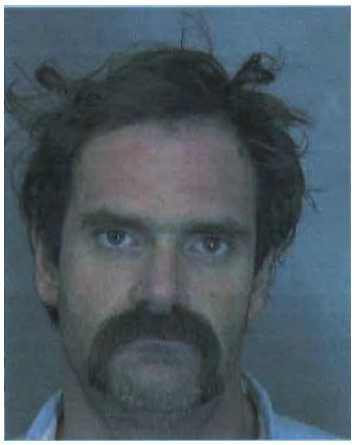
Bill Black — Resided in Farmers Branch at 2965 Bergen Lane with wife Betty; discovered wife's body around 9:30 AM on January 29, 1998; State's witness at trial.

Gary Black — Son of Betty and Bill Black; estranged common-law husband of Jackie Roberts; successful drug dealer incarcerated at time of murder; reduced Jackie's allowance from his drug money shortly before murder; had resided in Farmers Branch at both 13412 Emeline (with Jackie) and at 2965 Bergen Lane (with parents); hid drug money in parent's house and, per rumor, various cars before going to prison.

Santana — Doberman Pinscher found shot dead at 2965 Bergen Lane along with Mrs. Black.

Gary & Jackie's Circle

Doug Roberts — Resided in Farmers Branch; intravenous drug user and dealer; knew Gary Black since high school; knew Ric Childs; formerly married to Jackie, with whom he remained close; was present at 13412 Emeline Street (Jackie's mother's house) the morning of Betty Black's murder; State's witness at trial; contrary to



Jackie's story at trial, saw only Ric leaving the Emeline house in the VW.

Jason Clark

Resided in Farmers Branch, on Emeline Street across the street from Jackie; drug user; friends with Doug Roberts, Jackie Roberts, Gary Black; met Ric Childs a month or so before the murder; broke into cars with Ric; State's witness before the Grand Jury in Ric Childs's case only; testified to the Grand Jury that Ric had entered into their group recently before the murder, that Ric had ingratiated himself by spreading around free drugs, and that he had watched a cop show with Ric about using potatoes as silencers.

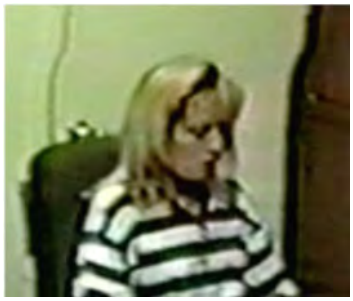
Alan Weaver

Friends with Doug and Jackie Roberts; at 13412 Emeline Street the morning of Betty Black's murder; seems to have spent significant time with Jackie after the murder but, like other associates of Jackie, made no mention to police of Charlie Flores or any Hispanic individuals threatening her; in interviews with police, gave a story of the morning of the murder that was consistent with Doug's original interview but inconsistent with Jackie and Doug's trial testimony, and which was inconsistent with the claim that Charlie was with Ric and Jackie when they arrived at the Emeline house before the murder.

Ray Graham	Intravenous drug user who resided in Irving and knew Charlie and Ric; formerly of Farmers Branch, where he grew up and knew Gary Black, Doug Roberts; Myra heard Ric talk to Ray about a breaking and entering job Ric wanted to do; reportedly sold a .380 firearm to Ric Childs (which could have been the murder weapon that was never recovered); Ray called Charlie on January 31st to let him know that Ric had been arrested for capital murder and the police were looking for the VW that Ric had abandoned outside Charlie's trailer.
Terry Plunk	Resided in Garland; higher-volume drug dealer who supplied drugs to Jackie (Jackie's "connect"); supplied drugs in deal organized by Ric and unexpectedly involving Jackie and Charlie (a stranger to Plunk) on night before the murder; State's witness at trial; contradicted Jackie's testimony about Charlie's actions during the drug deal.
Judy Haney	Resided near Love Field; friends with Terry Plunk and Jackie; provided her apartment for the drug deal with Terry Plunk that was organized by Ric on night before the murder; State's witness at trial; contradicted Jackie's testimony about Charlie's actions during the drug deal.
Elaine Dixon	Doug Roberts' girlfriend; drug user; lived with Jason Clark on Emeline Street across the street from Jackie; Jackie often left her kids with Elaine; State's witness at trial, called to try to shore up Jackie's false testimony that the map to the Blacks' house which she drew was for Elaine's benefit, not for Ric to use in the burglary, contrary to Jackie's contemporaneous statements to investigators.

Blacks' Neighbors

Jill Barganier



Resided in Farmers Branch next door to Betty and Bill Black; saw two men get out of Volkswagen the morning of murder; submitted to hypnosis session at police station; State's witness in Zani hearing and before the jury; positively identified Ric Childs as man she observed; described second man as white with long hair; was unable to identify anyone (including a recent photo of Charlie Flores, a Hispanic man with short hair) in police lineups; only identified Flores as second man thirteen months later, at trial.

Robert Barganier

Resided in Farmers Branch, next door to Betty and Bill Black; married to Jill Barganier; observed Volkswagen and recognized it as having previously been on Emeline Street at Jackie's mother's house; State's witness at trial.

Michelle Babler

Resided in Farmers Branch across the street from the Blacks' house; she and two minor sons witnessed two men get out of Volkswagen the morning of the murder; State's witness at trial, as was her minor son Nathan; her description of the car's passenger changed significant from the day of murder to conform to Charlie's appearance.

Ric Childs' Circle

Shelia Vanessa Stovall "Vanessa"

Resided in Irving, Texas; Ric Childs' girlfriend since high school; was waiting for him at his grandmother's house in North Dallas at 11807 High Meadow the night

before the murder; was allowed to meet privately with Ric when he was in police custody; interview with her was not recorded; State's witness at trial; testified that Ric and Charlie were with her in North Dallas between 6:30 and 7:00 a.m. on the morning of the murder, which notably overlaps with the time during which Jackie claimed Ric and Charlie were dropping her off at the Emeline house (7:00-7:15 a.m.), and which also overlaps with when Jill Barganier saw two men outside the Blacks' home (6:45 a.m.) in Farmers Branch.

Deborah Howard

Resided in Irving, Texas; one of Ric Childs' girlfriends, whom Ric met through Ray Graham; her name was given to FBPD by Roy Childs, Jr., Ric's brother; reported to police that, towards the end of 1997, Ric was obsessed with some drug money hidden behind a wall by a drug dealer; defense witness at trial; corresponded with Ric while in jail, who referred to the deal he was to receive before Charlie's trial.

Mack Salmon

Ric Childs's uncle, who went to 11807 High Meadow on the day after the murder while Ric and Jackie were there, and removed Ric's backpack from Jackie's car, which was later found on Ric when he was arrested and which contained rounds of the same ammunition that had been used to kill Betty Black; interviewed by police after Ric's arrest, but was apparently not asked why he had taken the backpack into the house; never charged for assisting Ric in attempting to evade arrest.

Robert Peters

Ric Childs' friend who drove a pick-up to 11807 High Meadow, where Ric was hiding after the murder, and gave Ric his vehicle and clothing, apparently in order

to assist him in evading the police; interviewed by police after Ric's arrest; never charged for assisting Ric in attempting to evade arrest.

Officer Roy Childs, Sr. Ric and Roy Jr.'s biological father; passed away in 2020; career member of the area's law enforcement, including as a reserve police officer for the Irving PD; was working for the Department of Public Safety in Dallas at the time of the Black murder.

Wesley Dean Ric's step-father; wrote letter to Ric's parole board presenting narrative of the case that was highly inculpatory of Jackie Roberts, alleging that she was a principal in planning and facilitating the burglary, and claiming that she was given a deal of some kind by the DA's Office; stated that ADA January told the family that Ric's sentence was excessive and gave them advice.

Roy Childs Jr. Ric Childs' brother; no personal knowledge of Black murder; despite not being involved, was approached by FBPD a day or two after the murder, and likely was the first individual to point FBPD in Charlie's direction for unknown reasons; also gave FBPD the name Deborah Howard as Ric's girlfriend.

Charlie's Circle

Lily Flores

Charlie's mother; a 60 year-old diabetic who was arrested and indicted for allegedly helping her son avoid apprehension; took Myra into the family home after Charlie went on the run; subpoenaed by the State at trial but not called as a witness; was available, but was not called by the defense to provide mitigation evidence.

Carterino "Carter" Flores

(with Charlie)

Charlie's father; Air Force veteran; owner of a roofing business based in Irving; ordained minister with the Church of Christ; arrested and indicted for allegedly helping his son avoid apprehension; took Myra into the family home after Charlie went on the run; entreated Charlie to turn to God for help; was available, but was not called by the defense to provide mitigation evidence.

Homero Garcia aka "Medal"

Resided in Irving; friend of Charlie's from high school; neighbor of Myra, Jonathan, and Connie Wait; police confiscated his .380 gun during a traffic stop on the day after the murder; taken into FBI custody months after the fact, when he was in danger of being charged with being a felon on probation in possession of a firearm and drugs; was likely told in FBI custody that he was being investigated for Mrs. Black's murder because of the .380 (weapon was thereafter categorically excluded as the murder weapon); signed Affidavit typed by law enforcement after being awake for days that was used at trial to claim that Charlie confessed to Homero; State's witness at trial, where he stated that he didn't remember telling the FBI "half" of

what was in the Affidavit; fled before he could be cross-examined; continued to receive favors from ADA January for his repeated probation violations after Charlie was convicted, provided because he had been a witness against Charlie; recanted FBI affidavit, and detailed pressure from ADA January, in later statement.

Myra Wait

Resided in Irving with mother and brother and then with Charlie at 2729 Sagebrush Trail; arrested for allegedly hindering apprehension of her fiancé Charlie, although the State failed to get an indictment against her; has consistently stated that Charlie was with her and her daughters in their trailer on the morning of the murder; was threatened with losing custody of her children by ADA January unless she provided information against Charlie; lived with Charlie's parents after Charlie fled the U.S.; told Charlie's defense attorneys that Charlie was with her the morning of the murder, but was not called to testify for defense; subpoenaed, but not called, by the State at trial.

Jonathan Wait Jr.

(circa 2012)

Resided in Irving; Myra's younger brother; assisted Charlie in burning the VW that Ric had abandoned outside Charlie's trailer after the murder (and which Charlie had learned was being sought by police) on January 31st; shot at James Jordan when he, Charlie, and Myra were fleeing the arson; never charged for involvement in arson; State's witness at trial; testified to non-credible account of arson, including claiming that Charlie was able to drive Myra's Suzuki away from the arson while improbably leaning out of the car and shooting backwards at Jordan out of the driver-

	side window; was never cross-examined by the defense.
Jamie Dodge	Resided in Irving; Myra's cousin; State's witness at trial; testified to the time that Ric and Charlie left the trailer the night before the murder.
William Waylon Dunaway **"Waylon"**	Resided in Irving with his mother on Glenwick near Charlie's trailer; friend of Charlie's; arrested and interrogated by the State, but not subpoenaed at trial; pressured by DA's office to provide information against Charlie in exchange for making Dunaway's drug charges "go away."
Tommy Lee Philips	Resided in Terrell; bought drugs from Charlie and sold guns.

Key Law Enforcement

Dan Porter	Lieutenant with Farmers Branch Police Department at time of murder; did not testify at trial.
Charles Gerald Callaway[10]	Detective with Farmers Branch Police Department CID (Criminal Investigative Division); lead investigator on Betty Black case; defense witness at trial.
Jerry Baker	Detective with Farmers Branch Police Department CID; second investigator on Betty Black case; set up

[10] Callaway's name is misspelled in the trial record as "Calloway."

	video and sat in on hypnosis session; State's witness in Zani hearing.
Alfredo Roen Serna	Officer with Farmers Branch Police Department; investigator on Betty Black case; hypnotized Jill Barganier; State's witness in Zani hearing.
George Mount, Ph.D.	Dallas clinical psychologist; State's hypnosis expert in Zani hearing.
James Stephens	Investigator with Farmers Branch Police Department CID; State's witness at trial.
M.V. Stanton	Narcotics investigator with SID unit in Farmers Branch Police Department; conducted surveillance of 11807 High Meadow of Ric Childs, Jackie, and others after the murder, and then ultimately arrested Ric Childs; State's witness at trial.
Sgt. Ashabranner 	Sergeant in narcotics unit (SID) of Farmers Branch Police Department, which was asked to assist CID in Betty Black murder investigation; interviewed Ric Childs' brother Roy the day after the murder; with Stanton and Koehlar, searched at Bergen Lane and found $39K in cash; had conversation with Doug Roberts that then allowed Ashabranner and Koehlar to locate Alan Weaver hiding in a hotel; conducted surveillance of 11807 High Meadow of Ric Childs, Jackie, and others after the murder; defense witness at trial.

Investigator Koehlar	Investigator with narcotics unit of Farmers Branch Police Department, which was asked to assist CID in Betty Black murder investigation; conducted surveillance of 11807 High Meadow of Ric Childs, Jackie, and others the day after the murder; lead custodial interview of Ric and seemed to have history with him and knowledge of his recent movements; did not testify at trial.
Amy Bartlett	Detective with Farmers Branch Police Department; conducted search of 11807 High Meadow (Ric's grandmother's house); found .44 Magnum revolver (which was loaded at the time); State's witness at trial.

Principal Attorneys

Jason January	ADA with the Dallas County District Attorney's Office; lead prosecutor at trial.
Greg Davis	ADA with the Dallas County District Attorney's Office; second-chair prosecutor at trial.
Brad Lollar	Lead defense attorney for Charlie Flores.
Doug Parks	Second-chair defense attorney for Charlie Flores who officed at 3300 Oak Lawn Avenue, Ste 600.
William E. "Karo" Johnson	Attorney for Ric Childs who officed at 3300 Oak Lawn Avenue, Ste 600. Provided surety for Ric Childs' $1000 bond on a possession-with-intent-to-deliver

charge on June 3, 1997, which was forfeited; represented Ric in capital murder case thereafter.

Other State's Witnesses/Informants

Jonathan Wait Sr. — Myra and Jonathan Wait Jr.'s estranged father; multi-drug user; longtime law enforcement informant; sought to assist in investigation into Charlie Flores in hopes of attaining reward and pleasing law enforcement; as State's witness at trial, testified to a facially incredible story about Charlie confessing to him, which no records indicate he ever told to anyone before taking the stand (including in his many previous attempts to provide law enforcement with information).

Charles Alan Linch — Trace evidence analyst at SWIFS; had very positive relationship with DA's Office, but quit SWIFS soon after Flores trial due to conflicts with SWIFS supervisors; during trial, was directed by ADA January to look for "potato fragments" on or in the .44 Magnum revolver found at Ric's grandmother's house, which had been lying around the DA's Office after the chain of custody had been broken, in order to bolster the State's claim that Ric had used this "bigger gun" to shoot the dog during the break-in; testified to the presence of potato fragments in the gun at trial, only a day after conducting the testing; his work at SWIFS for Dallas Co. DA's has come under scrutiny as a possible contributor to wrongful convictions; has since disavowed his testing of the .44 magnum and its results and has also harshly criticized the inferences that the State drew at the Flores trial based on his testing without consulting with him.

James Jordan	Motorist who observed Ric's distinctive VW (which Ric had abandoned in front of Charlie's trailer after the murder, and which Charlie later learned was being sought in connection with a crime) being burned by Charlie Flores and Jonathan Wait Jr.; shot at by Wait Jr. when he pursued them after the VW arson; originally only able to describe one individual, a white man with long, dark hair with build similar to Wait Jr. at the time; later identified, apparently with assistance from police, Charlie Flores (who has not denied his involvement in the arson) as VW arsonist and as individual who shot at him; State's witness at trial.
Kimberly Cole	Doug Roberts' girlfriend; no personal knowledge of the crime; when interviewed by police, repeated what Doug had told her about the crime and Jackie and Ric's involvement, which notably did not include anything about a Hispanic man named Charlie; did not testify at trial
Jeff Burgess	Former owner of the purple VW Beetle, which he sold to Ric; met Ric through Johnny Russel, who sold drugs for Ric; did not testify at trial.
Johnny Russell	Sold drugs for Ric Childs; told law enforcement that Ric "always" carried a .380 hand gun in the small of his back; stated that Charlie supplied Ric with drugs; did not testify at trial.

FACTUAL BACKGROUND

At the Flores trial, it was understood that, on the morning of January 29, 1998, two men invaded Betty and Bill Black's home, where Betty Black and the family's dog were shot dead. Likewise, it was understood that Ric Childs, the owner and driver of a pink-and-purple Volkswagen Beetle that had been seen outside the Blacks' home that morning, was one of these two men. But the key specifics, such as the identity of Ric's accomplice, and the question of who actually shot Mrs. Black and the dog, were hotly contested—until mid-trial. Then, a witness who had been subjected to several highly suggestive interactions with law enforcement, including a hypnosis session conducted by a police officer, was allowed to testify about her in-court epiphany that Charlie Flores was the second man. That the witness, **Jill Barganier**,[11] had suddenly become able to identify Ric's accomplice, was a dramatic turn of events. She had easily picked Ric out of two different photographic lineups within days of the murder, but she had been unable to identify anyone (including Charlie) as Ric Childs' accomplice, whom she originally described to police as a "white male" with "long, dirty hair," who resembled Ric Childs.

Here are mugshots of Ric Childs and of Charlie Flores from the time of the crime:

[11] Mrs. Barganier's name was misspelled in the time transcripts as "Bargainer." The correct spelling was ascertained during a post-conviction hearing and is used here.

Charlie, nicknamed “Fat Charlie,” looked nothing like Ric Childs, a tall, thin, 29-year-old white male. But the jury never heard about the dramatic difference between Mrs. Barganier’s initial description to police of what she had observed on January 29, 1998, around 6:45 a.m., and what she claimed at trial. Instead, they heard her insistence that she was “more than 100 percent” positive that Charlie Flores was the second man she had seen.

Then the jury heard Charlie’s own lawyer stand up in Closing Arguments and concede his client’s presence at the crime scene and urged the jury to “find him guilty of murder” or “whatever you want”—an outrageous decision that the lawyer later tried, when his effectiveness was challenged to blame on his client. 39 RR 86. The jury convicted Charlie and, after defense counsel presented no mitigating evidence, sentenced him to death.

What neither a jury nor any court has ever heard is the considerable effort by State actors to bury evidence of Ric Childs' culpability as the shooter, as well as evidence inculpating his co-conspirators, including Jackie Roberts, Betty Black's daughter-in-law and the State's star witness. The prosecution's intentional and sustained suppression of records from the initial criminal investigation has made exposing the State's attempts to mislead extraordinarily difficult. But this complex deception was not simply a matter of suppressing evidence that would have been favorable to Charlie Flores's defense. The prosecutorial misconduct also involved:

- concealing that Ric had been out on bond when he invaded the Blacks' home, that his father worked in local law enforcement, and that both Ric and his brother had a mysterious "history" and apparently close relationship with several police departments;

- concealing that the Farmers Branch narcotics unit was monitoring Ric's movements in the days leading up to Betty Black's murder and knew he had engaged in other criminal activity;

- burying evidence suggesting that Jackie, Betty's daughter-in-law, had likely been conspiring with Ric to break into the Blacks' house in search of hidden drug money well before her one brief encounter with Charlie Flores;

- burying evidence that Ric had actually confessed to Jackie that he had shot Mrs. Black, as well as evidence showing that Jackie informed the lead detective and members of the DA's Office of Ric's confession soon after the murder;

- cultivating an intimate relationship with Jackie, a co-conspirator in Mrs. Black's murder, including asking the Dallas crime lab to do a paternity test on the fetus she believed she was carrying and refraining from indicting her so that she looked less like the accomplice that she was;

- sponsoring lies at the Flores trial that Charlie was a "big dog" drug dealer who had orchestrated a drug deal, and then a break-in, when it was actually Ric who had done these things;

- exploiting police witness-tampering, so that a witness was primed to make a mid-trial "identification" of Charlie completely at odds with the initial description she had given to police;

- inventing, without any supporting evidence, a hypothesis about a "bigger gun," in order to argue that Ric had merely shot the dog and that Charlie shot Mrs. Black, despite the State's knowledge that Ric had confessed to Jackie that he had shot Mrs. Black (which Ric then admitted to doing in a judicial confession signed soon after the Flores trial;

- concocting half-cocked evidence during trial to support the already questionable "bigger gun" hypothesis noted above;

- obscuring that law enforcement had first been given Charlie's name by Roy Childs Jr.—the co-defendant's brother, who had no personal knowledge of Betty Black's murder—and that law enforcement thereafter sought to shift liability from Ric and his known co-conspirators towards Charlie, despite there being no physical evidence or credible witnesses linking Charlie to the crime scene;

- abusing the Grand Jury to intimidate defense witnesses and to sponsor false testimony that could help the State minimize Ric's role in the murder;

- coercing and manipulating a host of witnesses to obtain testimony helpful to the State, regardless of its falsity, and then hiding promises of leniency made in exchange;

- playing unprincipled games with discovery and conducting trial prep "on the fly" as the lead prosecutor made time to flit around the globe with a singing group;

- encouraging and enabling State's witnesses to change and coordinate their testimony during trial;

- orchestrating a remarkably generous plea deal for co-defendant Ric Childs, hiding that he had committed the murder while out on bond, and rewarding him for avoiding accepting responsibility and for *not* testifying at trial; and

- ensuring that Jackie Roberts, Ric's co-conspirator and the State's star witness at trial, received no punishment at all.

I. THE JURY DID NOT HEAR THE TRUTH ABOUT ABSENT CO-DEFENDANT RIC CHILDS, HIS CO-CONSPIRATORS (INCLUDING THE MURDER VICTIM'S ESTRANGED DAUGHTER-IN-LAW JACKIE ROBERTS), OR THE REMARKABLE LENIENCY SHOWN TO THEM BY THE LEAD PROSECUTOR.

A. Before Betty Black's Murder, Ric Childs Had a Significant History of Criminal Conduct and of Evading Punishment.

It was not disputed at trial that, on January 29, 1998, Ric Child's burglarized Betty and Bill Blacks' home with another individual, and that Betty and the family dog were shot dead. At Charlie Flores' trial, Ric did not take the stand, and the State pushed arguments that minimized Ric's role. After Charlie was sentenced to death, Ric pled to a remarkably generous deal, despite having provided no testimony or evident assistance to the State. Moreover, in his judicial confession, he admitted, contrary to the State's position at trial, that he had himself shot Mrs. Black.

By 1997, at age 28, Ric Childs already had over ten years of drug-related and weapons-possession arrests and convictions. Yet despite a long rap sheet, he had

spent very little time in prison. Ex. 1. This pattern of lawbreaking and light consequences was ongoing in the spring of 1997; one incident in particular is relevant to the Black murder. On April 21, 1997, Ric was pulled over by the Carrollton[12] police on Keller Springs Road. Ric had been driving erratically and presented as "extremely nervous," "[h]is hands and body trembling." In rapid succession, he offered inconsistent stories about what he was doing and where he was going. An officer ran his license and found that he had ***five*** outstanding warrants in Dallas County. A search of his vehicle revealed: a few marijuana cigarettes, an electronic scale, numerous plastic baggies, a syringe, and "one small plastic bag which contained a brownish rock like substance and another small plastic bag which contained a brownish powder like substance"—both of which tested positive for methamphetamine. Ex. 2. Ric was indicted a few days later for possession-with-intent-to-deliver a controlled substance. The original bond request was for $20,000. But by June 3, 1997, Ric's bond had been reduced to $1,000, and he bonded out of the Dallas County jail. The surety for his $1,000 bond was provided by a local attorney: William E. "Karo" Johnson. Ex. 3. Judge Nelms of the 195th district court, who would later preside over the Flores trial, was the presiding judge. The Notice of

[12] Carrollton is a municipality located in parts of Denton, Dallas, and Collin counties. It is a part of the greater Dallas metroplex.

Disposition made a condition of Ric's release a requirement that he report every two weeks. Ex. 3. Ric was out on this bond when he burglarized Mrs. Black's home.

A few months after his distribution arrest, Ric suddenly appeared in Irving[13] looking for Charlie Flores—whom Ric had met a few years before, at the house of one of his many girlfriends. Ric, who had become a hard-core, intravenous drug-user, was drifting among the homes of various girlfriends—including **Deborah Howard** and Vanessa Stovall—as well as his grandmother's house in North Dallas and yet another place in Irving. Ric had heard that Charlie had started selling small amounts of drugs to friends, and Ric wanted in. Ex. 4.

In November of 1997, Ric was again stopped by law-enforcement, this time in Tarrant County. He was not taken into custody, however, despite numerous outstanding warrants in neighboring Dallas County. He was merely cited for driving while his license was suspended. Ex. 2. Despite a suspended license, Ric had never stopped driving or acquiring cars. Around this time, he had added to his car collection, buying an old "hippie bug," a flamboyant pink-and-purple Volkswagen Beetle with Grateful Dead stickers on it. 35 RR 64; AppX57.

In mid-December of 1997, within two months of the Black home invasion, Ric was picked up by Irving police for some unknown reason. Apparently, they

[13] Irving is a city within Dallas County that is a part of the greater Dallas-Fort Worth metroplex.

decided to transfer him from their jail to the Dallas County facility because of one of the outstanding warrants. But Dallas County refused to take him because of a "wound to his finger that needed medical attention." Ex. 5. Because Ric did not want medical treatment, the Irving police decided to drop Ric off outside of the lobby of the Irving police station and let him go. *Id.* It is unclear how Ric had injured his finger—although there is an oblique reference that one of his girlfriends, Deborah Howard, had seen him shoot himself in the hand. Ex. 6. Around this time, Ric also acquired yet another girlfriend: Jackie Roberts, of Farmers Branch.

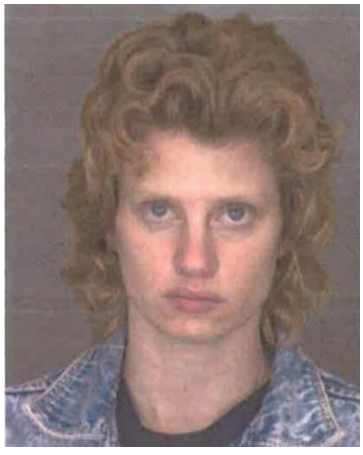
Thus, in the relatively short time between his April, 1997 arrest, and the January, 1998 murder, Ric was in significant contact with the court system and various police departments, re-introduced himself to Charlie, got close to Jackie Roberts—the wife of a well-known, incarcerated drug dealer, Gary Black,—and acquired the distinctive Volkswagen that would play a large role in the Black murder investigation.

B. Before Betty Black's Murder, Jackie Roberts Had a Significant History of Drug Abuse, Access to the Blacks' House, and a Motive to Steal Money Hidden There.

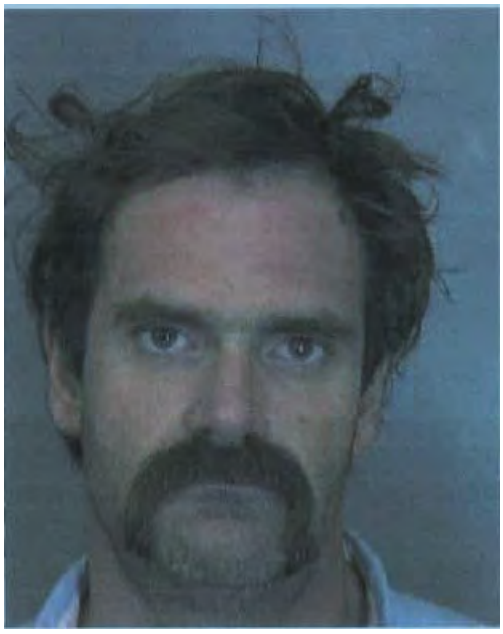
Gary Black, Ric Childs, and Doug Roberts were all past or present romantic partners of Jackie Roberts, Betty Black's daughter-in-law. **Gary Black** was her incarcerated husband, a well-known local drug dealer and Betty Black's son, who, before going to prison, had hidden his illegal proceeds in his parents' house, and

who, at the time of the murder, had recently ordered Jackie's allowance from that stash sharply reduced. Ric was Jackie's new boyfriend as of December, 1997. Finally, **Doug Roberts** was Jackie's first husband and still-close associate. Doug was another addict and member of Gary and Jackie's circle. As discussed below, Doug was an early and enthusiastic interlocutor with the police after the murder investigation began, whose actions evince a goal of diverting suspicion from himself and Jackie. Doug Roberts was killed violently not long after Flores' conviction. As is also discussed below, Gary Black (at the very least) apparently believed that Doug Roberts was involved in his mother's murder, and sought to share his belief with police (which was not shared with the defense).

Jackie's fraught financial and romantic entanglements, with Gary Black, Ric Childs, and Doug Roberts, provide essential background for the deadly January 29, 1998 home invasion at Gary's parents' home.



Jackie had gone to R.L. Turner High School in Farmers Branch but dropped out without graduating. At R.L. Turner, she had met Doug Roberts:



In 1988, Doug and Jackie started doing drugs together, including amphetamines. 34 RR 103-104. They had a son together when Jackie was 21 years old and then got married. 34 RR 103, 112.

When Doug was sent to prison for a few months for a drug-related offense, Jackie got together with one of his friends: Gary Black, Betty and Bill Black's son. Jackie also sold drugs for Gary. 34 RR 104; 34 RR 225. So even from the beginning, Jackie's romantic relationship with Gary could never quite be separated from the contentious process of divvying up drug proceeds.

In or around September 1991, Jackie was arrested for the first time for possession of dangerous drugs. Ex. 7. Thereafter, she continued to struggle with

addiction. She gave birth to two daughters, in 1993 and 1994, fathered by Gary Black. 34 RR 103.

In November 1995, Jackie was again arrested—this time for possession of methamphetamines with intent to deliver. She was convicted and received a light sentence: five-years probation. 34 RR 1-6; 38 RR 112.

In 1996, Jackie met **Judy Haney** through Gary Black. Jackie and Judy did drugs together. 34 RR 170, 179. Judy Haney's apartment would be an important location on the night prior to the murder; Jackie used it as an impromptu setting for a drug deal that Ric had requested and then enlisted Charlie, whom Jackie did not know, to put up the money.

During this time, after Gary and Jackie got together, and before Gary Black went to prison, the couple argued over the fact that Jackie believed Gary was keeping the proceeds from their drug sales from her. Doug Roberts, now out of prison and back in the fold, heard them arguing and listened to Jackie voice her resentment that Gary was not giving her what she considered to be her share of this money. 35 RR 263; 38 RR 24-25, 137.

Gary Black ended up catching a drug case. Yet he remained out of prison while the appeal was pending—during which time he continued to deal drugs and stockpile the proceeds. 34 RR 253-255. Jackie claimed that, the day before he was to leave for prison, Gary had told her that there was $150,000 in cash stashed in his

parents' house in Farmers Branch on Bergen Lane. 38 RR 118, 137. Although she denied the fact at the Flores trial, Jackie admitted to law enforcement (and to members of the DA's Office) that she believed that Gary had hidden this money in Betty and Bill Black's bathroom walls, behind the medicine cabinets. Ex. 8; Ex. 9.

While Gary Black was in prison, Jackie soon grew restless. She stopped writing Gary regularly and started doing more drugs. 34 RR 261. Soon, Gary was writing letters to her and to his parents threatening to cut back her allowance, which the Blacks were dispensing from Gary's stash of "dirty money" hidden in their Bergen Lane home. 34 RR 72, 117, 138; Ex. 9.

Around mid-1997, Jackie met **Terry Plunk** through Judy Haney. 34 RR 202. Plunk was someone with access to larger supplies of methamphetamine. She referred to him as her "connect" or "connection." *See, e.g.*, 38 RR 112. Terry Plunk was the supplying party in the drug deal thrown together by Ric, through Jackie, at Judy Haney's apartment on the night of the murder.

By the end of 1997, Gary Black's threats to cut back Jackie's allowance had become more pointed, and these threats turned into clear directives to his parents. SX51. One letter from Gary Black, written to Jackie approximately a month before his mother's murder, and which was not produced at the time of the Flores trial, suggests that Gary had learned that Jackie was "working for" someone—*i.e.*, selling

drugs for someone else—and wanted the person's name. Ex. 10.[14] It seems likely that a concern that Jackie was selling for someone else contributed to Gary Black's decision to cut her allowance.

C. At the End of 1997, Jackie Roberts Took Up with Ric Childs and Their Lives Spun Further Out of Control.

As discussed below, but as the jury did not hear, Ric and Doug Roberts seemed to have known each other previously, before Ric penetrated Jackie's larger circle of drug users and dealers. Ric only became a part of this group, and only got together with Jackie, in late 1997 or early 1998, soon before the murder. Ric inserted himself into the little cadre flashily, by spreading around free drugs. He also displayed a keen interest in Gary Black's money and where it might be stashed.

At the end of 1997, despite other run-ins with law enforcement, Ric was still out on bond for his most recent possession-with-intent-to-deliver charge; Jackie was similarly still on probation for the 1995 Dallas County conviction for unlawful possession with intent to deliver methamphetamine and unlawful possession of amphetamine. Ex. 11. Jackie was living with her mother, **Helen Ramirez**, in Farmers Branch at 13412 Emeline Street. Jackie, who had three children, spent much of her time hanging out with a crew of drug-users who had known each other since

[14] This letter was found during a review of the DA's file nearly two decades after the Flores trial; it was withheld from the collection of Gary Black's letters that were introduced into evidence.

high school—her ex-husband Doug Roberts, their friend and neighbor Jason Clark, who lived across the street on Emeline, as well as Alan Weaver and Ray Graham. The newcomer, who had some unexplained history with Doug Roberts, was Ric Childs. All of these individuals sold and used drugs. Ex. 12 at 34-36; 34 RR 109.

During the Flores trial, Jackie testified that she had met Ric through her friend Jason Clark and that Ric and Doug had both dealt drugs at Clark's house on Emeline Street for some indeterminate time. 34 RR 107, 109. Although the jury was told that both Ric and Doug had mechanics stalls near each other, 35 RR 82; 34 RR 113, 228, the jury did not hear from Clark, and thus did not hear material information he had shared with a Grand Jury about how Ric Childs came into his life, and then Jackie's, about a month before Mrs. Black was murdered. Clark had met Ric, who seemed to have "a [mechanics] shop down there" by Doug Roberts' shop, only after one of Doug's girlfriends "showed up with [Ric] at [Clark's] front doorstep" on Emeline Street one day. Ex. 12 at 25, 27, 34-35. According to Clark, Ric just "started showing up at my house right across the street from Jackie's house, you know, just everyday [sic] and I don't even know the guy from Adam and Eve, you know." *Id.* at 32.

Ric had shown up at Clark's house out of the blue and started dispensing free drugs, which made him rather popular with Clark's crowd. *Id.* at 33. Ric was smoking and shooting up drugs every time Clark saw him. *Id.* at 34. After Ric's first appearance at Clark's house, it "[s]eemed like [Ric] showed up about every other

day or every day for pretty much [sic].” *Id.* at 28, 29. Clark even speculated that it seemed “so strange,” “like he [Ric] planned it, you know.” *Id.* at 33.

Clark also provided the grand jury (but not the petit jury) with some other relevant background about Ric. He described Ric as always carrying a weapon: specifically, a pistol that was “an automatic of some sort”—not a revolver—which he kept tucked into his pants but which would fall out every time he stood up to stretch. *Id*. at 33. Clark also remembered Ric and the rest of the group watching some “cop show” at Clark’s house, about a murder investigation where a perpetrator had apparently used a potato as a silencer. *Id.* at 29-30. Ric met Jackie, who lived across the street, while hanging out at Clark’s house.

Soon after Ric and Jackie hooked up, Jackie discussed Gary Black’s hidden drug money with Ric. She told him that her common-law husband, who was in prison, had left a significant amount of cash behind, hidden in the Farmers Branch home of his parents: Betty and Bill Black. There were also rumors that Gary had hidden some money in one or more of his various vehicles. Others who knew Ric reported that, about a month before Mrs. Black was murdered, Ric was seemingly obsessed with “drug money” hidden by an “old dope man doing time.” Ex. 13; AppX57.

In January of 1998, the month of the Black home invasion and murder, Jackie was often seen riding around with Ric in an old Volkswagen Beetle that he had

recently acquired. Ex. 8. According to her ex-husband Doug, she was "speeding" all of the time on drugs and had no real job. 38 RR 48; 34 RR 108, 110. She relied on others to take care of her kids while she ran around doing and dealing drugs with Ric. She often left her kids with her ex-husband's girlfriend, Elaine Dixon, another meth user, as well as with Betty Black. 39 RR 20; 34 RR 111. She relied heavily on her mother, Helen Ramirez, too, with whom she lived. Jackie also collected government assistance and food stamps without disclosing the income she obtained from drug sales or the monthly "allowance" she received from the Blacks courtesy of Gary's "dirty money." 34 RR 107-108; 38 RR 140.

At trial, Jackie tried to present a picture of her relationship with Ric that minimized their involvement in the drug trade and their shared addictions. She claimed on the stand that she had been sober for two years and that she only started using meth again after she and Ric began hanging out, a few weeks before Mrs. Black's death. 34 RR 110. Jackie also tried to justify her involvement with Ric by claiming that he was no longer dealing drugs when she met him, and that he was planning to try a new way of life. All of this was plainly a lie. When Ric broke into Jackie's circle soon before Betty Black's murder, he was a hardcore, intravenous drug-user, and he and Jackie were both dealing drugs to support their own habits.

Jackie also testified at the Flores trial that she and her friend and neighbor Jason Clark made $10 a piece repairing car antennas. 34 RR 107-108. She further

suggested that she and her drug connection Terry Plunk had been planning to start some antenna-fixing business together. 34 RR 156-157. Most likely, this facially absurd business plan was, if anything, dreamt up to make her more sympathetic to the jury. Moreover, Jackie did not share with Charlie's jury what she had told law enforcement soon after Betty Black's murder: that, in fact, Jason Clark and Ric were "working" together, but their work involved stealing "some stereos" that Ric stored sometimes in her El Camino and sometimes in his Volkswagen. AppX57.

Despite her lies at trial, a letter Jackie sent to her estranged husband in prison around November 1997 shows some awareness that she was losing her way during the months before Betty Black's murder:

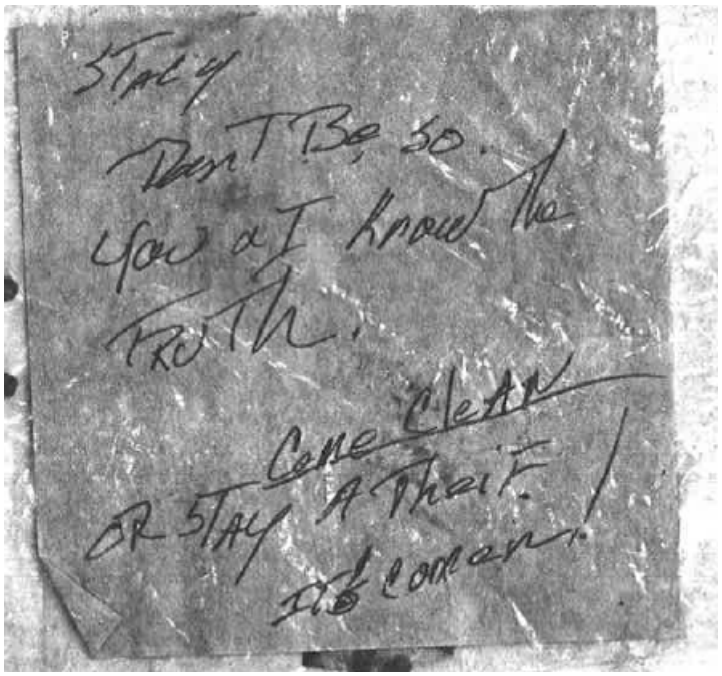
> Gary,
>
> Hi, how are you doing? Things are really going downhill for me! Its [sic] getting harder and harder to wake up every day! I hope you can forgave [sic] me for the things I have done. I am not exactly the most responsible person you know but I am trying my hardest. I just know you aren't going to understand. You probably are even going to hate me. I don't even know why I am trying. You may say you forgive I know but it will be a different [unintelligible] when you get out. I guess I deserve it but when the proballems [sic] kept coming **I just tried to hide my emotions by using other things that would make me forget but when that didn't help it just got worse. So know I am really bad off.**

SXR100 (emphasis added).

In January of 1998, the month of the Black murder, Jackie and Ric, the newly-minted couple, again came to the attention of local police departments. But records

from this time reveal Ric's odd relationship with local law enforcement. Moreover, they show that the Farmers Branch Police Department was passively surveilling Ric for some time leading up to the murder, but that they did not arrest him for crimes observed or reported against him, or even after he skipped out on his court date for his April, 1997 possession-with-intent-to-distribute charge.

For instance, on January 5, 1998, soon after Jackie and Ric had started running around together, and about three weeks before the murder, Ric had been cited by the Irving police for "criminal mischief." Police had been called about a threatening note he had left on a woman's car accusing her of being a thief and stating "Come clean or stay a thief. I's coming."



Ex. 5. Ric also seemed to be responsible for some considerable damage to the car. The officer tried to find Ric at home, but one of his roommates supposedly reported

that "Richard comes and goes & he may be there one day and then be gone for a week." The officer also noted "***Richard does have a history with our dept. & that is attached to the report.***" *Id.* (emphasis added). The attachment about Ric's "history" with the Irving PD has never been produced. However, parole records finally produced in 2020 provide a clue that this "history" was more complex than a history of multiple arrests. Apparently, ***Ric's biological father, Roy B. Childs Sr., had been an officer for Irving PD***, and at the time of Mrs. Black's murder, Ric's father was still working in law enforcement through DPS, providing security at Parkland Hospital. Ex. 14. Other records discussed below suggest that Ric was also positively connected to law enforcement through his brother, **Roy Childs Jr.**, who apparently was the first to provide police with Charlie Flores' name in the Black investigation, and whose involvement in the investigation has long been concealed.

A few days after Ric was cited by Irving police, Ric's possession-with-intent-to-deliver case, pending in the 195th district court, was called. But he did not show up. Therefore, the $1,000 bond that this attorney, Karo Johnson, had put up was forfeited. A citation was served on Johnson on January 22, 1998, a week before the murder. Ex. 3.

There is no record of exactly how Ric spent his days over the next week. There is, however, one clue that can be teased out of a custodial interview conducted with Ric a week after Betty Black's murder. One of the officers interrogating him reveals

that they knew that he had gotten his hands on a car, a Camaro Z28 (aka a "Z"), "on Monday" before the murder—*i.e.*, on January 26, 1998—and that he had tried to make some keys for it. SXR101. He then used these keys to try to steal that "Z" right after he and Jackie had engaged in a drug deal with Terry Plunk employing Charlie Flores's money. What is noteworthy about the incident with the "Z" is that it suggests that ***Ric's movement were being monitored by law enforcement mere days before and up to the morning of Betty Black's murder, and while he had already skipped out on his bond***—a fact that was never disclosed to the defense.

D. Jackie and Ric, the Prime Suspects in Betty Black's Murder, Were Not Taken into Custody for Several Days.

The day before Betty Black was killed, the Blacks informed Jackie that her allowance from Gary was going to be cut again, down from $500 to $250 a month. 34 RR 116-117. Police records describe her as "extremely irate" about the decision to cut her allowance, although she denied this at the Flores trial. Ex. 15.

Within the 24-hour period after the Blacks told her that her allowance was being cut in half, Jackie, who was then using meth daily, (1) set up a drug deal for Ric Childs (described in detail in Section II.C) and (2) planned a burglary of her in-

laws' house. Both of these ill-conceived plans ended badly—particularly for the innocent victim, Jackie's mother-in-law Betty Black.[15]

Betty Black was murdered soon after 6:30 a.m. and well before 9:30 a.m. on January 29, 1998.

The Flores trial record includes no information about where Ric was during much of January 29, 1998, after Mrs. Black was murdered.

The night before, on January 28, 1998, Ric had promised to meet up with one of his other girlfriends, Vanessa, at his grandmother's house in North Dallas at 11807 High Meadow. But he never showed up. Vanessa later testified that this pattern was not uncommon. 35 RR 66-69.

At some point after January 28th had rolled into the 29th, Ric showed up at a trailer in Irving where Charlie Flores was then living with his girlfriend Myra and her three daughters. After Ric made some phone calls, around 3:00 a.m., Ric drove Charlie from Irving to Jackie's mother's house on Emeline Street in Farmers Branch in his psychedelic Volkswagen Beetle. Ric left his Volkswagen out front blocking the driveway. Jackie then drove them in an El Camino registered in the name of her husband, Gary Black, to a meeting with Jackie's "connect," Terry Plunk, that Jackie had arranged at Ric's request. 34 RR 115-117.

[15] At the Flores trial, Jackie admitted only that she had told Ric that she knew where *she* could get money. 38 RR 117. Ric suggested to law enforcement that he had known about the money hidden in the Blacks' house "for a long time." SXR101.

Before meeting that night, Charlie did not know about Jackie; Jackie did not know about Charlie. Ric later insisted in one police interview that the drug transaction was "not his deal," and that he was just there to test the product. SXR101. That assertion was demonstrably false. It was *Ric's* idea; and he was the force that made the connection between people who did not know each other. Notably, while Jackie ultimately admitted at the Flores trial that she had arranged for Ric to do a drug deal with her "connect," Ric's critical role in this transaction, ***while out on bond for a possession-with-intent-to-deliver case***, was not conveyed to the jury (or shared with the defense).

As for how Jackie's day unfolded, the confusion begins with the timeline she later provided as to when she had returned to her mother Helen's house on Emeline Street. In the few records that capture Jackie's pre-trial statements, she described returning to Emeline Street in Farmers Branch between 7:00-7:15 a.m. in the El Camino. 34 RR 153; Ex. 8. Jackie's ex-husband, Doug Roberts, initially claimed that he was at the house sleeping on the couch when she returned at 6:30 a.m. But at trial, he changed the time to 7:00. He also testified that he saw Jackie return and that, when he opened the door to let her in the house, he saw Ric duck into the driver's side of his Volkswagen that had been blocking the driveway and drove off. 34 RR 235-238. Doug described Jackie going to the back bedroom, after casually saying something about Ric going to get doughnuts. A few minutes later, Doug claimed that

their friend **Alan Weaver** emerged from the backyard. He had supposedly arrived to return Jackie's mother's Oldsmobile and then left on the motorcycle he had left there the night before. 34 RR 275-276.

Some time later that morning, Jackie left the house on Emeline Street—and then disappeared for several days. At the Flores trial, she claimed that she left the house around 9:15 a.m. or so and went to meet Alan Weaver in a hotel room. 34 RR 155. Initially, she testified that she went there and told him "something was really strange about Rick and his friend." 34 RR 155. The second time she was called to the stand, she claimed that she just went to check to see if Weaver had made it to his hotel room okay because his inspection sticker was expired. 38 RR 142. (The jury did not hear from Alan Weaver, who was interviewed by police and made no mention of Charlie Flores and claimed he had no knowledge of the events leading up to Betty Black's death although he was the person with whom Jackie spent extended time while she was hiding from the police.) SXR101.

Jason Clark later told a Grand Jury (but not Charlie's jury) that he had dropped by Jackie's house around "9:30/10:00 o'clock" the very morning of the murder. Ex. 12 at 36. According to Clark, he had come over from across the street to pick up a tool; he claimed that he asked Doug where Jackie was, and Doug had said "I don't know. Rick left to go get some donuts and didn't come back and Jackie got in a frenzy and left." *Id.* That timeline would work with Jackie's story—and, if she had

been waiting for Ric to come right back after breaking into the Blacks' house, it would explain why, when he did not come back, she "got in a frenzy and left." *Id.*; *see also* 34 RR 279-280; 38 RR 45. But Doug would later testify that Jackie was home until about 10:15 a.m. and left only when Terry Plunk came by the Emeline house to pick her up in his van. 34 RR 240, 278. (Jackie, by contrast, testified that she drove to Terry Plunk's house in the El Camino. 34 RR 155.) Doug claimed that Ric finally called the house around 12:30-1:00 p.m., looking for Jackie, but she was gone by then. 34 RR 281.

At some point that day, Jackie learned that her mother-in-law had been murdered and knew that Doug intended to go to the police to finger Ric as the person he had seen dropping Jackie off, and then leaving the house on Emeline Street in a Volkswagen Beetle, right before the murder. 34 RR 286-287. But Jackie, who refused to join Doug in going to the police, was not taken into custody until February 2, 1998—and only after Doug, in a self-protective move, eventually called the police to report that she had shown up at his apartment.

Jackie and Doug's trial testimony about their actions in the wake of the murder was confusing and often inconsistent with each other, with their actions as reported by others, and with their previous statements. How Jackie spent most of those intervening days, between the January 29th murder and her February 2nd arrest, is largely unknown. Terry Plunk described going out shopping with her on January

29th—after looking through a black backpack that Ric had left in her El Camino. 34 RR 219-221. (This backpack would appear again on the night that Ric was arrested.) In that backpack, Terry Plunk testified he found some checks in the name of Jackie's friend and neighbor Jason Clark along with a map of how to get from the Emeline Street house to the Blacks' house on Bergen Lane. 34 RR 160-161. Judy Haney claimed that, about this same time, she learned of Mrs. Black's murder and told Terry Plunk (who was then with Jackie). 34 RR 196-198.

By contrast, Doug and Jackie claimed that Doug tracked Jackie down at Plunk's around 8:00 p.m. and that it was only then that she learned the news about Mrs. Black's death—which prompted her to start screaming. 34 RR 161-162, 221. (Doug also noted that Jackie was "high on speed" at the time—as she had been pretty much continuously for the past three weeks she had been with Ric. 38 RR 48.)

Doug further testified at the Flores trial that, that night after meeting up with her around 8 p.m., he urged Jackie to go right to the police and tell them what she knew. 34 RR 161-162. While Jackie supposedly suggested that she "somehow felt totally responsible for what had happened to Betty," she did not go to the police. 34 RR 161-162. She knew the police were looking for her, 38 RR 149; but instead, she reputedly directed Doug to drive her to look for Alan Weaver.

Along the way, Doug threw away the map that Jackie had drawn showing how to get from her house to the Blacks' house, which Terry had found in Ric's black

backpack (and which, at trial, Jackie first denied drawing at all, and then later denied drawing for Ric). 35 RR 30-31, 35-37, 54. Doug claimed that he had thrown the map away because, if the police found it, "they would try to say that [he] committed the murder" since he had "had bad dealings" with the Farmers Branch PD. 35 RR 29.

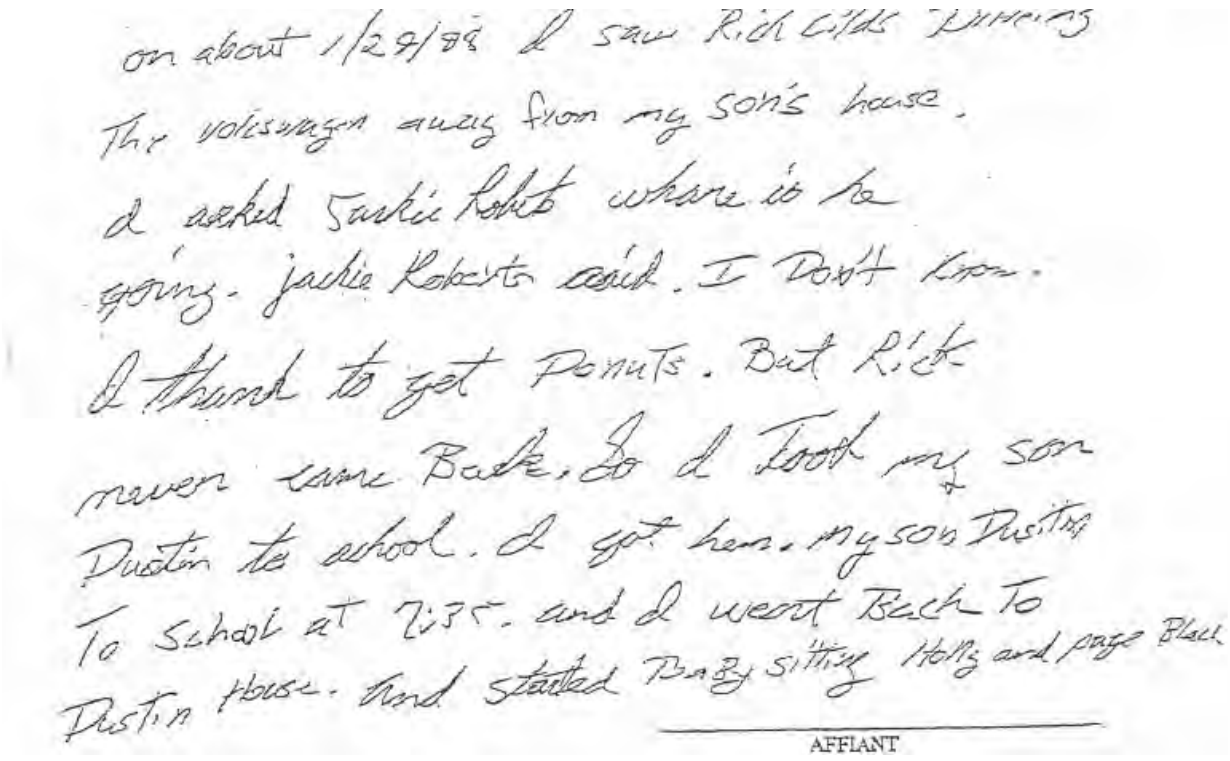
Jackie claimed that she had looked for Weaver at a Howard Johnson's, but later admitted that she had actually checked herself into a Days Inn under a false name; somehow Alan Weaver had known how to find her there. At this point, she was apparently no longer with Doug. According to her confusing report, Weaver arrived right after she did, picked her up on his motorcycle, and took her to Terry Plunk's to pick up her El Camino. 38 RR 35-36, 167, 162-163, 170; 35 RR 40.

Then, at some point, Doug met up with Jackie at Plunk's, took her to a motel, and went to the police to report that Ric owned the Volkswagen that had been seen outside of the Blacks' house that morning. Once at the police station, Doug denied knowing where Jackie, whom he had just dropped at a motel, was. 34 RR 241-243, 246-47, 291-292. A handwritten "Affidavit" obtained from Doug's girlfriend, Kimberly Cole, from that same night suggests that Doug first went to the apartment where they lived together and told her what he intended to tell the police, seemingly to create some kind of backup for himself. AppX57.

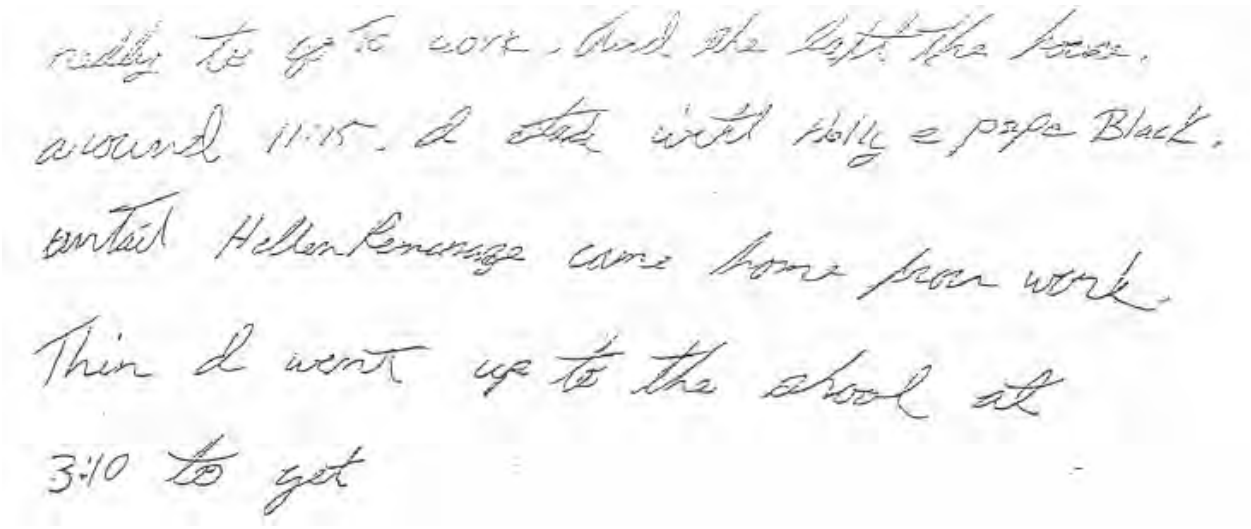
Setting aside the State's witnesses' not-terribly-credible accounts of their movements, it is true that Doug Roberts went to the Farmers Branch police station

around 9:00 p.m. the day of the murder and spoke to investigators for several hours. 34 RR 246. Their conversations were not recorded. However, it is clear that, despite having just spent significant time with Jackie, who would at trial present a story of the night leading up to the murder focused intensely on Charlie Flores, and her purported fear of Charlie, in this initial interview with investigators (in which Doug was evidently trying to push responsibility elsewhere), Doug Roberts said nothing to investigators about Charlie Flores, or any Hispanic male, having been involved.

The police file, finally produced in 2016, shows that Doug also wrote out a fragmentary statement on a Farmers Branch police form about what he had supposedly witnessed that morning:


on about 1/29/88 I saw Rick Childs Dimmitt
The volkswagen away from my son's house.
I asked Jackie Roberts where is he
going. Jackie Roberts said. I Don't know.
I thank to get Donuts. But Rick
never came Back. So I took my son
Dustin to school. I got here. my son Dustin
To School at 7:35. and I went Back To
Dustin House. and started Baby sitting Holly and page Black

AFFIANT



SXR101. For some reason, Doug was not asked to complete or sign that statement.

Although police asked Doug whether he had seen a second man in the Volkswagen Beetle with Ric, he said that he had not—and did not suggest any awareness of a Hispanic male named Charlie Flores. DX2; DX3; 35 RR 36. Despite multiple interactions with Jackie, including acting to destroy evidence (the hand-drawn map) that he thought would make her or him look culpable, when Doug went to the police the night after the murder, he did not mention or provide a description of Charlie Flores; Charlie was, quite simply, not on Doug's or Jackie's radar at the time as someone the police should investigate. Right after the murder, Doug was laser-focused on ensuring that the police looked only to Ric Childs, away from him and Jackie.

It is now clear that Doug had undisclosed history—before, during, and after Betty Black's murder—with both law enforcement and the Dallas County DA's

Office that kept him insulated from serious legal consequences for his own criminality. *See* Section III below.

It is also now clear that Ric too had history—before, during, and after Betty Black's murder—with both law enforcement and the Dallas County DA's Office that enabled him to obtain an astonishingly generous plea deal despite his primary role in causing Betty Black's death.

As put forward below, a great deal of critical information—about the night of the murder, the investigation, and the State's evidence at trial—has been uncovered since Charlie Flores was sentenced to death. However, a variety of vital questions remain obscure to this day. For instance, what was the history that the Farmers Branch narcotics unit, a.k.a. the Special Investigations Divisions or "SID," had with Gary Black, Jackie and Doug Roberts, and Ric Childs? Why is it that, soon after the murder investigation was launched, members of the Farmers Branch SID went straight to ***Ric Childs' brother*** in Irving, **Roy Childs**, seeking information? And how is it that Roy Childs thought to give SID investigators the name of a small-time drug dealer, "Charlie Flores," from whom Ric had only recently started to obtain drugs?

And why had Ric, who had been obsessing about Gary Black's hidden drug money for weeks, suddenly decided to set up a drug deal between strangers Charlie and Jackie hours before Betty Black was murdered in the house containing the hidden drug money that Ric had been wanting to steal? How had Ric met Doug

Roberts, and when? And why is it, that instead of looking carefully at known drug addicts/dealers Doug Roberts, Jackie Roberts, and Ric Childs, law enforcement allowed these prime suspects to coordinate their stories, even after the trio knew they were suspects?

Finally, why is it that the individual who would ultimately try the Flores case, **ADA Jason January**, was involved in the investigation even before *anyone* had been indicted for Betty Black's murder? And why is it that he readily gave undisclosed promises of leniency to two co-conspirators, Jackie and Ric, as well as others eventually induced to provide false testimony to obtain the conviction of Charlie Flores?

E. Jackie Roberts, Who Planned the Burglary, and Ric Childs, Who Actually Shot Betty Black, Were Shown Remarkable Leniency, Orchestrated by ADA January.

When Ric and Jackie were finally taken into custody, two and five days, respectively, after Betty Black's murder, they had already been shown remarkable leniency. That leniency included allowing them to spend hours alone together to coordinate their stories when they both knew they were wanted in connection with Betty Black's murder. *See* Section III below. Then, after they were taken into custody, the path was laid to provide them with remarkable deals, which were never disclosed and were only recently uncovered in the face of decades of stonewalling. The puppet-master pulling the strings was then a member of the Dallas County DA's

Office, ADA Jason January, who left the office in some disgrace not long after Ric signed a Judicial Confession and began serving his notably short prison sentence.

1. ADA January groomed Jackie Roberts to tell the State's false narrative at the Flores trial, pushing culpability onto Charlie and away from herself and Ric and then rewarded her with exceptional, undisclosed generosity.

a. Jackie was complicit in Betty Black's murder.

The very morning that Betty Black's body was discovered, Bill Black, the victim's husband, told Farmers Branch investigators that, the day before, they had delivered a letter to Jackie from their son cutting her monthly allowance in half, from $500 to $250. Ex. 16. Investigative notes prepared by law enforcement, but not produced until long after trial, show that several people close to the Black family immediately suspected that Jackie had been involvement in the crime. *See, e.g.*, AppX10 (investigator's note that Bob Barganier, next-door neighbor of the victim, had called to report where Jackie might be hiding out);[16] AppX57 (investigator's note that, during an interview with Kimberley Cole, Doug Robert's girlfriend, she had emphasized "Jackie talking alot [sic] about wanting to get the $ at the parents[']house. '100s of thousands.'").

[16] Bob Barganier would testify at the Flores trial that he recognized the Volkswagen seen outside of the Blacks' house the morning Betty Black was murdered because he had previously seen that car outside of Jackie's house. No record indicates that investigators sought to find out how and why Bob Barganier knew Jackie, knew where she lived, and knew someone who might be hiding her after the murder.

Even two months after the murder, during an interview with Gary Black captured in notes not disclosed before trial, the murder victim's son stressed that his wife Jackie "knew $ in walls"—or at least that is what Gary had led her to believe. AppX57. But, as Gary reported, the money had actually been moved to the attic and his parents had been specifically instructed *not* to talk to Jackie about it because she could not be trusted. *Id.*

The unresolved mystery of the garage door also suggests Jackie's involvement. It was unexplained how the Blacks' garage door had been raised up sufficiently so as to enable Ric and his comrade to lift up the door and go in. 35 RR 263. A garage door opener was found at the scene at a place where no one leaves a garage door opener: by the door into the house right by the button one uses to operate the garage door. 35 RR 234-235. Plainly, Ric could not have acquired the Blacks' garage door opener without help from someone who had access—*i.e.*, the mother of the Blacks' grandchildren: Jackie.

Perhaps Jackie did not have personal knowledge of exactly what had transpired at the Blacks' house. But there is ample evidence, intentionally suppressed, that she orchestrated the break-in by providing: a map, a garage door opener, information about the Blacks' schedules, and information about where she believed Gary's "dirty money" had been hidden (in the bathroom walls).

Additionally, as discussed below, Ric Childs' step-father presented his son's parole board with an account of the murder that emphasized Jackie's in-depth involvement in planning and facilitating the home invasion, which he seems likely to have heard from either Ric or ADA January.

Farmers Branch investigators with the Criminal Investigations Division or "CID" easily obtained a warrant for Jackie's arrest. Ex. 15. The warrant accused Jackie of "Criminal Conspiracy (Capital Murder)." *Id.* The supporting affidavit from law enforcement recited the following facts:

- She had been described as "extremely irate" about the news that Gary Black wanted her allowance cut in half.
- She "had knowledge of a large amount of cash her husband had hidden at the victim's residence prior to him reporting to prison."
- She had had "no contact with the victim's family since the offense"—*i.e.*, for nearly five days.
- She had been "seen by undercover officers taking a packed bag of clothing to [Ric] shortly before his arrest."

Id.

Although the warrant issued and Jackie was eventually apprehended, no indictment was ever pursued. Instead, she was held only for violations of the terms of her probation. 34 RR 106-107. Although she was indisputably on the run for nearly five days after the murder, knowing that police wanted to talk to her, the evidence of flight was never held up as an indication of her guilt—as it was with

Charlie, whose guilt-phase trial was dominated by evidence of the extraneous offenses he committed in trying to avoid apprehension. *See* 37 RR 12-239.

In the Flores trial, Jackie conceded that she was still on probation for a drug-related crime. 34 RR 107. But she did not reveal the scheme in which she had been enlisted to obscure her own guilt, minimize Ric's role, and support the false theory that Charlie had been involved in Betty Black's murder.

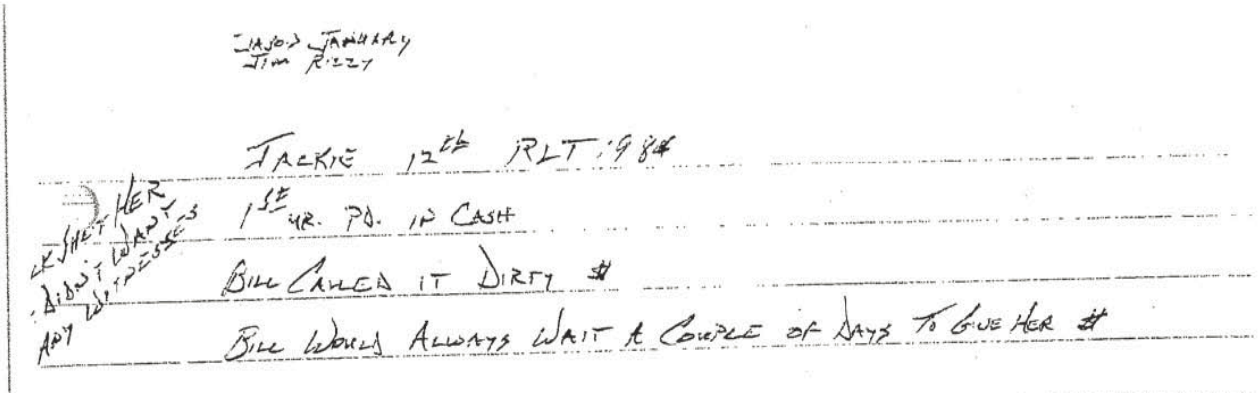
b. Early on, the State decided to suppress key evidence to obscure that Jackie was an accomplice.

A cryptic reference in one of Detective Callaway's handwritten notes (obtained two decades after trial) suggests that ADA January had gotten involved in the Betty Black murder case almost immediately, before anyone was arrested, let alone indicted: on January 30, 1998. AppX57. Other handwritten notes show that ADA January joined Callaway early on in interviewing Jackie Roberts: on February 12, 1998.

The day that initial interview with Jackie was conducted in the Dallas County Sheriff's Office, the State filed a Motion to Revoke Jackie's probation for her previous drug possession conviction. Ex. 11. The motion does not mention her recent arrest for Conspiracy to Commit Capital Murder but only refers to relatively minor probation violations, including several failed drug tests. *Id.* During the interview that

followed, Jackie made statements implicating herself and Ric—that were subsequently ***purged from the record***.

Callaway's handwritten notes from the February 12th interview with Jackie, never disclosed by the State, lists "Jason January" and "Jim Rizzy" (of the DA's Office) as being present on the "12th". Ex. 9. The handwritten notes further reflect that Jackie told law enforcement (and ADA January) that ***"Ric shot her"*** because he "didn't want any witnesses." *Id.* Those same notes also reveal that Jackie had reported that she "didn't think Gary's Dad would tell if they did get $," he would "feel bad" about telling "police about the $." *Id.*



In other words, by at least February 12, 1998, Jackie had told law enforcement and ADA January that ***Ric*** had confessed to shooting Mrs. Black. She had also essentially admitted that she had planned the burglary—because she had thought it unlikely that Mr. Black would have reported the theft of his son's "dirty money." *Id.*

Subsequently, a typed document styled "Supplementary Report" and "Supplement Report" was created, which was ultimately produced to the defense

during the Flores trial. This document supposedly captured the fruits of the February 12th interview with Jackie. 46 RR 75; Ex. 16. As with the handwritten notes, the typed document shows that State's counsel, ADA January, was present:

Supplement Report (con't)

Present during the interview with Jackie Roberts, other than myself were Jason January, Prosecutor, Dallas County District Attorney's Office and Jim Rizzi, Criminal Investigator, Dallas County District Attorney's Office.

The typed version also shows that, during this interview, Jackie shared her understanding that Gary Black had "hidden $80,000.00 in his parent's [sic] home prior to reporting to Tx. Dept. Of Corrections" and that the Blacks were aware of what they called Gary's "dirty money." The typed version, like the handwritten notes, shows that Jackie also shared her understanding that "***the money was hidden in the walls, behind the medicine cabinet***," which is why it always took a few days before she got money when she requested it from the Blacks. *Id.* (emphasis added).

The typed report—the version that was produced at trial—does *not*, however, include the significant details in the handwritten notes that: (1) ***Ric*** had shot Betty Black because he did not want any witnesses; and (2) Jackie had admitted to believing that Bill Black would not "tell" if they stole Gary's "dirty money" because he would "feel bad" about involving the police. *Compare* Ex. 9 *with* Ex. 16. These details are also not in the two-and-a-half page "Voluntary Statement" that SID

investigators had taken from Jackie on February 4th over the course of a twelve-plus hour interrogation. *See* Ex. 8.

These key facts were inconvenient to the State's trial theory that Jackie and Ric were mere pawns of Charlie Flores who, they argued, had, unbeknownst to Jackie, forced Ric to go break into the Blacks' house (where neither of them had been before) and then shot Mrs. Black when she surprised them. This theory was pushed all the way through trial by the State, largely through Jackie, although Jackie was the likely source of any information about where the Blacks' lived, where money may have been hidden within the house, and what the Blacks' schedules were. Therefore, Callaway, with ADA January's knowledge,[17] seems to have made these inconvenient facts inculpating Jackie disappear in typing up a record of the February 12th interview.

Notably, there is no credible evidence that Jackie ever told Doug Roberts, her close friend and ex-husband, over the course of the five days before she was apprehended that she suspected Charlie Flores had been involved in the murder. If that was her belief, she did not share it with Doug Roberts, Alan Weaver, Terry Plunk, Judy Haney, or even Jackie's mother Helen—or go to the police with that information. Only well *after* she had spent several hours alone with Ric, knowing

[17] Other evidence, presented below, supports the inference that ADA January authorized excising these details from the typed report that he would eventually produce to the defense at trial.

the police were looking for them, only *after* she had been taken into police custody, when she was highly motivated to minimize the role that she and Ric had played, and only *after* investigators had told her they were interested in Charlie Flores, did his name come up. Further, Jackie essentially admitted at trial that, upon her arrest, officers had told *her*, before she started talking, that Ric had already been arrested but Charlie "was still on the loose." 34 RR 165, 167.

c. The State took measures to maintain control over Jackie before, during, and after the Flores trial.

Despite *knowing* that Jackie had shared that Ric had shot Mrs. Black, at trial the prosecution pushed a story that Charlie had not only been present but he, not Ric, had shot Mrs. Black. *See* Section VI below. And instead of trying to uncover the truth, the prosecution devoted most of its energy during the months before trial working with Jackie to craft a story that would support a false narrative that served Jackie's self-interest. As it turns out, Jackie was required to meet ***weekly*** with ADA January. But no records of those sessions have ever been produced. Only recently has it been possible to piece together the nature of the relationship between Jackie and ADA January. Court records show how ADA January was able to keep the threat of a Conspiracy to Commit Capital Murder charge hanging over her to induce cooperation while simultaneously showing tremendous leniency toward her by relying solely on her status as a probationer, not as a co-conspirator.

The evidence of how ADA January exerted control is buried in community supervision records and other documents. Ex. 17.

First, on April 24, 1998, January filed a motion withdrawing the State's Motion to Revoke Jackie's probation, which had been filed on February 12th, the same day as her first (known) interview with ADA January. *Id*. A couple of days later, Jackie was released from jail on an electronic monitoring program—but with the condition that she ***must report to Jason January every Friday at 9:30 a.m***. *Id*.

Within a few weeks, Jackie felt so close to ADA January that she turned to him when she feared that Ric had impregnated her. Ex. 18. She contacted January; he then used his authority to contact Southwestern Institute of Forensic Sciences aka "SWIFS," the Dallas County crime lab, and asked for a little favor. He wanted the DNA department to do testing to determine paternity, another fact not disclosed for two decades:

SOUTHWESTERN
INSTITUTE OF FORENSIC SCIENCES

DATE 4 May 98 FL NUMBER 98 P0282

TIME 0900

CALLER NAME/NUMBER Jason January ( )

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

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

Ex. 19.

A couple of months after that scare, when Jackie had a relapse, ADA January filed a capias for her arrest. Ex. 17. She was subsequently booked into the Dallas County jail but just long enough for ADA January to reassert control. The next week, on November 25, 1998, Jackie's probation was reinstated with modified, user-friendly conditions—including an obligation to attend intensive outpatient treatment and to continue intensive supervision for 90 days. *Id*.

That 90-day supervision period enabled ADA January to keep Jackie on a tight leash during the time leading up to the Flores trial—for which voir dire was set

to begin on January 8, 1999, less than a year after the murder. 2 RR. The result of all this was that Jackie came to see ADA January as "like a mentor," as she "met with Jason January a lot to prepare [her] testimony and go over the case." Ex. 18.

2. ADA January gave Betty Black's Shooter, Ric Childs, an astonishingly generous deal—apparently in exchange for no assistance to the State.

Soon after Ric was indicted in the Betty Black murder case, he was transferred to the Dallas County jail. At that point, someone in the DA's Office realized that the "Ric Childs" who had been indicted for capital murder was the same "Ric Childs" who, a few weeks before the murder, had forfeited the bond that his lawyer had put up for him in a drug case. Ex. 3. But that history was not shared with Charles Flores.

Someone (most likely ADA January) did, however, share this information with Karo Johnson, the attorney who had previously posted bond for Ric. On or around February 13, 1998—the day after ADA January's first known interview with Jackie—Johnson arranged for Judge Nelms to appoint him as Ric's counsel in this new capital case. *Id.*[18] A couple of weeks later, on March 4, 1998, Johnson again filed a motion seeking a bond reduction for Ric, this time in the capital murder case. He also generously offered to again act as Ric's surety for a bond of up to $15,000—

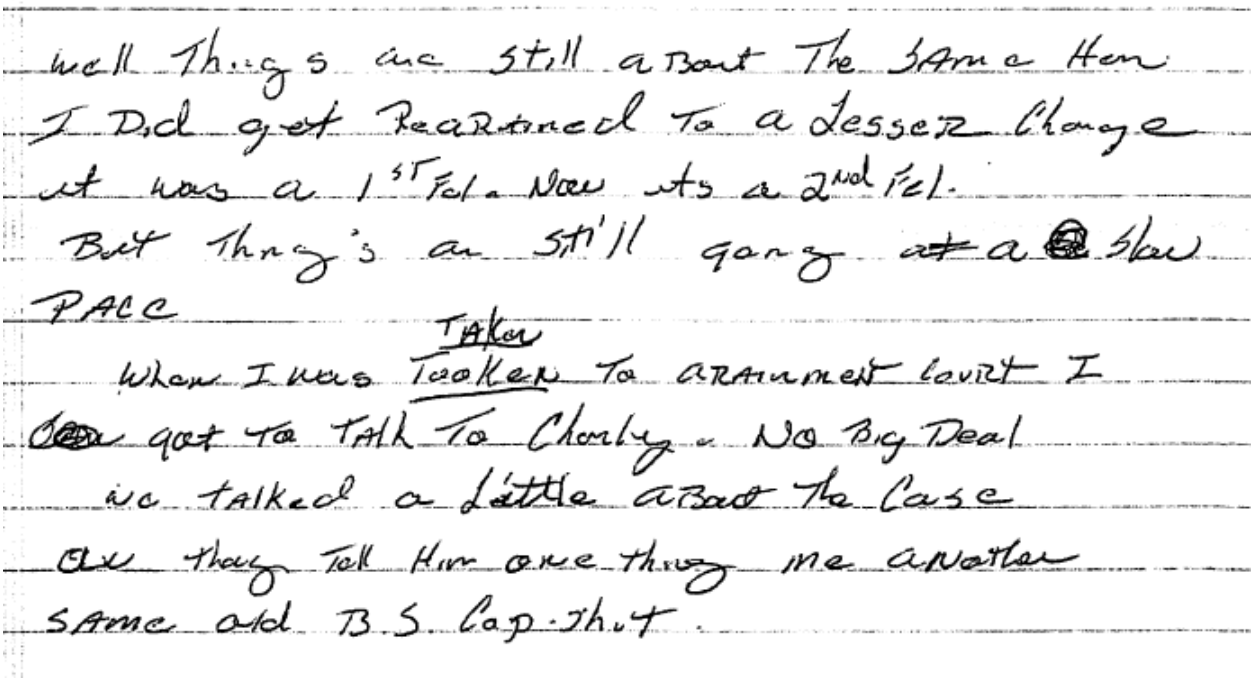
[18] According to jail visitation records, Johnson secured this appointment without first visiting with his former client. Johnson's first meeting with Ric after he had been charged with capital murder was on February 17, 1998. Ex. 21.

even though Ric had caused Johnson to forfeit the last bond that had been put up on his behalf. *Id*. The docket in the capital murder case notes that the State filed some answer to the motion, but no pleading is found in the Clerk's Record. Instead, another entry on the docket shows that Judge Nelms (also presiding over the Flores case) ended up signing an "Order to Set Aside Bond Forfeiture" on Ric Childs' behalf, and then set bond in the capital murder case at $50,000.

After efforts had been made to eliminate evidence of the bond forfeiture, ADA January sought a subpoena duces tecum for all TDCJ records related to Ric Childs. Ex. 20. If ADA January had reviewed those records as well as Ric's criminal records in Dallas and Tarrant counties, January would have seen: that Ric had a long record of dealing drugs going back to at least 1986; that Ric had repeatedly violated the terms of various releases; that he had been cited for possessing a sawed off shot gun—among other disturbing facts. Ex. 1; Ex. 2. But, despite this evidence about Ric's past, including his wanton disregard for the law when out on bond right before Betty Black's murder, the State, via ADA January, proved willing to offer him a most amazing deal.

To this day, little is known about what Ric did while in the Dallas County jail during the year leading up to the Flores trial. If Ric was ever interviewed again by law enforcement or the prosecution, which seems highly probable, those records have been destroyed or at least have never been produced to Charlie Flores. One

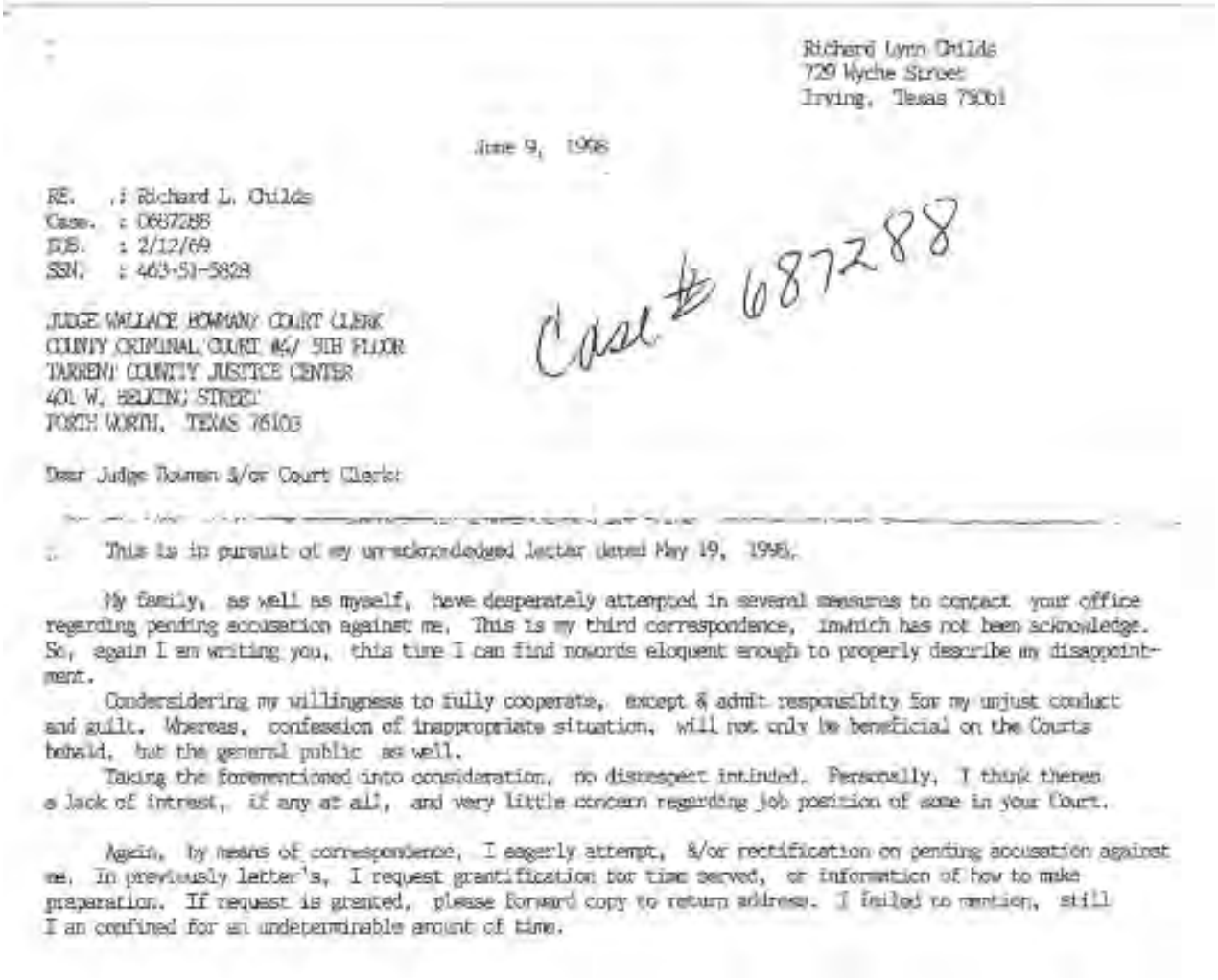
letter found in the DA's file long after-the-fact suggests that Ric believed that he had already been re-arraigned for a lesser offense *before* the Flores trial—yet no official record of this exists:



well Things are still about The Same Hon
I Did get Rearranced To a Lesser Charge
it was a 1ST Fel. Now its a 2nd Fel.
But Thngs's an Stil'll gang at a Slow
PACE
When I was Taken To ARAIGNMENT Court I
got To TALK To Charley. NO Big Deal
we talked a Little about The Case
ole they Tell Him one thing me another
Same old B.S. Cop-Shit.

Ex. 22. This letter, which Ric wrote to his girlfriend Deborah Howard from the Dallas County jail, was found years later stashed in the DA's file. The letter shows that Ric had already been rewarded *before* the Flores trial and shows Ric, far from grateful, whining that his interactions with law enforcement were just the "same old B.S. cop-shit." *Id.*

If one scours the clerk's records in other jurisdictions, one finds that Ric also spent some time writing letters, for instance, to the Tarrant County Justice Center, seeking to strike a deal with respect to outstanding cases in that county too.



Richard Lynn Childs
729 Wyche Street
Irving, Texas 75061

June 9, 1998

RE. : Richard L. Childs
Case. : 0687288
DOB. : 2/12/69
SSN. : 463-51-5828

Case # 687288

JUDGE WALLACE BOWMAN/ COURT CLERK
COUNTY CRIMINAL COURT #4/ 9TH FLOOR
TARRANT COUNTY JUSTICE CENTER
401 W. BELKNAP STREET
FORTH WORTH, TEXAS 76103

Dear Judge Bowman &/or Court Clerk:

This is in pursuit of my unacknowledged letter dated May 19, 1998.

My family, as well as myself, have desperately attempted in several measures to contact your office regarding pending accusation against me. This is my third correspondence, inwhich has not been acknowledge. So, again I am writing you, this time I can find nowords eloquent enough to properly describe my disappointment.

Condersidering my willingness to fully cooperate, except & admit responsibity for my unjust conduct and guilt. Whereas, confession of inappropriate situation, will not only be beneficial on the Courts behald, but the general public as well.

Taking the forementioned into consideration, no disrespect intinded. Personally, I think theres a lack of intrest, if any at all, and very little concern regarding job position of some in your Court.

Again, by means of correspondence, I eagerly attempt, &/or rectification on pending accusation against me. In previously letter's, I request grantification for time served, or information of how to make preparation. If requast is granted, please forward copy to return address. I failed to mention, still I an confined for an undeterminable amount of time.

Ex. 23. This petulant letter is dated a few months after Ric's arrest for Betty Black's murder—and months before the Flores trial. Ric's request for a deal for "time served" was ultimately granted. But, importantly, well before the Flores trial, Ric was seemingly being guided on how to "clean up" the rest of his outstanding cases so that he would have nothing else hanging over him when he accepted a plea deal for Betty Black's murder.

Circumstantial evidence suggests that Ric was promised a deal of some kind to resolve the Betty Back case before the Flores trial even began. Yet Ric did not

have to testify at the Flores trial. Was this his "reward" for agreeing to go along with a plan to conceal the identity of his actual accomplice, perhaps Doug Roberts, and then implicate the easy-to-demonize, unconnected Hispanic guy who had not actually been involved? In any event, the State was content to go to trial against Charlie in a tenuous circumstantial case based largely on the incredible testimony of Ric's co-conspirator Jackie—who was spared any punishment—and evidence of Charlie's attempts to evade apprehension.[19]

Nearly a year after Charlie was convicted, sentenced, and sent to death row, on March 27, 2000, Ric's own case was set for trial. But that setting was no more than a formality, as there was never a plan to go to trial against Ric.

At that time, Ric was still represented by Karo Johnson, who, according to jail visitation records, only visited Ric a total of six times during the representation: once soon after Ric was transferred to the Dallas County jail, two more times in 1998, two times in February 1999 while ramp-up for the Flores trial was underway, then one final time on May 23, 1999—after Charlie Flores had been convicted. Ex. 21. There were *no* visits during the subsequent ten-month period leading up to the execution of Ric's extraordinary plea deal.

[19] The only facially credible evidence offered at trial came into existence *during* trial: Charles Linch's testimony as an "expert" about observing potato starch inside a gun and Jill Barganier's identification. *See* Sections VI and VII below.

But during that time, Karo Johnson was likely in regular communication with ADA January. Moreover, as it turns out, throughout this time, Karo Johnson shared an office with **Doug Parks**, one of the two lawyers who had been appointed to represent Ric's co-defendant, Charlie Flores, in the Betty Black case:

Respectfully submitted,

WM. E. "KARO" JOHNSON
State Bar No. 10804500
3300 Oak Lawn, Ste. 600
Dallas, Texas 75219
(214) 824-9955

ATTORNEY FOR DEFENDANT

Respectfully submitted,

DOUGLAS H. PARKS
Attorney at Law
3300 Oak Lawn, Ste. 600
Dallas, Texas 75219
214-521-2670
State Bar No. 15520000

Johnson and Parks shared office space throughout the time they were representing co-defendants. This information was not shared with Charlie Flores. Ex. 4. Nor does any lawyer seemed to have raised the issue with the trial court.[20] But, in retrospect,

[20] Members of Charlie's state post-conviction team endeavored in 2017 to speak with Karo Johnson about his representation of Ric Childs. Johnson became very angry and instead wanted to talk about another pending Dallas County capital post-conviction case in which he had been accused of providing ineffective assistance. He stated that he was proud of the work his trial team had done for that other defendant (Franklin Davis) and described giving all of the members of that defense team a gift at the conclusion of the trial that resulted in their client being sentenced to death. He described the gift as an engraved pen with the following sentiment: "A lawyer without a pen is like a rapist without a dick." He then invited the two female members of the Office of Capital and Forensic Writs to a social gathering that he was attending that night. These members

it is evident that Parks' loyalty to his own client was non-existent because, soon after the plea deal was obtained for Ric, Parks became a willing participant in a scheme to betray Charlie during the initial sham state habeas proceeding, signing an affidavit in support of the State's position. *See* Ex. 25 (Parks' affidavit contains language virtually identical to several passages in affidavits signed by ADAs January and Davis).

Ric's plea deal was formalized in a flurry of filings. The contours of the remarkable plea deal he received can be discerned from those filings. But at the time, Charlie could have known nothing about this because he was, by then, languishing on death row without any meaningful representation and nothing about the plan to offer this deal had been disclosed to the defense before or during trial.

First, on April 4, 2000, ADA January filed, in the State's name, a motion to strike words in Ric's indictment.

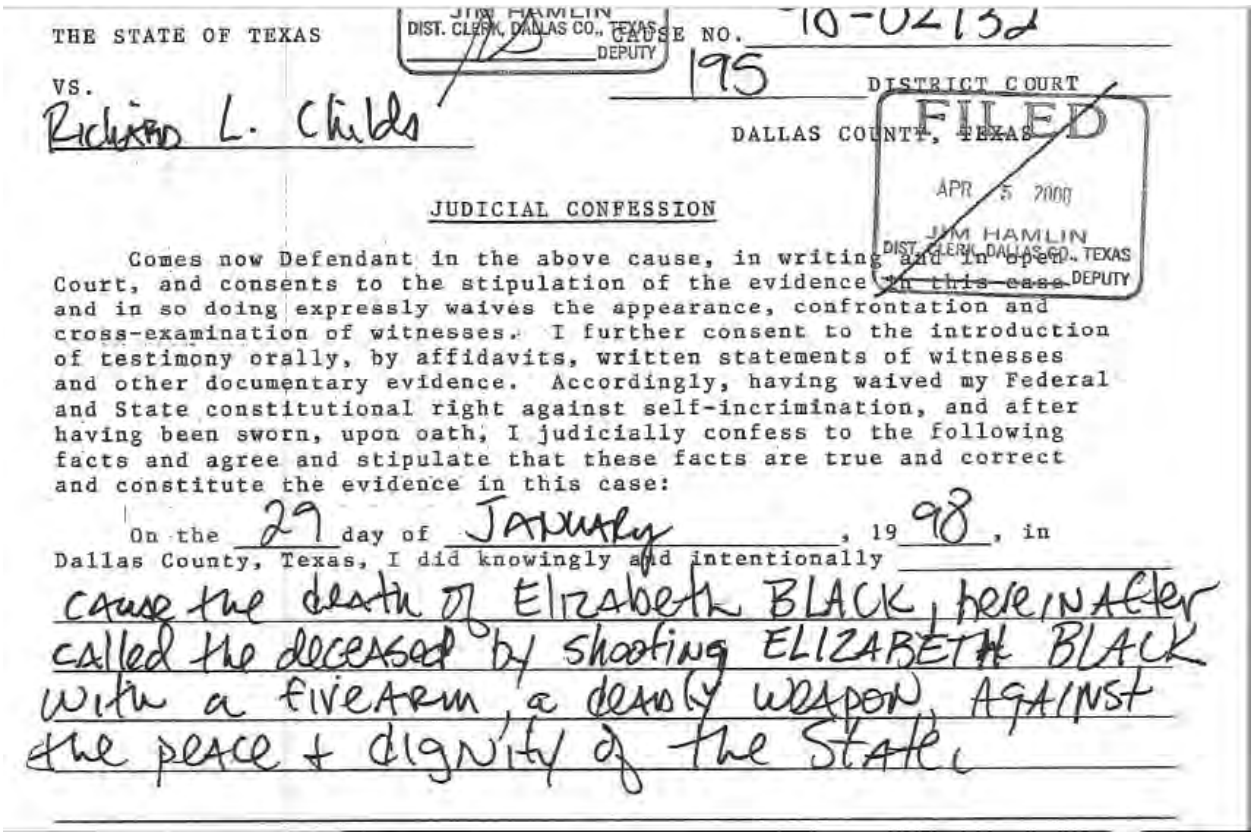
The next day, ADA January filed a motion to reduce the offense to murder (instead of capital murder) along with a motion to dismiss the indictment for capital murder.

---

of Charlie Flores's team were left with the impression that Mr. Johnson was not going to be a helpful resource for obtaining information about his representation of Ric Childs and what details Johnson may have shared with co-defendant's counsel about how he obtained the sweetheart plea deal for Ric Childs.

Also, a Plea Agreement was filed, disposing of the possession-with-intent-to-deliver-methamphetamine case, which pre-dated the murder case by nine months, along with the murder charge. The deal involved Ric being sentenced to 15 years for the drug case to run concurrently with a 35-year sentence for Betty Black's murder. The matter was summarily referred to a magistrate. The magistrate then adopted the State's proposed "Findings, Conclusions and Recommendations of Magistrate [in support of] Original Plea" that same day, recommending that Ric be sentenced to a total of only 35 years. Ric was also given credit for time served from February 10, 1998, soon after he had been transferred from Farmers Branch to the Dallas County jail, up to April 5, 2000, the date when the plea deal was formalized.

Notably, the record also included Ric's "Judicial Confession," in which he admitted that he had caused the death of Elizabeth Black by shooting her with a firearm—with no mention of a burglary:



THE STATE OF TEXAS

JIM HAMLIN DIST. CLERK, DALLAS CO., TEXAS DEPUTY

CAUSE NO. 10-02132

VS. Richard L. Childs

195 DISTRICT COURT

DALLAS COUNTY, TEXAS

FILED APR 5 2000 JIM HAMLIN DIST. CLERK, DALLAS CO., TEXAS DEPUTY

JUDICIAL CONFESSION

Comes now Defendant in the above cause, in writing and in open Court, and consents to the stipulation of the evidence ~~in this case~~ and in so doing expressly waives the appearance, confrontation and cross-examination of witnesses. I further consent to the introduction of testimony orally, by affidavits, written statements of witnesses and other documentary evidence. Accordingly, having waived my Federal and State constitutional right against self-incrimination, and after having been sworn, upon oath, I judicially confess to the following facts and agree and stipulate that these facts are true and correct and constitute the evidence in this case:

On the 29 day of JANUARY, 1998, in Dallas County, Texas, I did knowingly and intentionally cause the death of Elizabeth BLACK, hereinafter called the deceased by shooting ELIZABETH BLACK with a firearm, a deadly weapon, AGAINST the peace + dignity of the State.

This was all done very quietly and efficiently in the same court that had presided over the Flores capital murder trial, before the same judge who would eventually sign the State's proposed findings of fact and conclusions of law recommending that Charlie be denied all habeas relief. And as noted above, the plea deal also disposed of the drug possession case for which Ric had bonded out of jail and then failed to appear in court mere days before he broke into the Blacks' house and shot Mrs. Black.

About two months after the plea deal was effected, on June 7, 2000, Judge Nelms signed a "Defense Claim for Service or Expenses," submitted by Ric's lawyer, Karo Johnson. Johnson was paid the strikingly modest sum of $5,000 for

reputedly representing Ric Childs during the two-year period after Ric was indicted for capital murder. Records indicate that Johnson rarely met with Ric in the Dallas County jail. Yet without any meaningful input from his client, Johnson managed to obtain this remarkable deal for a client for whom Johnson had posted bond twice, even when this client had caused the forfeiture of a bond that had cost Johnson at least $1,000. The record authorizing the payment of county funds to Karo Johnson includes a handwritten note stating that Ric "pled to 35; Co-D (Flores)-Death." Ex. 3. Seemingly, the fact that co-defendant Charlie Flores, a Hispanic individual, had been sentenced to death for a crime to which white individual, Ric Childs, had ultimately confessed, was worth rewarding—especially since Johnson's bill was so modest.

After serving only 15 years of the 35-year sentence, on April 11, 2016, Ric was paroled. At that time, Charlie Flores was under a death warrant, facing an execution date of June 2, 2016.

F. Fragments of Ric's Parole Records, Only Produced in July 2020, Further Expose Him as a Liar Still Shirking Responsibility—and Show That Former ADA January Had Continued to Advocate for Ric.

Despite multiple requests, Ric's parole records were never produced—until, suddenly, on July 10, 2020, the Dallas County DA's Office released a handful of

pages from a file that seems to be at least 468 pages long.[21] Ex. 24. The pages are heavily redacted and do not provide any legitimate explanation as to why Ric received such a sweetheart deal and why he was deemed parole-worthy in record time. But the documents do contain some fascinating information suggesting pronounced entitlement, chronic dishonesty, and ongoing assistance from ADA January—well after the latter had abruptly left the DA's Office at the end of 2000.

First, the scant collection of parole records that the State recently produced shows that Ric's explanation of how Mrs. Black was killed continued to evolve. He reputedly told state employees considering his parole eligibility that he had been no more than an innocent bystander; and that Charlie had shot Mrs. Black because "[s]he had ripped him off and he confronted her and shot her." Ex. 14 at 461. In other words, Ric was telling folks, including those evaluating his suitability for parole, that ***the victim, Betty Black,*** had "ripped off" Charlie "during a drug deal gone bad" and Ric was only "guilty by association." *Id.* This odd, self-serving story contrasts sharply to all narratives of the crime presented previously, including the State's case at trial, Ric's judicial confession, and what Ric told Jackie Roberts after the murder.

The parole records also include letters from Ric's step-father, Wesley Dean, purporting to tell the TDCJ Ombudsman how Ric and his parents were long-

[21] The Bates labels on the 29 pages that were produced suggest that the full file includes at least 468 pages.

suffering victims. *Id.* Dean insisted that Ric had not even wanted to take a plea deal but only accepted the State's (stunningly generous) offer under duress after refusing a series of increasingly softer proposed sentences. *Id.* Even more interesting is Dean's insistence that "[t]he assistant D.A. that handled Richard's case, **Jason January**, told us that he felt the sentence [of 35 years] was too excessive based on the facts of the case." *Id.* (emphasis added). According to Dean, January offered them sympathy for the "excessive" sentence of 35 years that Ric had received (relative to Flores's death sentence), then gave them legal advice: "He recommended filing an appeal for a possible sentence reduction." *Id.* That ADA January had supposedly been giving legal advice to someone he had prosecuted for murder was something Ric's parents felt could and should accrue to Ric's benefit: "We felt you needed to know this information," they wrote to the Texas Board of Pardons and Parole (TBPP). *Id.* The rest of that letter is redacted.

Similarly, in a letter scanned into the TBPP system on June 12, 2015, Ric's step-father, Wesley Dean, combining elements of fact and fiction, urged leniency for his step-son by citing the deal, undisclosed to Charlie Flores, that Jackie Roberts had received: "Jackie Denice Roberts, was offered and received, a reduced sentence[22] for the information she provided about the case to the Dallas County

[22] As explained above, Jackie did not receive any sentence at all because she was not even prosecuted.

district attorney's office." *Id.* Mr. Dean insisted to the TBPP that Jackie had "planned the burglary of the Black residence to recover the drug money from the interior walls of the home." *Id.* Mr. Dean also provided new details about Jackie's role, at odds with the State-sponsored testimony she gave during the Flores trial, claiming that she had drawn a map to the Blacks' house, had provided a garage door opener, and had provided the perpetrators with information about when the residence would be empty and where to look for the money. By contrast, at trial, Jackie herself had denied any such involvement. But Jackie *did* enable the burglary, in which Charlie did *not* participate, and she received no punishment of any kind.

Most likely, Ric's parents obtained these highly inculpatory details about Jackie's involvement from Ric, recounting information *he* and his male accomplice—perhaps Doug Roberts?—had obtained from Jackie Roberts. Jackie was, at that time, Ric's sexual partner and drug-dealing associate, who had access to the Blacks' house, knowledge of their schedules, and a sense that she was entitled to money hidden in their house, which she had been led to believe was hidden in the bathroom walls. Jackie had shared this information with her ex-husband Doug Roberts and Ric well before Jackie's one brief encounter with Charlie, a meeting orchestrated by Ric himself.

Ric's step-father's letters to the TBPP also include wild claims about "death threats" they had allegedly received from "Hispanic gang members," absent any

substantiation. Had there ever been any such evidence, ADA January would undoubtedly have waved it around during Charlie's trial. More likely, these ad hominem, racist allegations only shed additional light on the disparate treatment that the Flores family received. While the undeniably culpable white male and his family were treated as victims, Charlie and his family were terrorized and treated like pariahs.

Dean, Ric's step-father, went even further, claiming that his recitation of events amounted to "the facts of the case determined by the Dallas County District Attorney's office." *Id.* Dean was either lying to the TBPP in his desperate effort to help his step-son obtain parole or he had been told that these were "the facts" by someone in the Dallas County DA's Office. If the latter is the case, that means that the State's counsel had consciously suborned perjury from Jackie Roberts during the Flores trial. Because during the trial, as described further below, ADA January went to great lengths to obscure and even fight against any suggestion that Jackie had enabled the burglary.

Despite the brazen lies of Ric and his family members, he was rewarded with a grant of parole after serving only 15 years of a light 35-year sentence.

In short, Ric Childs, the actual shooter, was given an exceedingly light sentence and was required to serve only a fraction of that sentence despite his long criminal record, his failure to take any responsibility or show remorse, and his

chronic dishonesty. But among parole records finally produced in 2020 is a letter that provides some hint as to why he may have received this treatment. This particular letter is from Ric's biological father: a man named **Roy B. Childs** who, apparently, spent much of his professional life in law enforcement:

TDCJ - Parole Division
Attn: Correspondence
P.O. Box 13401
Capitol Station
Austin, Texas 78711

Re: Richard Lynn Childs
#920381 - Michael Unit

Ladies and Gentlemen of the Board:

My name is Roy Childs and Richard Lynn Childs (Ricky) is my son. I am writing this letter today to let you know that if Ricky is granted parole, he has a stable environment to come home to. I have lived here at this address for 23 years, along with my wife, Sherry Childs. I am a retired police officer from the City of Irving and Dallas, I have been the Post Marshall for Dallas and a police officer at Parkland. I have always been employed and a law abiding citizen and so has my wife, Sherry.

Ricky has a place to stay here in my home. He would be a huge help to me as I get older. I have horses, donkeys and dogs to take care of. I also have a large yard and pasture to keep up with. Ricky would be a tremendous asset to me and Sherry. I ask that you please grant parole to Richard Lynn Childs and send him home to a family that loves and supports him.

Thank you.

Ex. 14. The DA's Office produced material containing this letter revealing the identity of Ric's biological father soon after Roy Childs Sr. had died in July 2020:

Roy B. Childs

October 25, 1941 ~ July 24, 2020 (

No mention of Ric's biological father is found in any previously produced records. But as the letter in Ric's parole records and Roy Childs' 2020 obituary reveal, from 1970 to 1975, Roy Childs worked as a reserve police officer for the Irving PD. After several other positions in law enforcement, in 1995 "he went to work for the Department of Public Safety in Dallas, TX where he worked for Parkland Hospital until he retired." Ex. 26. This means that Ric's father was working in security at

Parkland Hospital when Charlie Flores was arrested for the murder that Roy Childs' son Ric had actually perpetrated.

There is a good-faith basis for suspecting that Ric was rewarded so handsomely, without even having to implicate an innocent person in the courtroom, in part because Ric was the son of a local police officer and the brother of a man, Roy Childs Jr., who originally provided Charlie Flores' name to the FBPD. It is only now clear that Roy Childs Jr. was the first person to supply law enforcement with the name of Charlie Flores. Seemingly, Charlie was perceived to be a convenient fall guy for a murder perpetrated by the drug-addicted prodigal son Ric, while he was out on bond, along with some other "white male with long hair."

The full, shocking truth of the disparate treatment that Ric received could obviously not have been disclosed before the Flores trial although ADA January had already set in motion the conditions to enable the deal before the Flores trial began. But ***nothing*** was disclosed about Ric's true role—including the fact that ADA January had every reason to believe that Ric had been the shooter. Likewise, the State did not disclose how ADA January had handsomely rewarded an array of drug addicts and dealers who testified in the Flores trial for their dishonesty. *See* Section V. These undisclosed deals constitute only some of the prosecutorial misconduct evident in this case, much of which has taken years to unearth in the face of mighty resistance.

II. THE JURY DID NOT HEAR CHARLIE'S STORY—INCLUDING EVIDENCE OF HIS ALIBI DEFENSE OR MITIGATING EVIDENCE OF ANY KIND.

A. Hearing Charlie's Life History Would Have Humanized Him.

Charles Don Flores, known as "Charlie" and later as "Fat Charlie" because of his robust stature, was born to Lily Garcia Flores and Caterino "Carter" Flores in Big Springs, Texas. Ex. 27 ¶1.

Lily Flores holding Charlie

Charlie's parents were native Texans of Mexican-American descent. They both grew up and went to school in Abilene, Texas. Ex. 28 ¶1. Although Lily and Carter had known each other virtually all of their lives, they did not get to know each other well until they were adults—and only after both had been previously married to others with whom they had had children. *Id.* ¶3. Charlie was their only child together. Ex. 29 ¶5.

Lily re-met Carter in the mid-1960s after her first husband had died in a car accident when her then-youngest child, Juan (called "Johnny"), was only eleven

months old. Ex. 28 ¶2. Carter was an Air Force veteran; but by the time he married Lily in 1967, he had a thriving roofing and renovations business. Lily and Carter married in a small courthouse ceremony in Brownsville where Carter then had a roofing job. Ex. 27 ¶4; Ex. 30 ¶2. Soon thereafter, he got a large project in Big Springs, and the family relocated there. *Id.* Carter worked long hours, and Lily took care of the sons Tony, Johnny, Julian, and Joe whom Lily and Carter's marriage had brought together as well as her niece, Frances, whom Lily had taken in at birth and raised as her daughter. *Id.* ¶6; Ex. 28 ¶4; Ex. 30 ¶1.

On October 31, 1969, while the kids were out trick-or-treating, Lily went into labor. Because Carter was away at a job site, Lily had to drive herself to the hospital, leaving Frances in charge of the boys. Fortunately, Lily arrived in time for the medical staff to assist her in giving birth to Charlie. Ex. 30 ¶4.

When Charlie was a toddler, the Floreses moved again: this time to Midland, Texas. *Id.* ¶5. For a time, they did quite well and were able to buy a house and adjoining property on the Garden City Highway stretching over an acre. Ex. 28 ¶6. By then, all but Charlie were attending school. *Id.* Charlie stayed home with his mother. They were very close—especially since, in those years, Carter often spent weeks on the road at worksites. *Id.* ¶7. Charlie's mother, who has now passed away, remembered Charlie as a happy child with a good imagination who enjoyed dressing up in a cowboy outfit and entertaining himself for hours. Ex. 29 ¶3. His siblings

remembered him as a social, adventurous, happy-go-lucky child bursting with energy, "always giving hugs and kisses." Ex. 27 ¶16; Ex. 28 ¶8; Ex. 30 ¶7.

Flores family photo (Charlie in red wagon)

Lily had a tough job, however, managing a blended family, dominated by boys. Ex. 27 ¶6; Ex. 28 ¶7. And when Carter was in town, he would spend a good deal of his limited free-time with friends. Ex. 27 ¶7. This pattern caused tension—exacerbated by alcohol consumption. When drinking, Lily and Carter would get into heated arguments that would occasionally get physical. *Id.*; Ex. 28 ¶15. During one of Charlie's early Christmases, such a fight broke out. Lily bashed the kids' Christmas presents, one after another, over Carter's body. As the fight escalated, they ended up toppling the family's Christmas tree. Ex. 28 ¶15.

Both Lily and Carter eventually stopped drinking when it was clear that it was creating chaos for their boys and interfering with their commitment to their church, with which they were heavily involved. Ex. 27 ¶8. Carter went on to become an ordained minister and an elder in the Church of Christ to which he remained devoted throughout his life—while also continuing to work as a roofer full-time. Ex. 30 ¶2; Ex. 31.

Meanwhile, Charlie, whose father was largely absent during his early childhood, had had to look to his older brothers for guidance about how to be a man. Ex. 27 ¶13; Ex. 28 ¶9.

Flores family photo (Charlie on his mother's right)

In part, this involved pushing the limits of what Charlie's much-younger body could handle. Initially, this meant learning early to ride dirt bikes around their property, to operate old trucks and construction equipment, and to try stunts on the family's trampoline. Ex. 28 ¶¶8, 9. He also taught himself to drive. Ex. 30 ¶8. But Charlie's

older brothers, who actively rebelled against their parents, started to engage in self-destructive behavior, which he also emulated. Ex. 27 ¶13; Ex. 28 ¶10. His brothers would take a container of gasoline they found stored in their father's workshop and, using a hose, would "huff' the gasoline, inducing a high as well as hallucinations and even sometimes a loss of consciousness. Ex. 27 ¶14; Ex. 28 ¶11. When Charlie was *as young as five*, his brothers encouraged him to join them in this exceedingly dangerous activity. Ex. 27 ¶14; Ex. 28 ¶12. One brother described how terrifying it was when, on one occasion, their youngest brother Charlie, his unformed brain reacting to the toxic fumes, grabbed the gasoline cannister and dosed himself in gas. But this alarming development did not deter the older boys, whose parents did not know how they were endangering themselves and their baby brother. Ex. 28 ¶¶12-13.

When Lily finally caught them, she beat the boys with the hose they had been using to huff the gas to teach them a lesson. Ex. 27 ¶14. But the real problem was that she was having to raise a large number of children, including five boys, without a strong male authority figure present. Carter was a great provider; but he was always off working. Ex. 28 ¶7. By the time the older boys were teenagers, they already had serious addictions. Ex. 27 ¶15. They soon moved on from huffing gasoline to drinking, smoking marijuana, and then experimenting with more dangerous drugs. *Id*.; Ex. 28 ¶¶13-14. All four of Charlie's older brothers ended up in trouble with the

law and with chronic drug or alcohol addiction by the time they were teenagers or young adults.

Unlike his older brothers, Charlie steered clear of disciplinary problems at school and had a solid set of friends in Midland. Ex. 28 ¶16; Ex. 29 ¶4; Ex. 32 ¶4. He also played football and loved it. Ex. 27 ¶16. He loved cars and spent hours studying how they worked and learning to fix them up. Ex. 28 ¶20; Ex. 33 ¶2.

In the mid-1980s, the oil industry took a nosedive, thereby hurting the entire West Texas economy, including Carter's roofing business. The resulting financial difficulties prompted the family to move to Irving, Texas, where Carter could join forces with one of his brothers who had a similar roofing business. Ex. 28 ¶18; Ex. 27 ¶17; Ex. 32 at 1; Ex. 30 ¶9.

B. Charlie's Adolescence and Early Adulthood Was Marked by Dissipation, Not by Violence or Gang Affiliation.

Charlie, who was then in high school, had to change schools midstream, leaving behind the small-town Midland High School for the more urban Nimitz High School in Irving. Ex. 28 ¶19. The new friends he made there were more adrift. Charlie, who had always done well academically, ended up repeating the ninth grade. Then he dropped out after flunking classes in tenth grade. *Id.* But because he went to work for his father full-time, his parents did not object. Ex. 33 ¶7; Ex. 4.

Charlie enjoyed working for his father and helping his friends work on cars. *Id.* ¶¶11, 20. But he also continued to be dominated by his older brothers. As one of his high school friends recalled, Charlie's brothers would pick on him verbally and physically. They would do this relentlessly, "trying to exercise control over him." *Id.* ¶3. One brother, Johnny, admitted that he intentionally baited Charlie into physical fights to try to toughen him up. Ex. 28 ¶17. A friend from high school observed that one time, Johnny pounded Charlie so severely that his "head needed to be sewn up." Ex. 33 ¶3.

Charlie continued to live with his parents in Irving as a young adult while working off and on for his father. His world was a portrait in contrasts: on one hand, Carter set an example as a very hard-working man committed to his church, but he did not intervene with the escalating drug and alcohol problems his grown boys had developed. *Id.* ¶¶7-9.

When Charlie was in his early 20s, a couple moved into the house across the street from his parents' house on Waldrop Street in Irving: a woman named Jane and her boyfriend Ric Childs:

Ric owned several hot rods and a dune buggy, which caught Charlie's attention. Ric was often outside working on his cars. He also had a mechanics stall in North Dallas. Soon, the two young men bonded over their mutual interest in working on cars (and smoking weed). Ex. 4.

That same year, Charlie got in trouble with the law for an offense that, as his older brother Jose "Joe" Flores admitted, was primarily Joe's doing. The two brothers had pulled into a service station. While Joe went inside to get beer, Charlie waited in the car. Unbeknownst to Charlie, Joe decided impulsively to dart out of the store without paying for the beer when he saw that no one was behind the counter. As Joe got back to the car, they were approached by a man who had observed Joe steal the beer. The man walked up to Charlie's side of the car and started yelling at them. Charlie, who had no idea why this stranger was attacking them, fought back. Thereafter, both brothers were arrested for robbery involving bodily injury—at which point Charlie was caught in possession of some drugs. He was charged and

convicted for the drug offense, for which he served two years in state prison. Ex. 27 ¶¶20-21; Ex. 4.

When Charlie got out in November 1996, he moved back to Irving and went back to work for his dad. He went to his parents' house every day to visit his mom. One day, he saw a new truck parked across the street at Jane's house. She called Charlie over and introduced him to a man named **Ray Graham**. Ray, who had grown up in Farmers Branch, knew Ric Childs and had met Jane through him. Ray had a mechanics stall up on Royal Lane—as did Ric. 39 RR 19. But by this time, Ray, like Jane, had succumbed to the allure of a new street drug: methamphetamine aka "Ice" or "Crank." They were not just using, but shooting up, this drug. Ex. 4.

Charlie's old friends from the neighborhood, including **Homero Garcia**, had gotten into this new street drug too. Meanwhile, they welcomed Charlie back into their circle, as he was seen as the life-of-the-party: warm, generous, enthusiastic about organizing celebrations of his friends' birthdays, and fun to watch sports with—particularly Dallas Cowboys games. He also continued to develop his passion for classic cars and hot rods and would eagerly work on anyone's car for them. Ex. 33 ¶11-12; Ex. 34 ¶2. But before long, he got caught up in the new drug culture too. Ex. 4.

Through Homero, who lived on the same street, Charlie met a woman he fell in love with and planned to marry, **Myra Wait**:

She was living with her mother and struggling to raise her three young girls, and Charlie wanted to help. Ex. 4. His friends thought she may have gotten involved with Charlie to have access to drugs but noted that she was smart like Charlie. Ex. 34 ¶6.

By 1997, Charlie and Myra were living together, with Charlie eagerly stepping into the role of surrogate father to her three young daughters. Ex. 4. They moved into a trailer at 2729 Sagebrush in Irving—right around the corner from Crystal Court where Homero's mother and Myra's mother lived. Charlie was still working for Carter's roofing business at that time—and Myra eventually got a job working in the office. According to Myra, their drug use was recreational, and Charlie started dealing drugs only to fund their new methamphetamine habit, which, according to Myra, was mainly indulged on the weekends when her children were with her mother. But Charlie admitted that he was soon doing drugs on a daily basis, although he was fearful of what meth did to people who started shooting it up. For

instance, Ray Graham had shot up so much that he had blown the veins in his arm out; he then switched to shooting directly into his neck. Charlie witnessed Ray nearly die from this on one occasion.[23] Therefore, Charlie never tried shooting up the drug, but he still became addicted. Ex. 4; Ex. 13.

C. Things Went Downhill Fast for Charlie after Ric Childs Resurfaced in His Life.

On August 24, 1997, Charlie got arrested in Irving for outstanding warrants. Ex. 35. He was booked into the Irving jail, and his mugshot was taken:

Around this same time, Charlie was told that Ric Childs had resurfaced and wanted to meet up with him. Ric was then seeing Deborah Howard, known as "Red," who lived nearby and knew Charlie through Ray Graham. Charlie had fond

[23] Before the Flores trial, Ray Graham had a heart attack as a result of his drug abuse. A couple of years later he died.

memories of Ric as someone it had been fun to hang out with, someone who shared Charlie's passion for cars. But when they reunited in the fall of 1997, Charlie saw that Ric, like his old girlfriend Jane, had descended into serious drug addiction. Ric seemed to be using drugs all the time and was shooting up methamphetamine. Charlie felt sorry for him and let him come around even though Myra and his older friends, like Waylon Dunaway, did not like the guy. Ex. 13; Ex. 34 ¶7 (describing Ric as "a dirty, trashy, biker-wannabe" who "was shooting up meth and did not seem to care about anything other than himself").

Charlie saw that Ric was too far gone to buy his own drugs and sell enough to make a profit. Charlie was willing to front Ric a small amount to see if he could be trusted to bring back the money. Pretty soon, Ric owed Charlie a lot of money. 36 RR 257; Ex. 4.

At this time, Myra remembered that Ray Graham seemed to be coming over almost every day. Ex. 13. Ray was friends with a guy named Doug Roberts from Farmers Branch. Doug also had a mechanics stall on Royal Lane. 35 RR 82; 34 RR 228; 39 RR 19. Unbeknownst to Charlie, Ray and Doug had been friends since high school, along with Gary Black. 34 RR 102. Ray lived about two miles from the Blacks' house in Farmers Branch. They were all involved in doing and dealing drugs. Charlie did not know anyone in that circle other than Ric and Ray, both of

whom he had met through Jane in Irving. Charlie had never spent time in Farmers Branch. Ex. 4.

Two people who did not know each other (Charlie's girlfriend Myra and one of Ric's many girlfriends, Deborah Howard), independently reported that, toward the end of 1997, Ric was constantly talking about some money hidden behind a wall. He would say "what would you do if you knew about 250,000 in drug money?" He said it belonged to an "old dope man doing time." He would say that he just needed people to help him. Myra also heard Ric talk to Ray Graham about a breaking and entering job he wanted to do. Ex. 36; AppX57.

D. On the Night of the Crime, Ric Childs Set Up a Drug Deal and Got Charlie Involved; After the Deal, Charlie Got in Bed with Myra Wait, Whom He Was with At the Time that Two White Men (Ric Childs and an Accomplice) Were Breaking into the Blacks' Home.

In mid-January 1998, Ric came around wanting more drugs from Charlie. But Charlie's own supplier was out, so he could not give Ric any. After about a week, Ric came by the trailer on Sagebrush, insisting that *he* knew how to get some product. Charlie did not ask for the details but agreed to put up the money. Ex. 4.

On the night of January 28th into the 29th, 1998, Charlie was at the trailer on Sagebrush with Myra and some of their friends. After Myra and the girls went to sleep, Charlie continued to hang out with Myra's younger brother, **Jonathan Wait Jr.** ("Jonathan"), and their cousin, **Jamie Dodge**. Homero also dropped by at some

point—as did Ric. Ric announced that he had set up a drug deal. Around 2:00-3:00 a.m., Ric offered to take Charlie to do the deal. As Jamie Dodge and Jonathan Wait left in Jamie's car, Ric drove Charlie in a recently acquired vintage, multi-colored Volkswagen Beetle to a house in Farmers Branch where a woman named Jackie Roberts was waiting for Ric. Until they got to her house, Charlie had not known that another person would be involved. He did not know this woman who was, apparently, Ric's newest girlfriend. 34 RR 118-120; Ex. 4.

As it turned out, Jackie had not known that Charlie was going to be involved either. She was reluctant to bring this unknown person along to meet her drug supplier or "connect," Terry Plunk. 34 RR 115-119. ***Ric*** had been the one to set it up with Jackie and had not mentioned Charlie. ***Ric*** was supposed to give the money to Jackie, who would then make the deal happen alone with Terry Plunk. 34 RR 118-119. But without telling Jackie, Ric had enlisted Charlie to get involved and supply the money. According to Jackie, she resisted the idea of Charlie coming along, but she claimed Charlie insisted that he was not going to risk getting ripped off. 34 RR 118-120.

Despite the wariness of both Jackie and Charlie, Ric left his Volkswagen at Jackie's house in Farmers Branch on Emeline Street, and the three of them went directly to do the drug deal in the El Camino, with Jackie driving, because she knew

where they were going. 34 RR 122.[24] The three of them could not have been together in the El Camino until some time around 3:00 a.m.[25] The around-3:00-a.m. timeline also corresponds to one piece of information that Ric gave to the police in more colorful language: "It was after the bars closed caused [sic] with Terry, he hangs out [at] the Baby Dog or Baby Jesus, some shit. We met over there before morning." SXR101.[26]

So, some time around 3:00 a.m. on January 29, 1998, Jackie drove Ric and Charlie in an El Camino to the apartment of a woman named Judy Haney on Empire Central near Love Field. Jackie had arranged to meet Terry Plunk at Haney's apartment—but without telling Haney in advance. 34 RR 173. The plan was to pay some amount in cash for what Jackie claimed was supposed to be a ¼ pound of product and what Charlie thought was to be a ½ pound. 34 RR 118; Ex. 4.[27] When

[24] Jackie's narrative has them driving from her mother's house in Farmers Branch directly to an apartment near Love Field on Empire Central. 34 RR 121. That is a distance of about 9-10 miles.

[25] One of the people at Charlie's trailer that night, Jamie Dodge, testified that he left around 3:00 a.m., with Jonathan Wait, and, at the same time, Charlie went off with Ric Childs in Ric's Volkswagen. Jamie Dodge did not mention Jackie Roberts. *See also* 34 RR 172-73 (testimony of Judy Haney confirming timing).

[26] This comment suggests that Ric had some history with Terry Plunk too as he purported to know his habits. No records have ever been produced showing any effort to explore the relationships between Plunk and Ric or Plunk and Jackie.

[27] According to both Jackie and her connect, Terry Plunk, the drug deal that she set up for Ric was supposed to be for a ¼ pound of meth and was supposed to be just between the two of them (at Judy Haney's apartment). 34 RR 117-118, 204-205. But by the time of the Flores trial, even these two key players were not consistent about what the terms of the deal had been. Jackie said that the price was supposed to be $3,900; Plunk was adamant that the deal was for $3,600. Judy Haney provided some helpful context: (1) $3,900 for a ¼ pound of meth would have been

they got to the appointed meeting place, Jackie went up to Terry Plunk in the parking lot and told him that Ric and Charlie were going to join her "because they didn't want to sit outside in the dark and wait. It might look suspicious." 34 RR 124. Jackie, Judy Haney, and Terry Plunk all later testified that Jackie, Ric, and Charlie entered Judy's apartment first, and Terry Plunk came up afterwards. 34 RR 124; 34 RR 185; 34 RR 206-208.

There was a lot of tension during the short interaction. Charlie suddenly feared that this may be a set up. He gave Ric the money and sat back on the couch. Ric joined Plunk at a small kitchen table. Ric took a small amount of the meth and shot it into his arm. The drug hit his system, and he did not concentrate on weighing the product. At that time, Charlie did not see the scale register that they had only been given a ¼ pound. Ex. 4. But, according to Judy Haney, he did comment on the amount seeming "short." She claimed he "said it pretty low key, but he was pretty adamant about it." But "everybody was trying to get out of there, and Terry told them, take it or leave it, you know." 34 RR 177.[28] Nobody wanted to be there—except Ric. At least *Ric* had gotten one thing he wanted: more dope.

"expensive;" and (2) you cannot tell how much meth you are getting from looking at it; you have to weigh it. 34 RR 188-190. But the bottom line was: no one involved agreed about what the terms were supposed to have been—which may partly explain why it did not work out as Jackie had hoped. Clearly, there had been no "meeting of the minds" about the key terms of this deal in advance.

[28] Recently, Judy Haney disclosed that, in response to the rising tension, she pulled out a gun. And that brought an end to the meeting. Ex. 37.

Upon leaving Judy Haney's apartment, Ric drove Jackie's El Camino. 34 RR 135. While they were on Highway 183, Ric said he had keys to a car and wanted to pick up something. He drove to an apartment complex off of O'Connor Boulevard near downtown Irving. He pulled up next to a Camaro Z28. Ric used a key to get into the car but did not have the ignition key. He tried to get it started and failed. Ric did not explain what he was up to, but after a few minutes, they left and started heading toward Charlie and Myra's trailer in Irving. Ex. 4.

They made one more stop—at the house of Charlie's friend, **W. Waylon Dunaway**, who lived on Glenwick, right behind the trailer on Sagebrush. Jackie did not go inside. Ex. 4; 34 RR 134-35.[29]

Once they were back at the trailer, he wanted to weigh the drugs they had bought from Plunk. Meanwhile, Myra and her three girls were sleeping. According to Jackie, they all went into the back bedroom where a woman Charlie referred to as "his wife" was in bed asleep. Charlie took out scales and weighed the drugs. 34 RR 137. Jackie later claimed that Charlie jumped up, pointed out that they had been ripped off, pulled out a gun, and waved it at her head. 34 RR 138-139. Charlie denies that this occurred; but he did yell at Ric about this being a messed-up deal. Ex. 4.

[29] At trial, Jackie claimed they stopped at "some house" after first going to Charlie's trailer. She claimed she did not go into this house but she saw Ric and Charlie come out with guns, which she had trouble describing. 34 RR 144-45. No one corroborated her version of events from the time they left Judy Haney's apartment until the time she arrived back home in Farmers Branch.

Jackie agreed to call Terry Plunk to complain about the shortage. Charlie then got on the phone with Plunk and conveyed that he felt he had been shorted; but Plunk insisted that they "got exactly" what they had paid for, and he didn't "do business that way. Nobody in this town gets it that cheap." 34 RR 216-217.

The yelling woke Myra up. She told Charlie to make Ric and the woman with him leave. Charlie then told Ric and Jackie to get out. ***Ric and Jackie then drove off in Jackie's El Camino.***[30] Ex. 13; Ex. 4.

Charlie stewed for a little while about how he had been ripped off, castigating himself for being so stupid as to get involved with people he did not know, wondering how he was going to track down Terry Plunk, and fearing Myra's wrath in the morning. He then got into bed beside Myra and went to sleep for a couple of hours. Ex. 4.

Myra's alarm went off at 6:15 a.m. She got up around 6:30 a.m. and started getting her children ready for school. At that time, Charlie was still asleep—as Myra later told the police, Charlie's trial attorneys, and post-conviction investigators over

[30] As explained below, the uncorroborated story that Jackie told at trial about what supposedly happened from about 3:30 to 7:00 a.m. deviates entirely from Myra Wait's reports. There is a good-faith basis to believe that Jackie came up with her version during the many hours when she was finally interviewed days after Mrs. Black's death as a suspect and revised it thereafter during the year she spent being "mentored" by ADA January. Ex. 8; Ex. 18.

the years. Ex. 13.[31] Charles soon got up and made breakfast for Myra and her three girls and then took two of them to school, as he usually did. *Id.*; Ex. 4.

Later that morning, Charlie's friend Mary came by and hung out for a while as Charlie worked on her Cadillac. Ex. 4. At some point Ric called asking if Charlie still had some of the dope they had bought from Plunk. He asked if he could come by and pick some up. Meanwhile, another guy named Tommy Lee Philips also called, saying he wanted to drop by. That was how Charlie's small-time drug business was done: a handful of people in his circle would "drop by" to buy or trade for some quantity of dope from his larger supply and then sell or use it themselves.[32] *Id.*

After they left, Charlie went out shopping with Myra and her girls in her Suzuki Sidekick. They were preparing to move. They had recently come back to the trailer one night and found that the entire place smelled like gas. That had been the last straw in a series of weird incidents that had prompted them to give notice. They planned to move in with Charlie's cousin who lived nearby on 6th Street and Hilltop in Irving. *Id.*

[31] For years now, Myra has refused all requests for further interviews.

[32] Judy Haney recently confirmed that the amount of product involved in the drug deal that Jackie had set up with Terry Plunk was not "even dealing with that large an amount of drugs." Ex. 37 ¶3.

Later that same afternoon, Charlie got another call from Ric. Ric said he was with some girl named Melissa. He wanted to know if they could drop by the trailer and leave his Volkswagen there because she was going to drive him around in her Mustang. Charlie had no problem with that, as he had not yet heard about Betty Black's murder or that the police were looking for Ric's distinctive multi-colored Volkswagen Beetle. When Charlie, Myra, and the girls got home from shopping, they saw that Ric's purple-and-pink Volkswagen Beetle, as well as a motorcycle he had left several days before, were parked out back on Glenwick Lane just at the periphery of the trailer park. *Id.*

Two days later, on January 31, 1998, Charlie got a call from Ray Graham who told him that Ric had been arrested for capital murder—and that the police were looking for his Volkswagen. As Charlie was listening to this news, he looked out the window of his trailer at the Volkswagen that Ric had left there two days before. *Id.*

E. Charlie Panicked, Fled, and Resisted Being Taken for a Crime He Had Not Committed; Meanwhile, Law Enforcement Went After His Loved Ones.

Over the next three months, Charlie engaged in a string of monumentally self-destructive and impulsive acts out of fear that he was being set up for a crime he had not committed. First, he just wanted to get rid of that car, but he didn't have the keys. Myra's brother, Jonathan, was at the trailer helping them move. Jonathan checked and saw that the car doors had been left open and the steering column was not

locked—so they could tow it. They then used Myra's Sidekick to tow the car to Charlie's dad's roofing company's office in Grand Prairie.[33] There they feebly tried to spray paint it black since the paint scheme was so noticeable. After dark, Charlie and Jonathan again tied the Volkswagen behind Myra's Suzuki Sidekick and towed Ric's Volkswagen to a service road entrance to Interstate 30 near NW 19th Street where they tried to set it on fire on the shoulder of the freeway. Charlie drove the Sidekick, and Myra rode in the front passenger's seat. Jonathan sat in the Volkswagen to steer it. When they pulled over, Charlie and Jonathan both got out, poured gasoline on the Volkswagen, and lit it. Ex. 4.

Not surprisingly, their actions were observed. It was around 7:00 p.m. by then, but well after sunset. As the car was burning, a driver (later identified as James Jordan) pulled up in front of the two cars. Charlie and Jonathan then jumped into the Suzuki—Charlie in the driver's seat, Jonathan in the backseat—and sped off. But the car that had pulled over sped off after them. As Charlie drove, Jonathan rolled down the driver's side rear window and fired shots in the air back toward the car that was chasing them. But the driver continued to chase them even after they exited the freeway. After a reckless bit of driving, Charlie believed they had evaded the car that

[33] Grand Prairie is a municipality partly in Dallas County, Tarrant County, and Ellis County, which is part of the Mid-Cities region in the Dallas–Fort Worth metroplex.

was chasing them. *Id*. Meanwhile, that driver flagged down an Arlington[34] police officer and reported witnessing the arson and being shot at as he chased the car.

Multiple police departments were soon involved because the events had unfolded in an area of the Dallas-Fort Worth metroplex that covers several smaller municipalities: Arlington, Grand Prairie, and Irving:

Meanwhile, because the Farmers Branch PD had sent out a bulletin several days before (on January 29th) alerting area police departments that they were looking for a Volkswagen Beetle, Farmers Branch PD was soon involved. Police investigating the arson incident on January 31st quickly realized that the car that had been abandoned on I-30 was the same car the Farmers Branch PD were looking for in conjunction with its investigation of Mrs. Black's murder. *See* Section III below.

[34] Arlington is a city, west of Dallas and east of Fort Worth, which is part of the larger Dallas-Fort Worth metroplex.

The next day, February 1, 1998, Charlie and Myra went forward with their plans to get married. Charlie had previously bought her a ring, and Myra had found a place on Shady Grove where a Dallas state court judge, the Honorable John Ovard, performed ceremonies in a chapel on the ground floor of his Irving townhouse.[35] Myra's brother Jonathan was there, along with her three daughters. A few days later, they rented a storage unit in the USA Storage building between Estes and Beltline at Highway 183 to use during their move. Charlie and Myra remained in Irving over the next several days, moving things back and forth between the trailer and Charlie's cousin's house on Hilltop. Ex. 4. They did not know that they were under surveillance most of this time.

On February 6, 1998, the *Dallas Morning News* ran another article on Mrs. Black's murder; the headline read: "Slain woman was not random victim, police say." The article named both Ric Childs and Charles Flores as suspects. The article described the two men's criminal records and asked that: "Anyone with information on Mr. Flores is asked to call Farmers Branch police at (972) 484-3620." Ex. 38. Charlie was described as "about 6 feet tall and 260 to 270 pounds. He has short dark hair and wears glasses[.]" *Id.* This description was an accurate description although, in his most recent mugshot, he was not wearing glasses:

[35] For the marriage to be formalized, they would need to register it with Dallas County. But because of intervening events, that did not happen.

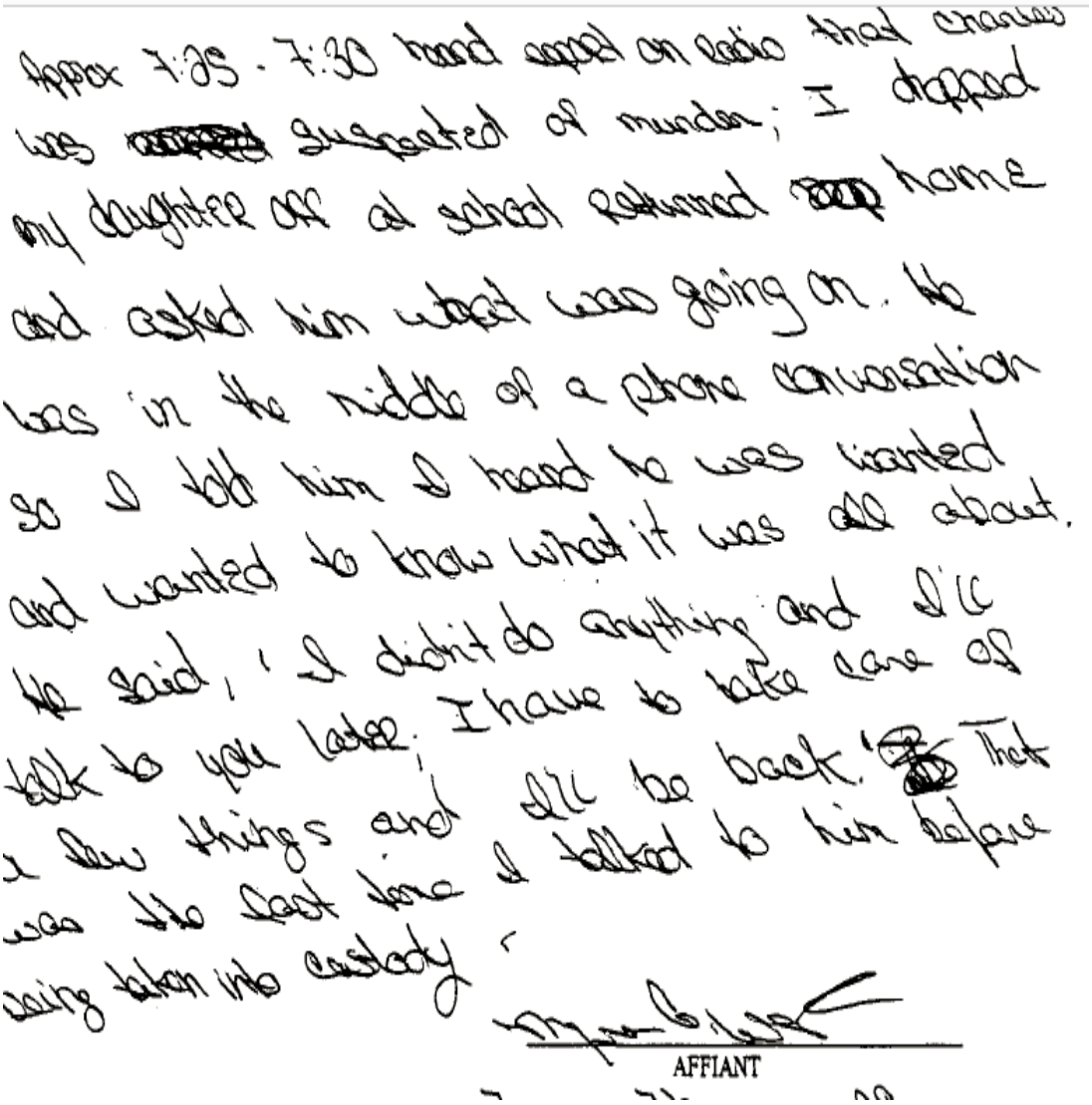
That day, February 6th, Charlie got a call early in the morning from his father. Carter Flores had just heard on KRLD radio that his son was wanted for capital murder. After Charlie finished the call, he told Myra, who could see that he was very upset, that he had some things to take care of. He told her that he had not done this thing; it seemed that something Ric had done was being pinned on him. Ex. 4; Ex. 36.

Later that same day, Myra decided to go to her mother's house on Crystal Court. In short order, investigators arrived and approached Myra. They demanded that she tell them where Charlie was. She refused to cooperate. They claimed to run a search of her license, said that she had outstanding DPS warrants, arrested her, and hauled her into the Farmers Branch police station.

When Myra did not return, Charlie panicked. He left money for his cousin to help Myra and to ensure that her girls could be reunited with her when she reappeared. Ex. 4.

Meanwhile, at the police station, Myra was interrogated by several men, including the lead investigator in the Betty Black murder case: Gerald Callaway. The investigators demanded that she provide information about where Charlie was and other things that she knew nothing about. She was held overnight. They kept threatening her—particularly with the prospect that she would lose custody of her kids if she did not cooperate. Ex. 13.

The next day, Myra wrote out and signed a statement, dated February 7, 1998, about what had happened the previous morning before she was taken into police custody:


Approx 7:25 - 7:30 heard report on radio that Charles was suspected of murder; I dropped my daughter off at school returned home and asked him what was going on. He was in the middle of a phone conversation so I told him I heard he was wanted and wanted to know what it was all about. He said, 'I didn't do anything and I'll talk to you later; I have to take care of a few things and I'll be back.' That was the last time I talked to him before being taken into custody.

AFFIANT

Ex. 39. Although Myra was repeatedly interrogated and harassed thereafter, this was the only statement she ever wrote in her own very distinctive handwriting; it states that Charlie had told her "I didn't do anything" before he left. *Id.*

After Myra signed that statement, the police let her go.

Earlier that day (February 7th), *The Dallas Morning News* had run another article about the Black murder case. The article asserted that "Farmers Branch officials said they were flooded with tips about Mr. Flores" after running an article

the day before featuring his name, description, and picture: "'We got a lot of calls after we put his name and picture out there,' said Donna Huerta, a city spokeswoman. 'We do believe he's still in the area.'" Ex. 38.

The article also discussed the fact that, the "same day" that Ric Childs had been arrested (January 31st), "a motorist reported being shot at on I-30. Arlington police said the motorist reportedly pulled up to ***two men*** and a car beside the freeway Saturday evening and asked if they needed help." *Id.* (emphasis added). This motorist, James Jordan, had told police about seeing one man with "long hair" shoot at him; and later he would not mention a second man at all. Yet Jonathan was undisputedly with Charlie at the time; and Jonathan, not Charlie, had long hair and had done the shooting. But days before this article ran on February 7th, the Arlington police had already been apprised by the Farmers Branch PD that the suspect in the arson was Charles Flores, and Arlington had issued an aggravated assault warrant in connection with the freeway shooting (actually perpetrated by Jonathan Wait). *Id.*; SXR1.

After Myra got out of the Farmers Branch jail on February 7th, she learned that Charlie had fled to Mexico. He was able to do this even though he had spent several days openly going about his business in Irving, Texas from January 29–February 6, 1998. In retrospect, it is clear that, by at least January 31st, Farmers Branch law enforcement had learned Charlie's name and a physical description and knew he was

associated with Ric Childs before; law enforcement had also known where Charlie was living and had been watching the place. But how and precisely when they got his name has long been concealed.[36] *See* Section III. In any event, despite considering him a suspect and placing him under surveillance, he was not arrested and was only indicted after he fled to Mexico.

Charlie's terrified parents had helped enable him to flee. They did not know the facts, but were aware that he was being accused of a death-penalty crime that he denied committing. After Charlie left for Mexico, Myra ended up moving in with his parents because she could not trust her own parents who were actively working as informants. Her estranged father, **Jonathan Wait Sr. ("Wait Sr.")**, was a drug addict and a long-time snitch. He was interested in collecting the $10,000 reward then being offered for information leading to Charlie's arrest. **Connie Wait**, Myra's mother, was trying to take permanent custody of Myra's girls. Since Myra's arrest, the only way Myra had been able to see her kids was to go to her mother's place on Crystal Court in Irving. She usually went just before the girls were put to bed so she could at least say good night to them. But many times, the police would show up

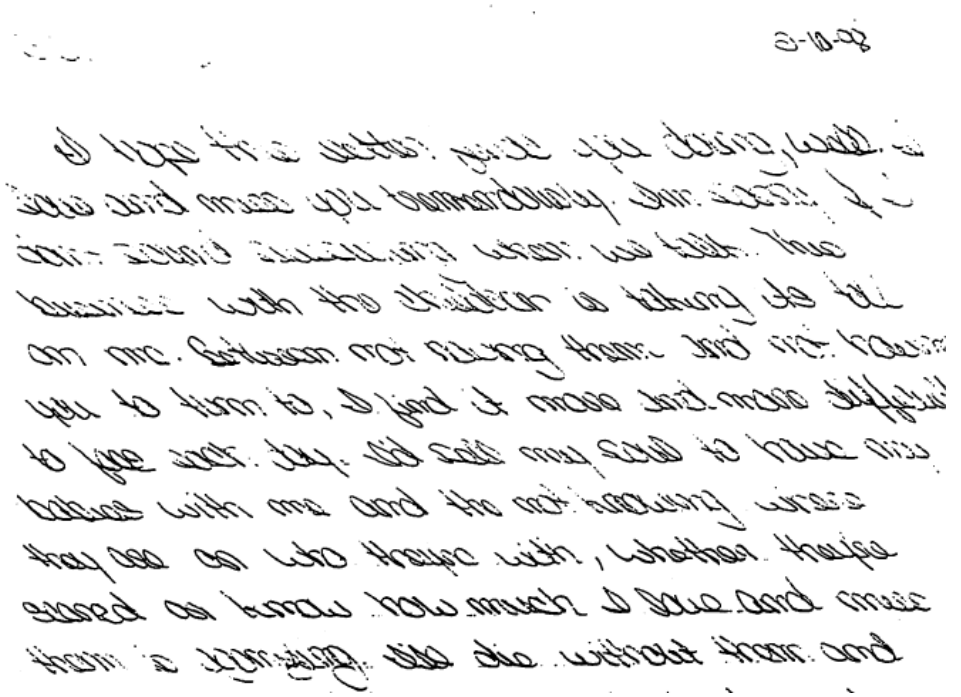
[36] On information and belief, Ric may have re-entered Charlie's life in late 1997 when Ric was out on bond, at the same time when he also met Jason Clark and Jackie Roberts, because Ric was working as an informant. Thus, he may have given law enforcement the name of his drug suppliers before Mrs. Black's murder occurred. Neither the Irving PD nor the Farmers Branch PD, however, has ever released records describing their history with Ric, although some records do refer vaguely to a "history" between Ric and the Irving PD. There is also reason to believe that Ric, perhaps with Doug Roberts, planned to steal Gary Black's notorious "dirty money" even before Ric met Jackie and started running around with her.

right after she got there and start interrogating her about Charlie's whereabouts. Ex. 13.

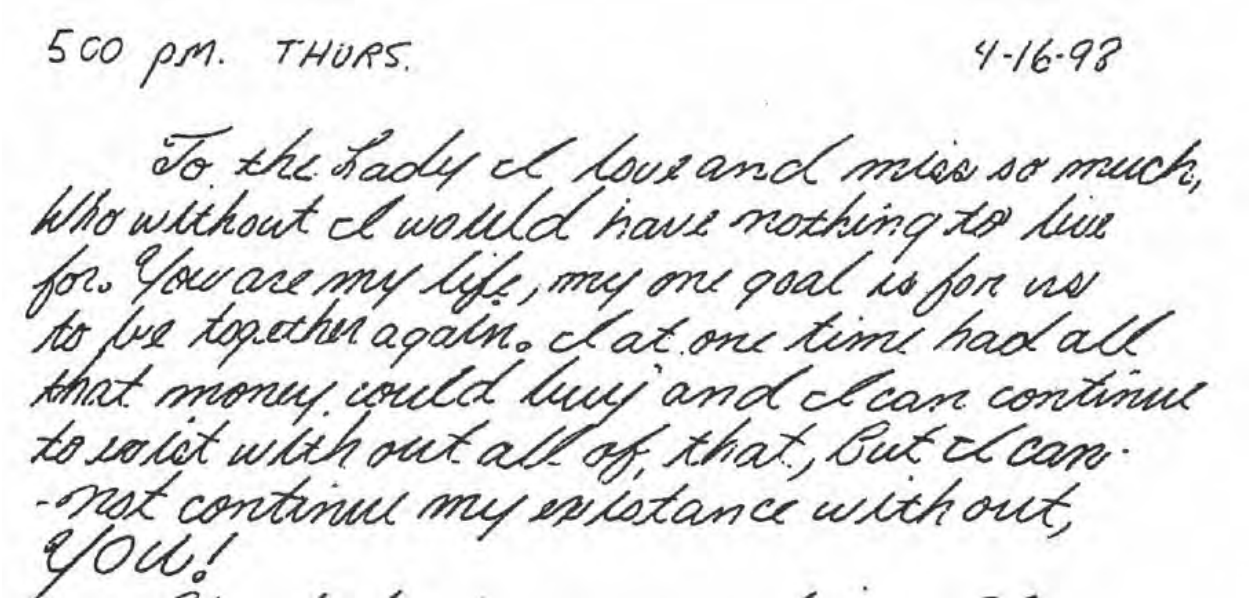
Meanwhile, undercover police stationed themselves in the park across the street from the Floreses' house every day. Officers followed Myra whenever she went out, including to the grocery store and to see her kids at her mother's house. *Id.*

The FBI had gotten involved as well. While Charlie was on the lam, although the FBI was aware of his whereabouts, he was not extradited. But, during this time, Detective Callaway, working in conjunction with the FBI, was trying to induce the U.S. Attorney in the Northern District of Texas to file a federal case for "Unlawful Flight and/or Felon with a Firearm." The plan, as described in a memo dated March 16, 1998, was to use the federal case as a hook to enable extradition; then, once Charlie was back in Texas, the plan was to drop that case and pursue the state capital murder charge—since Mexico would not cooperate if the death penalty was on the table. Callaway commented: "I ought to at least get an 'A' for effort, don't you think?" AppX57.

While in Mexico, Myra and Charlie wrote to each other, *e.g.*, Myra to Charlie:



And Charlie to Myra:



Ex. 40.[37] In these letters, Myra had tried to reassure Charlie: "I love and miss you tremendously;" she had also shared with him her panic about the situation with her children:

> Between not having them and not having you to turn to, I find it more and more difficult to face each day. I'll sell my soul to have my babies with me and the not knowing where they are or who they're with, whether they're scared or how much I love and miss them is agonizing. . . . You are my soul and the great love of my life but my children are my reason for living[.] . . . Now I've lost my husband, my soulmate, my best friend, my support and those three precious babies.

Id. Myra also reassured Charlie that his parents, with whom she was then living, "are wonderful" but not what she longed for "so the void never diminishes." *Id.* The FBI also intercepted a letter from his concerned father entreating his son to turn to God for help as he had been raised to do. Ex. 41.

After a few months, feeling lost and homesick, Charlie returned to Texas, hoping to reunite with Myra. Before he made it home, however, he got pulled over for a drunk-driving incident in Hays County and resisted arrest. After being hauled into jail, he gave his older brother's name instead of his own; then he contacted his

[37] Later at trial, the State offered into evidence various items found on Charlie when he was arrested: a Spanish-English dictionary, Mexican currency, a pager, a knife, a bullfight ticket, etc. 37 RR 172-176. The State did not offer the love letters from Myra that he had been carrying with him at the time of his arrest or the ones Myra had received that were confiscated when the FBI raided the Floreses' home. These letters were not produced to trial counsel. They were discovered in the DA's file when a review was permitted only after his subsequent writ application was remanded for further factual development of a claim challenging the science used to justify the police's use of "investigative hypnosis" on one of the State's witnesses.

mother who, along with Myra, traveled to Hays County and helped him post bond and leave town. Ex. 4.

The FBI, which was continuing to monitor Charlie's movements, let several more days pass. Then, on May 1, 1998, he was apprehended. That day, he had gone to see his old friend Waylon Dunaway at his house on Glenwick in Irving. Charlie stayed for a few hours; Myra came over at some point. But Charlie eventually got "jumpy" and decided to leave. Ex. 34 ¶8. As it turns out, law enforcement was waiting for him outside. A high-speed chase ensued. 35 RR 18. After crashing his car, Charlie continued trying to run on foot until he was tackled. He was injured in the process and taken to Parkland Hospital. While in the hospital, Farmers Branch detectives Callaway and Baker approached Charlie and tried to talk to him about the Black murder case. He refused to talk to them. Thereafter, they arranged for the arrests of Charlie's elderly parents and Myra. Ex. 4.

Meanwhile, not long after Charlie had left Waylon's house, six men showed up at Waylon's door: three FBI agents and three members of Irving PD's SID. They asked if they could search his house. He gave them permission because this was his first encounter with law enforcement and he did not think he had anything to hide. After entering the house, they revealed that they knew that Charlie had just been there—and then claimed to find some meth "under the bed in a little package." Waylon knew it was not his; and law enforcement insinuated that Charlie must have

left it there. But Waylon was charged with possession of a controlled substance. Ex. 34 ¶¶9-10.

That day, Myra was arrested while she was at her mother's place on Crystal Court in Irving. Her mother had called and asked her to come over and get her things out of the attic. When Myra got there, she saw her mother use the phone. Minutes later, the police arrived and arrested her, supposedly, for a four-year-old unpaid ticket. But when she got to the police station, she was met by the same detectives who had arrested Charlie earlier that same day. They said they were coming after her for "Hindering Apprehension" of a fugitive. Ex. 13.

For the next three days, Myra was held at the Farmers Branch police station and, according to her, was questioned for an hour about every two hours. Callaway, who was running the Black murder investigation, was involved in the interrogations, as was an FBI agent. Early on, she gave them the key to the storage unit she and Charlie had rented before he knew he was a suspect in a murder case. *Id*.

At some point while she was in the Farmers Branch drunk tank, Charlie, who was being held on a medical floor in the Dallas County jail, was taken by wheelchair to an office. There, an officer picked up the telephone, dialed a number, and handed the phone to Charlie. Myra was on the other end. She started crying, saying that she was being threatened with having her kids taken from her and that they were both going to prison. Charlie tried to calm her down, saying that they were just messing

with her head; he had not done this crime. The officer then took the phone away from him. At this time, Charlie did not yet know that the Farmers Branch PD had also taken his parents into custody and were threatening them with prosecution too. Ex. 4.

While Myra was in custody, several so-called "Voluntary Statements" were prepared for Myra to sign—all in Detective Callaway's handwriting. One is dated May 6, 1998. Two more are dated May 7, 1998. Ex. 13.[38] Despite seemingly inculpatory statements written out by Callaway, Myra later insisted to Charlie's lawyers that Charlie had never told her that he was at the Blacks' house. Instead, the opposite was true: that he had told her that he did not do this crime. Ex. 36.

F. The State Worked to Destroy Charlie's Alibi Defense and His Support System.

After several days in the Farmer's Branch jail, Myra was transferred to the Dallas County jail. Ex. 42. Then ADA January took charge of the harassment. He tried to indict Myra as well as Charlie's parents, Carter and Lily Flores, for assisting him in evading arrest. Myra was eventually released because they were not able to indict her.

[38] The signatures on these statements are not consistent with Myra's signature on the one statement that she had written herself. But because none of these statements were ever offered into evidence or even mentioned at trial, their authenticity was never tested.

But Lily and Carter did not fare so well. They had been arrested when Detective Callaway, joining forces with the FBI and the Irving PD, descended upon their home. After being detained and questioned by the authorities for several days, they were indicted. The Floreses, two people in their 60s who had never been in trouble with the law, were held in jail cells in Farmers Branch and threatened with either taking a deal that would require pleading guilty to abetting Charlie's escape or face the prospect of many years in prison. They were told that bond would be set at $30,000 each unless they agreed to cooperate and sign statements inculpating their son. They felt they had no choice because the income from Carter's roofing business was essential to supporting their extended family. Only after they signed statements were they transferred to the Dallas County jail where bond was lowered to $1,500. Ex. 43; Ex. 29; Ex. 32.

Some time after the attempt to indict her failed, Myra got served with a subpoena from the Dallas County DA's office, summoning her to meet with the lead prosecutor: Jason January. Before appearing, she got a lawyer and was supposed to meet that lawyer at the DA's Office so that she would have counsel with her during any interrogation this time. She arrived at the appointed time and checked in. Another prosecutor in the DA's office came out to meet her. She told him that her lawyer was going to be meeting her there. But the prosecutor told her to come on in the office and they would have her attorney sent up when he arrived. Ex. 13.

Myra was taken to ADA January. The two prosecutors then started to question her about her relationship with Charlie. They wanted to know how long they had been together and were they really married. They also wanted to know about Charlie's relationship with Ric Childs. They wanted to know how long Ric and Charlie had known each other and what kind of dealings they had had with each other. Myra reported that she did not like Ric, and so he would only come around for very brief intervals. *Id.*

ADA January insisted that she knew more about the situation and that they would see to it that she testified. She was reportedly told that, if she did not cooperate, they would file charges on her for other crimes surrounding Charlie's case. They also told her they would become involved in the custody case between her and her mother over her children. They said that they would recommend to the courts that her mother gain full custody and that Myra's rights be taken away. The distinct impression was created that she was expected to come up with something to help the State convict Charlie for Betty Black's murder. *Id*.[39]

According to Myra, ADA January did not stop there. He repeatedly threatened her thereafter—saying he would have her arrested again for destroying evidence or hindering Charlie's arrest. He said he would pursue those charges after the trial was

[39] According to Myra, after ADA January let her go, she learned that, when her attorney had arrived to be present when she was being questioned, he had been told that she had not shown up for the appointment. Ex. 13.

over if she did not testify for the State. He said he would make sure that she did not get probation and that she had to serve the entire seven years in prison for helping hide Charlie. She was terrified by all of this, and called Charlie, incarcerated in the jail, hysterical that she was going to lose her children permanently and be sent to prison. *Id.*

G. Charlie Was Betrayed by His Own Lawyers.

Because Charlie was indigent, counsel was appointed for him: **Brad Lollar**, lead counsel, and **Doug Parks**, second chair. Charlie's interactions with counsel were extremely limited and mostly took place in the holding cell before or after court appearances. Ex. 4. There was no visit in the jail for nearly a year, and that finally occurred on March 15, 1999, a week before the presentation of evidence began.

In the first couple of months of his incarceration in the Dallas County jail, Charlie received multiple visits from his parents and Myra, who reported how they were being hounded by law enforcement and members of the DA's Office. Charlie's panic began to rise. On July 10, 1998, while he was still confined to a wheelchair due to an injury he had sustained in trying to evade capture back on May 1st, Charlie was transported from the jail to Parkland Hospital. While in the hospital, he suddenly decided to try to escape. He wrestled Officer Sherman, the transport officer to the floor, and took his gun. Charlie, did not, however, shoot the gun. Officer Sherman pinned Charlie to the floor. As a radiology clerk watched, one of the doctors came

up and took the gun out of Charlie's hand. 37 RR 182, 193. Officer Sherman then reached for his mace. As he started to spray it, Charlie flailed around and bite Officer Sherman's hand, causing him to drop the mace. Charlie then grabbed the mace and started spraying it. Others, hearing the commotion, came to Officer Sherman's assistance. They helped subdue Charlie and threw handcuffs on him. 37 RR 183-239; Ex. 4. But this futile, self-destructive incident would become a centerpiece of the guilt-phase of Charlie's trial. (Ultimately, the State put on four different witnesses to testify about this one incident.)

During the few pre-trial meetings Charlie had with Brad Lollar, Charlie had tried to explain his role in events the night before and the morning of Mrs. Black's murder. He insisted that he was not guilty and explained that he had an alibi defense: when Mrs. Black was shot on the morning of January 29, 1998, in Farmers Branch, Texas, he had been sleeping in a trailer in Irving, Texas with Myra and had then gotten up to help Myra get her children ready for school.

Lollar, however, was skeptical. He repeatedly demanded of his client that he "come clean." Lollar suggested that ADA January was willing to offer a life sentence if Charlie would plead guilty; but Charlie, insisting on his innocence, refused. Lollar then told his client that, as a legal matter, it was okay if Charlie had been present at the scene because they could try to convince the jury that Ric Childs had acted based

on an "independent impulse" in shooting Mrs. Black and that Charlie could then only be convicted of burglary. Ex. 4.

Lollar's purported objective was to emphasize that the State had no physical evidence linking Charlie to the scene, and no means to prove who had actually shot Mrs. Black. Lollar suggested that the jury could be convinced to go for a "lesser included offense" instead of capital murder and thus save him from the death penalty. Lollar also suggested that the alibi witness (Myra) was tainted because she had helped Charlie try to evade arrest—and the Dallas County DA's Office was then actively seeking to indict her for that.[40] Ex. 4.

Lollar repeatedly told Charlie that he thought there was no way the State could prove capital murder, so a maximum 20-year sentence for burglary would be a far better outcome than the death penalty.[41]

Additionally, Charlie was painfully aware of how his loved ones were being treated—because of their role in trying to help *him*. Ex. 4. During the brief interval

[40] Lollar's notes from an interview with Myra Wait on March 6, 1999, shortly before the presentation of evidence began, indicates that she told him, among other things, that Charlie was in bed with her when the alarm went off at 6:15 a.m. on January 29, 1999. Ex. 36. Also, his co-counsel Doug Parks, described "Myra's Statement" as being that she "did not tell police that C told her he was there and shot the dog" and "says C at home exactly at time of murder." Ex. 44.

[41] The jury charge did ultimately include a burglary count as an alternative to three different capital murder theories, one of which was a "law of parties" theory. But this made little sense from a defense perspective because a guilty finding on burglary would have been sufficient to support a capital murder under the law of parties. As ADA Davis explained to the jury, if the defendant was found guilty of capital murder as a party, then the jury would never consider the lesser - included offenses. 39 RR 45.

between the time when Charlie was apprehended and his capital murder trial began,[42] the defense team also learned that the FBI, working with the Farmers Branch PD, had rounded up several of Charlie's acquaintances who had their own legal troubles and had shaken them down trying to get evidence to corroborate the State's theory that Charlie was liable for Mrs. Black's murder. Just before trial, they learned, for instance, that Homero Garcia, had been interrogated and eventually signed a statement, typed up by law enforcement, suggesting that Charlie had confessed to Homero, back on January 30, 1998, that Charlie had "shot the dog," and "Ric shot an old lady." Ex. 45. But Charlie had not even heard about the murder until January 31, 1998, when Ray Graham called and told Charlie that the police were looking for Ric's Volkswagen Beetle and had arrested him for a murder case. Ex. 4; Ex. 36.

When Charlie learned that Homero was claiming that Charlie had "confessed," he continued to insist on his innocence and demanded that his lawyers prepare to put on his alibi defense. But, meanwhile, Myra's girls had been taken away. Her terror when she visited Charlie in the jail was palpable. All of his loved ones believed that, if they testified in support of Charlie, then ADA January would use his authority to prosecute them and send them to prison as he had threatened to

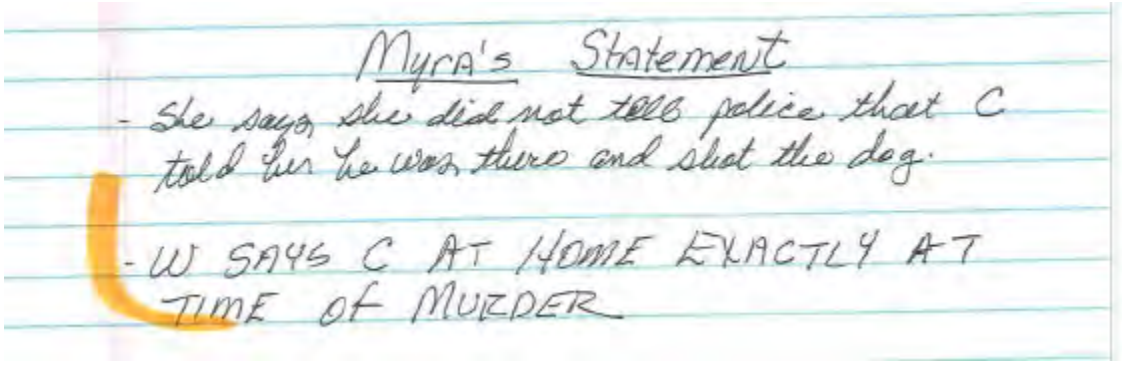
[42] Less than a year after Mrs. Black's death and less than nine months after Charlie's arrest, voir dire began on January 25, 1999. *See* 1 RR.

do. As Charlie's diabetic mother, then 60 years old, recalled: she and her husband "were both put in jail cells for a few days, and we were essentially threatened with the choice of either taking a plea deal where we pled guilty to aiding Charles's fleeing, or else to face the prospect of many years of prison time." Ex. 29 ¶18. Charles complained to Lollar about how his loved ones were being harassed, but Lollar simply responded that ADA January "could do that." Ex. 4.

Shortly before the presentation of evidence began, Myra finally got a call from Charlie's defense lawyer. They talked for about twenty minutes or so. The substance of this phone interview is captured in Lollar's notes. Ex. 36. According to Lollar's contemporaneous notes, dated March 6, 1999, Myra told Lollar that Charlie's parents had been arrested again the night before. As for the events leading up to Betty Black's murder, Myra told Lollar that Charlie had been home most of that night and, most importantly, reported that he was home in bed that morning when she woke up. She explained that they had had dinner together the night of January 28, 1998. Then, her brother Jonathan had come by, her cousin Jamie Dodge, their mutual friend Homero "Medal" Garcia, and Charlie's friend Jonathan Irvin. They had played cards. Homero left at some point. Then she went to bed. She told Lollar about being woken up later by an argument Charlie was having with Ric and some woman. Myra told the lawyer about Charlie getting into bed at some point and that he was there in the bed asleep when her alarm went off around 6:15 a.m. *Id.*

The notes also show that Myra told Lollar about other specific events that had occurred over the course of that morning. She reported that she and Charlie didn't go anywhere that next night and heard nothing about a murder for several days. Then, when the news reached them, Charlie denied that he had anything to do with it. She also shared her negative opinion of Ric and how Ric had been obsessing about some hidden "drug money" that he wanted to steal for over a month before Mrs. Black was killed. Myra also explained how she had heard Ric trying to recruit Ray Graham to help Ric with some breaking-and-entering job. *Id.*

Myra told Charlie's lawyers all of these critical facts before the presentation of evidence began. She also told them that she never told the police that Charlie was there or that he had just shot the dog. *See id.* Lollar's more detailed notes match, in essence, notes made by his co-counsel, Doug Parks.


Myra's Statement
- She says she did not tell police that C told her he was there and shot the dog.
- W SAYS C AT HOME EXACTLY AT TIME OF MURDER

Ex. 44.

Parks' notes also include a list with a heading: "Our Witnesses." But the list only included one name: Ray Graham. Ray Graham reportedly had sold a .380 to

Ric Childs that could have been the murder weapon. *Id.* Seemingly, an investigator retained by the defense had interviewed Ray Graham, Ex. 46, but there is no record of specific information ascertained from Graham and he was not called to testify at Charlie's trial. Nor was Myra asked to testify, even though she was present in the courthouse throughout the trial.

Myra was at the courthouse because the State, not the defense, had subpoenaed her. The defense did not call her although she had conveyed plainly that she could testify to facts that amounted to an alibi defense. Nor did the defense subpoena *any* mitigation witnesses or otherwise prepare in any way to put on a punishment-phase case should their client be convicted.

Because the State had subpoenaed Myra, she was there and had to wait outside the courtroom the whole time. After the third day, she asked Lollar why the State had not called her as a witness. Ex. 13. He suggested that ADA January probably thought she would have been a hostile witness. That observation, quite reasonable based on the facts Myra could have attested to, led Myra to assume that the defense would call her on the last day of the trial. But the defense did not call her either. Moreover, she was never even asked about the prospect of testifying in the punishment phase. She never told anyone that she did not want to testify or that she would plead the Fifth if she were called to the stand, although she had described feeling very intimidated due to the way the prosecution team had treated her. *Id.*

During trial, Charlie had listened as the State's witnesses, particularly Jackie Roberts, spun a convoluted story to try to put Charlie in Ric's Volkswagen around the time it was seen outside of the Blacks' house in Farmers Branch on January 29, 1998. Their testimony was not only untrue; it did not add up. But Charlie was also highly distracted during trial by having to wear a stun belt as an officer stood directly behind him, threatening to light him up with 50,000 volts if he made any sudden moves. 40 RR 156. That officer had also informed Charlie that if he were to shock him, he would not be getting up, he would "defecate in [his] pants, and [he was] going to urinate." 40 RR 159. That officer further explained that at least six armed members of the sheriff's office were in the court watching him at all times. 40 RR 155-156. At one point, the judge directed this officer to "zap the heck out of him if he creates any disturbance" even though the officer armed with the stun device had admitted that he had not seen Mr. Flores "act inappropriately at any time in the Courtroom[.]" 40 RR 164, 156.

Right before the third day of evidence was to begin, the State informed the defense that one of the Blacks' neighbors, Jill Barganier, was suddenly prepared to identify Charlie as the person she had seen getting out of the passenger side of the multi-colored Volkswagen Beetle thirteen months earlier. Mrs. Barganier, right after the murder, had been able to pick Ric Childs out of two separate photographic line-ups as the driver of the Volkswagen. But she had never succeeded at identifying the

passenger—despite multiple attempts. Thirteen months later, she suddenly decided that she could make an identification after seeing Charlie, the accused, sitting in the courtroom at the defense table. Judge Nelms expressed some skepticism since she had, by then, known the defendant's name: "And honestly you don't have to be a rocket scientist to pick out who is the Hispanic individual in the Courtroom. You agree with that, do you not?" 36 RR 108. But Mrs. Barganier insisted that she was now sure about her identification.

Because Mrs. Barganier had undergone a hypnosis session conducted at the Farmers Branch police station to help her "remember more" about what she had seen on January 29, 1998, Texas law required a "Zani hearing" outside of the jury's presence. The hearing's objective was supposed to be to assess whether the hypnosis session had comported with "procedural safeguards" required by Texas law. *See State v. Zani*, 758 S.W.2d 233 (1988). In the middle of trial, first thing on March 24, 1999, the requisite "Zani hearing" was hastily convened. 36 RR. Although *none* of the *Zani* procedural safeguards had been adhered to, the court denied the defense's motion to preclude Mrs. Barganier from testifying about her post-hypnosis identification. 36 RR 1-117; *see also* Section VII below.

Mrs. Barganier was allowed to testify to the jury at the end of that same day, asserting that she was now "[o]ver 100 percent" sure that it was Charles Flores she had spied through her miniblinds as two men got out of a psychedelic Volkswagen

Bug outside of the Blacks' house at 6:45 a.m. the day of Mrs. Black's murder. 36 RR 276-295. The history of how Mrs. Barganier got to this point of exceptional certainty, thirteen months after her fleeting glimpse of two strangers, in the driveway next door, before dawn, on January 29, 1998, is discussed below. Although utterly unreliable, the testimony was devastating to the defense. Thereafter, Charlie felt that he had no chance for an acquittal unless he testified because he was the only person who could contradict the compendium of lies that were before the jury. Ex. 4.

Lollar, however, insisted that Charlie testifying would be "suicide," arguing that he would be cross-examined about all of his extraneous offenses before and after the murder. *Id.* The extraneous offenses that Charlie had committed after learning that he was being pursued as a suspect in the Black murder case proved to be a huge part of the State's case.[43] Lollar had objected to admitting evidence of these extraneous offense under Rules 401 and 404(b); but ADA January had argued incoherently that all of the extraneous offenses were evidence of "flight," and since no one had been killed as a result of those offenses, admitting them did not "outweigh a killing." 35 RR 16-18. The court held that this evidence of "flight" was admissible as more probative than prejudicial (although the defense had not objected under Rule 403). 35 RR 18. This development further stacked the deck against

[43] Most of the State's convoluted Opening Statement was devoted to describing the extraneous offenses, not Charlie's alleged involvement in Mrs. Black's murder. *See* 34 RR 39-45.

Charlie in a trial that had commenced without the State being in possession of any credible evidence that he had participated in the murder or the break-in; no DNA, no weapon, no fingerprints, and no trace evidence tying him to the crime scene.

Because of the extraneous offenses, Lollar had told his client that the jury was going to hate him and want to find him guilty of *something*. So, after Mrs. Barganier was allowed to testify, Charlie told his attorneys that, instead of "Plan A" (he would testify), he was willing to go with "Plan B"—Lollar's plan. Ex. 4.

"Plan B" was for Lollar to argue the flaws in the State's case in hopes that the jury would settle on a lesser-included burglary offense.[44] "Plan B" did ***not*** involve conceding Charlie's presence at the scene or asking the jury to find him guilty. In fact, one way his attorneys convinced him not to testify was by telling him that, by *not* putting on a specific defense, he would still be able to pursue his innocence claim on appeal. *Id.*

In Lollar's Closing Argument, and without seeking or obtaining Charlie's consent, Lollar stood up and made a series of statements implicitly and quite explicitly conceding that Charlie had been at the scene at the time of the murder and stating that the jury should convict him—although Charlie had always *denied* being present. Ultimately, Lollar told the jurors that it was okay to find his client guilty of

[44] No reasonable lawyer could have believed that "Plan B" was a legitimate strategy. Either defense counsel intentionally misled their client or they did not understand the law of parties. It is, however, undisputed that this was the defense lawyers' so-called strategy.

capital murder, even as Lollar insisted that the State had not proven that Charlie was the shooter or had the requisite intent to commit capital murder:

- "Could it not also be true that he was doing those things [extraneous offenses] **because he was there at the scene at the time of the murder** committed by Rick Childs; that he knew that the Volkswagen was the vehicle that **they had gone over there in**; that sooner or later **the police were going to figure out who did it, who was there, who was involved**?" 39 RR 68 (emphasis added).

- "Between Richard Lynn Childs and Charles Don Flores, who is the more likely shooter of Elizabeth Black?" 39 RR 69 (implicit concession that Charles had been at the scene with Childs).

- "Who had the greater motive **between Charles Flores and Ricky Lynn Childs** to kill or to shoot Ms. Black?" 39 RR 71 (emphasis added) (another implicit concession of presence).

- "I don't think there's a way in the world that any reasonable juror could feel, under the state of this evidence, that the State has proven beyond a reasonable doubt that Charles Flores shot Ms. Black…. **It's a possibility that he did**, but we don't send people to the penitentiary or to death row based on possibilities." 39 RR 80 (emphasis added) (yet another concession).

Toward the end of this inexplicable Closing Argument, Lollar turned to the law-of-parties question in the jury charge. Lollar noted that the question required finding that Charlie and Ric had entered into a conspiracy to commit burglary and that, in an attempt to carry out the conspiracy, Ric had intentionally caused the death of Elizabeth Black and that the intentionally-caused death should have been anticipated. Lollar then argued that there was no evidence of "anticipation" because no one had expected Mrs. Black to be home, and thus the shooting by Ric Childs

was only an impulsive act on his part. 39 RR 82.[45] Yet Lollar knew that his request to include an "independent impulse" instruction in the jury charge ***had already been denied***. Having made an argument absent any legal hook for the jury to adopt, he then expressly conceded that the jury might find his client guilty of capital murder: "Should Charles Flores have reasonably anticipated that Ric Childs was going to commit the intentional murder? … If you believe that they knew that there was going to be somebody in there and that they were going to kill them, if there was somebody in there**, then find him guilty of capital murder**." 39 RR 85-86 (emphasis added).

In wrapping up, Lollar expressly asked the jury to find his own client guilty while also insisting that his guilt was not enough for capital murder: "**Find him guilty of murder; find him guilty of whatever you want to**, but it's not capital murder." 39 RR 86 (emphasis added).

ADA January then stood up and seized upon Lollar's concessions in making the State's final Closing Argument: "The defendant's guilty whether he's a party or whether he's the shooter. We've been over that." 39 RR 95.

[45] Lollar's description of "anticipation" was inconsistent with Texas law. There is no need for evidence that the specific act of murder was anticipated in advance; the State need only show that the defendant knew that his cohort had a deadly weapon. *See, e.g.*, *Cook v. State*, 858 S.W.2d 467, 470 (1993) (holding that a defendant's presence at the scene and participation in the underlying armed robbery was sufficient to convict him of capital murder as a party regardless of who pulled the trigger). *See also* Claim IX below.

Considering his attorney's unfathomable concessions, it is not surprising that Charlie was convicted of capital murder. 39 RR 113. The jury charge included three alternative theories of capital murder without requiring the jurors to identify which, if any, theory they agreed the State had proven beyond a reasonable doubt. The defense had merely sought and failed to have an "independent impulse" instruction, a request inconsistent with their client's insistence that he had not been present when Mrs. Black was shot.[46]

According to a *Dallas Morning News* article, "[t]he only emotion" in the room after the verdict was announced came from Charlie's mother, "who began to sob softly." Ex. 38. She was then excluded from the courtroom again as the punishment phase began immediately thereafter. 39 RR 115.

After the State put on two days of punishment-phase evidence, the defense informed the court that it would not be calling ***any*** witnesses. This is the explanation counsel provided, outside the jury's presence, for that decision:

> [T]he State has rested their case in chief in punishment, and it is our turn to present evidence. It was our intent to call to the stand the Defendant's father, Caterino Flores, his mother, Lily Flores, and his wife, Myra Wait Flores. We would state for the record that both Mr. and Mrs.

[46] Well before the Flores trial in 1999, the CCA had made it clear that instructing the jury about the "elusive" concept of "independent impulse" would have been improper where the State was alleging, as it was in the Flores trial, that the defendant had acted in concert with another "with the intent to promote or assist the commission of the offense," and the defendant was simply alleging "that he had not agreed to commit any offense at all." *See Mayfield v. State*, 716 S.W.2d 509 (1986).

> Flores are currently under indictment for the offense of hindering apprehension, the subject matter of that, those cases being assistance and aid allegedly given to the Defendant in this case, Charles Don Flores. Those cases are pending. . . .We keep hearing that [Myra's] the subject of Grand Jury investigation. We've heard she's been no-billed twice, and yet the matter is still before the Grand Jury.

40 RR 140-41. Although Lollar stated that it had been their "intent" to call at least three witnesses, nothing in counsel's file suggests any concrete plan for a mitigation case. They had not developed a life history—through his parents, his wife, his brothers, his sister, or his other many friends and relatives. Ex. 24.

Charlie's parents, who loved him so much that they had been willing to take tremendous risks to try to help him, had never been in trouble with the law. As an SMU professor who knew Lily and Carter for years attested, they were "gentle, soft-spoken, kind, and deeply religious people." Ex. 31. "Carter in particular relied heavily on his faith; his faith was "overarching." *Id.* ¶7. Carter had his own roofing business, for which Charlie, as well as Lily and her daughter Frances, had all worked over the years. *Id.* ¶8; Ex. 30 ¶6. But Charlie's own lawyers had made no attempt to involve his family, or to counter the false impression they were given that testifying meant risking prison time—a message that the prosecution had tried to convey with active prosecutions. Ex. 32 at 1-2.

There was, however, no barrier to Lily or Carter Flores testifying about Charlie's childhood, family history, work history, or any other potentially mitigating

evidence about which they had personal knowledge. Therefore, the failure to call Lily and Carter Flores as witnesses suggests, at best, that Charlie's lawyers misapprehended the scope of the Fifth Amendment; if someone is under indictment and might want to rely on the Fifth Amendment to avoid self-incrimination, that would have no bearing on a witness's ability to testify about facts wholly unrelated to the offense they had allegedly committed. Trial counsel not only failed to object to the prosecution's aggressive efforts to hamstring the defense; trial counsel convinced Charlie's loved ones they could not testify based on a misapprehension of the Fifth Amendment.

Likewise, there was no barrier to Charlie's sister Frances Hernandez Medina testifying. She had driven all the way from Mississippi to be present to support the family; but Charlie's lawyers never spoke to her "except to tell [her and her husband] not to talk to Lily and Carter about what was going on in court." Ex. 30. Frances could have told the jury about her experience of Charlie as "very easy-going" child who "was always giving hugs and kisses," who "loved it when [she] made pancakes," and who had so loved cars that he "taught himself how to drive" and shared many adventures with Frances's own daughter, protecting her, going with her "to the movies, bike riding, and on joyrides in the cars he fixed up." *Id.* ¶¶7-8.

Charlie's parents had been kept out of the courtroom throughout his trial on the pretext that they were on the State's witness list. On several occasions captured

on the record, they were scolded by the court for simply being present before proceedings began each day. After one such instance, Lily Flores responded: "He told us yesterday, and believe me, I'm afraid of you saying something else to me. I just stand over here and want to get a glimpse of my son when he comes in." 36 RR 171. And Charlie's parents were not the only family members to experience intimidation. Charlie's sister Frances and her husband Jorge Medina, who were present every day of trial, were treated rudely by officers in the courtroom. Ex. 30 ¶12. One day, officers took Mr. Medina into a room just outside of the courtroom, and Mrs. Medina watched helplessly as the officers "yelled and pushed him up against a wall. They demanded to know why [they] were there, what [they] were doing, how had [they] gotten in"—as if their mere presence in the courtroom as relatives of Charlie made them suspect. *Id.*

State actors had engaged in a pattern of harassment so that Charlie's mother, father, common-law wife, other family members, and friends all feared that any support they showed for Charlie could mean State actors would seek retribution against them. In addition to failing to resist that situation, defense counsel had no other plan to put on evidence reflecting his perspective and his humanity.

The prosecution seized upon this vacuum created by the defense counsel's ineffectiveness—which the prosecution knew they had helped create—in arguing

for a death sentence. ADA Davis insisted, falsely, that there was no one willing to say anything redeeming about Charlie Flores:

> If mitigation were drops of water to be poured out on the floor of this Courtroom, this Courtroom floor is bone dry, ladies and gentlemen. Because as Ms. Miller said, where is that one, just one piece of paper? Where is one person, just one person, neighbor, friend, family member, just one person to tell you that there is just one thing redeeming about this man where he ought to escape justice? Where is it? Not to be found, is it?

41 RR 58.

ADA January, the prosecutor who had indicted Charlie's parents for helping him evade arrest and who had sought repeatedly to convince the Grand Jury to indict Myra, piled on: "what is mitigating in this case? … his common-law wife. Where is she? … Bring her on. It's a reasonable deduction from the evidence they don't have anything good to say about the Defendant, his parents, his brothers." 41 RR 92.

Soon thereafter, the punishment charge was submitted to the jury. The jury announced that it had a verdict after little more than an hour. 41 RR 98.

In reaching its verdicts, the jury had heard no information about Charlie's side of the story—including his alibi defense or any mitigating evidence of any kind. To the jury, he was no more than the parade of extraneous offenses, mostly introduced during the guilt-phase of trial, without any of the backstory about why he was so loved that people had been willing to risk their own legal jeopardy to help him flee from what they believed was a wrongful prosecution.

While Charlie has made many mistakes in his life, he has consistently maintained that he played no role in Mrs. Black's murder. Ex. 4. Her death was caused by a drug-induced plan to rob the Blacks, cooked up by Jackie Roberts and Ric Childs, and perpetrated by Ric with the assistance of another "white male with long hair" who has never been identified. Although several probable suspects existed, most of whom are now dead, no one else was seriously investigated once the plan was hatched to frame Charlie Flores.

III. THE CONTOURS OF THE INVESTIGATION THAT CAN BE GLEANED FROM AN INCOMPLETE POLICE FILE (AND OTHER RECORDS FINALLY OBTAINED TWO DECADES AFTER TRIAL) REVEAL THAT CHARLIE FLORES WAS CAST AS A SUSPECT, NOT BECAUSE THAT IS WHERE THE EVIDENCE LED, BUT SO HE WOULD TAKE THE FALL FOR RIC CHILDS AND HIS UNKNOWN "WHITE MALE" CO-CONSPIRATOR.

A. While Jackie Was Avoiding the Police, the Murder Investigation Was Launched, But Did Not Yield Evidence Implicating Charlie Flores.

The police learned that Betty Black and the family dog had been shot to death after Bill Black came home around 9:15 a.m. and called 911 from 2965 Bergen Lane (the Blacks' house). AppX57 at 66. Lieutenant Dan Porter assigned Farmers Branch CID investigators Gerard Callaway and Jerry Baker to lead the investigation.

Before Doug Roberts showed up at the Farmers Branch police station about 12 hours after the murder, the investigation had yielded some critical information—and some significant clues had already been abandoned or ignored.

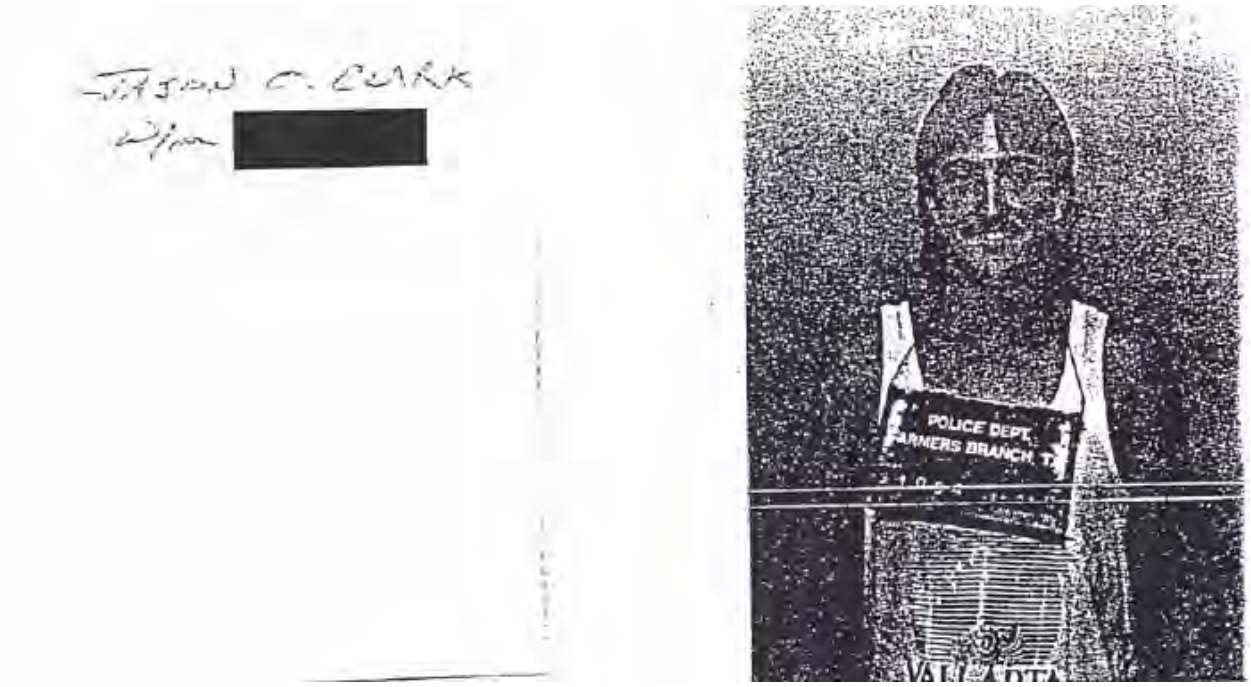
1. On January 29, 1998, all early leads pointed only to Ric Childs, Jackie Roberts, and their circle.

Investigators on the scene quickly recovered a single bullet and matching casing, suggesting that Mrs. Black had been killed by a CCI Blazer .380 caliber bullet shot from a .380 pistol. 35 RR 256. A second bullet was not recovered.

A large wad of green gum was found lying on the floor in the blood in the living room near the television and the coffee table where the dog's body was found. 35 RR 272-73. Although the gum was later submitted for DNA analysis, both Ric and Charlie were excluded. 35 RR 274.

After walking through the crime scene, officers began to canvass the neighborhood and found some witnesses who had seen "two white males, 25 years of age or older" get out of an older model Volkswagen Beetle and then enter the Blacks' house through the garage. AppX57. Some neighbors, including Michelle Babler, described them as wearing tan clothing. AppX57.

At least one neighbor reported seeing a second vehicle, a blue Nissan, outside of the Blacks' house the morning of the crime. A note in the police file (not produced until 2016) shows that the blue car likely belonged to Jason Clark, Jackie's friend, neighbor, and fellow drug dealer:



AppX57. This picture of Jason Clark, with Detective Callaway's redacted notation, is the only indication that (1) police thought Clark might have something to contribute to the investigation, and/or (2) Farmers Branch had some previous experience with Clark himself.

Shortly after 10:00 a.m., according to Lt. D.C. Porter of the Farmers Branch PD, the Blacks' next-door neighbor, Jill Barganier, "arrived at the scene." Mrs. Barganier described what she remembered seeing earlier that morning. Mrs. Barganier described the car as "a yellow Volkswagen bug." She described the Volkswagen's driver as "big, with long brown hair"; "a white male, about 30 years old and with a large build" with "a quart beer bottle in his hand when he got out of the car and that he stopped and put the bottle back into the VW before he walked up to the house." She described the passenger as "also a white male with darker hair

than the driver. She described his hair as almost black and thought it was 'longer.'" 4 EHRR 44-48; AppX10.

According to police records, each witness whom the police interviewed prepared a handwritten "Affidavit" on a Farmers Branch PD form. All but one of these affidavits can be found in the police file that was finally produced in 2016. Significantly, the one that has vanished from the face of the earth is the Affidavit of Jill Barganier—which would have captured precisely what she believed she had seen on the very morning of the crime *before* she was subjected to a series of highly suggestive police tactics over the course of the next thirteen months. *See* Section VII below.

Later that morning, the Farmers Branch PD broadcast a bulletin announcing they were looking for: two white males, possibly wearing tan clothing; a vintage Volkswagen Beetle; and a newer, two-door, blue Nissan, in conjunction with their homicide investigation. 4 EHRR 297; AppX57.

Multiple Farmers Branch officers were involved in inventorying evidence at the crime scene, including a patrol officer named **Alfredo Roen Serna**. Officer Serna had logged in at 10:41 a.m., out at 12:36 PM, back in at 12:48 p.m., but did not log out again. AppX52. Therefore, it is unclear how long he spent on site that day—but it was at least several hours. 4 EHRR 182, 184, 190-91.

While inventorying the crime scene, Investigator Stephens, of the Farmers Branch Criminal Investigations Division or CID, found a garage door opener on top of a cabinet or file cabinet in the garage near the door to the house—but no photo seems to have been taken (or at least preserved) of this discovery. 35 RR 264-65. The investigators did not "look any further into the question" of why a garage door opener was there and if there were any other garage door openers. 35 RR 265. He did not test the opener to see if it worked. 35 RR 278. Yet the neighbors who had reported seeing two white males enter the Blacks' house that morning had described them going into the house through the garage door. AppX57.

"Within hours of the initial call" reporting Mrs. Black's murder, "several investigators received information that it was rumored in the neighborhood that Gary Black"—whom Farmers Branch law enforcement described as a "known narcotics dealer"—had "hidden large sums of cash in the walls of the house." Ex. 16. On information and belief, there were also rumors that he had hidden cash in various vehicles that he owed.

Lt. Porter soon contacted Farmers Branch PD's Special Investigation Division or "SID" unit, whose job it is to investigate crimes related to narcotics. One SID investigator described the unit's function this way: "We receive incoming complaints of narcotics activity in the city. We investigate those complaints. We

work with confidential informants. We try to make arrangements for buying narcotics and arresting narcotics dealers." 36 RR 173.

SID investigators were informed that they were going to be needed to assist CID investigators with the Black murder investigation. 38 RR 190. SID was brought on to help because of "previous knowledge of the Black family." AppX8. A SID memo noted that Betty Black's son Gary "had been an active distributor of Methamphetamine" and, at the time of his mother's murder, he was incarcerated in TDCJ "stemming from said narcotics activity." *Id.*

The SID team included: Sgt Ashabranner, Investigator Stanton, and Investigator Koehlar. *Id*. The SID investigators arrived at the crime scene on Bergen Lane around 4:15 p.m. *Id.* They were only there for about 30 minutes to an hour. 38 RR 191. CID investigator Stephens reported to the SID team that a "lunch pail with approximately thirty thousand dollars in cash," as well as a locked tan metal box, had been found. AppX8. SID agents ultimately discovered another $9,000 in the locked box and multiple letters from Gary Black stating that he wanted to cut back the money his parents were giving to his wife, Jackie Roberts, from $500 to $250 a month. *Id.* According to the SID memo, the box with the $9,000 also included "a note that related to the money." *Id.* That note has never been produced.

Around 9:00 p.m., law enforcement heard from Jackie's ex-husband and close friend Doug Roberts. Doug had history with the Farmers Branch PD. 35 RR

29; 38 RR 192. He came of his own accord and spent several hours at the station speaking with Callaway and Sgt. Ashabranner. AppX8. There is no transcript of these conversations. Doug claimed that he had not seen Jackie since early that morning (although, in fact, he had dropped her off at a motel shortly before going to the police station); Doug's main goal was to inform law enforcement that he had seen Ric Childs leave Jackie's house on Emeline Street in a Volkswagen Beetle soon before the murder had occurred. 38 RR 192. Reportedly, Doug told investigators that this occurred "at approximately 6:30 A.M." AppX8. (At trial, he changed this to 7:00 A.M., perhaps to resolve a conflict—though, not the only conflict—with Jackie's testimony.) While Doug Roberts made no mention of seeing a second person leaving with Ric, he mentioned that another man, Alan Weaver, had been present outside the Emeline house when Jackie returned and left on a motorcycle right after Ric departed in his Volkswagen. *Id*.[47]

According to Doug, he also told the police that they might find the Volkswagen at Ric's grandmother's house; so, Farmers Branch officers went to check, but did not see it there. 35 RR 37. Other records show that, although his Volkswagen was not there, by the night of January 29, 1998, Ric was at 11807 High Meadow, his grandmother's house in North Dallas. We know this because an

[47] By trial, Jackie and Doug told slightly different stories about the presence of their friend Alan Weaver, dressed in coveralls with gloves, right as Jackie was returning home. 34 RR 154; 34 RR 274; 34 RR 276-277.

affidavit prepared by an officer with the Farmers Branch PD, Jerry Baker, stated that police had been tracing calls that Ric had placed from that address to the telephone at 13412 Emeline Drive—where Jackie lived with her mother Helen Ramirez and kids. Ex. 47. But law enforcement made no attempt to speak with, let alone arrest, Ric that night.

Another police record shows that, while Doug was at the station, Lt. Porter obtained a written statement from Doug's girlfriend, Kimberly Cole, at around 10:30 p.m. AppX57. The jury did not hear from Kimberly, who mostly reported what Doug had told her, but she did add her own observation as follows:

> Given the time Rick left Jackie[']s, what time the shot was heard, the volkswagon [sic] in the driveway, the fact that Gary Black was "known" to have kept large sums of cash at his mother's home and that Jackie had likely passed this knowledge on to Rick (she has been known to say she wants to get hold of some of that cash), the fact that Shelia, Betty's daughter[,] said the house had been torn apart all lead Doug and me to believe that Rick was involved in Betty's murder.

Id. Her statement, in that it reflects what Doug had told her, shows that Doug had not suggested that Jackie had made any allusion to a Hispanic guy named Charlie as possibly being involved.

After several hours, Doug left the police station. Thereafter, he called Alan Weaver and told him he too should go talk to the police the next morning because he was being considered as a suspect. 35 RR 38.

2. On January 30, 1998, police obtained Charlie's name from *Ric Childs' brother*—not from anyone with personal knowledge of the Black case; they also allowed Ric and Jackie to spend hours alone together that night.

The morning of January 30, 1998, one of the Blacks' neighbors, Jill Barganier, picked Ric Childs out of a photographic line-up. *See* Section VII below. That day (and the day before) several neighbors, including Mrs. Barganier, had gone to the police station and been shown several photographic lineups, but no other identification was made. No records have ever been produced as to what images were included in these other photographic lineups. But by the morning of January 30th, multiple pieces of evidence connected Ric Childs to the multi-colored Volkswagen Beetle, and placed him and that vehicle outside of the crime scene shortly before Mrs. Black was found shot dead. AppX20; AppX57 at 197; AppX57 at 199.

A handwritten note (produced decades after trial) shows that Callaway also interviewed Gary Black that morning. The note also refers to a "courtesy call" from Jason January, the ADA who would ultimately be the lead prosecutor in the Flores trial—although, at that point, no one had yet been arrested, let alone indicted, for Betty Black's murder. AppX57. According to Callaway's note, most of the conversation with Gary that day focused on the money that he had hidden in his parents' house. Gary supposedly reported that the money had been in the bathroom

wall "4-5 yrs. ago," then it was "moved to the attic" and "sprayed with Raid;" then his dad moved it again. *Id.* According to Gary, his father was directed to pay Jackie $700 a month at first, initially by cash, then by check because he "wanted proof of child support." *Id.* His mother knew about the money too. Gary had instructed his parents not to talk to Jackie about the money; but, importantly, Gary stated that Jackie had been led to believe the money was hidden in the walls. *Id.* She also thought it was over $100,000. *Id.* Soon before the murder, Gary had wanted to cut Jackie off completely, but when his dad suggested cutting it in half, Gary had agreed. *Id.* At trial, Jackie admitted that she had been informed about the cut, but she denied being bothered by this development. 38 RR 138-139.

Lt. Porter "[r]eceived a call from Bob Barganier," Mrs. Barganier's husband, that day suggesting that he thought the police should be looking for Jackie; he "advised that he remembered the [sic] Jackie Roberts has a friend named Stacy or Tracy whose grand mother lives on Balmoral in Carrolton."[48] The note explains that Mr. Barganier "believes that Jackie may be hiding out with Stacy (or Tracy)." AppX57. How and why Bob Barganier knew these details about Jackie was not explored; or if it was, there is no documentation to that effect.

[48] Carrolton is a municipality in parts of Denton, Dallas, and Collin counties and is part of the greater Dallas-Fort Worth metroplex.

Around 11:45 AM, SID investigators Ashabranner and Koehlar succeeded at locating Alan Weaver, who had been holed up in a Howard Johnson's with Jackie, who had checked in using a fictious name. 38 RR 191-193. Weaver agreed to come to the station to be interviewed. 38 RR 193. At the station, according to Callaway's handwritten notes (obtained years after trial), that interview took place around 12:45 p.m. Weaver claimed that he had returned Jackie's mother's car around 6:30 a.m. the day before and had then gone to the backyard to get his motorcycle. In the process, he had heard two car doors slam, a pause, and then a third slam. Ex. 48.

This information is noteworthy for two reasons. First, Weaver's memory of the time—6:30 a.m.—was consistent with what Doug Roberts initially reported (but did not match Doug and Jackie's trial testimony). Second, what Weaver reported hearing from the backyard suggests that he heard the two doors of the El Camino slam as Ric and Jackie got out of it and then heard ***the driver's door*** on the Volkswagen slam as Ric got into his car to drive off—as Doug had reported. But Alan Weaver's and Doug's consistent reports are inconsistent with the notion that Charlie had been with Ric and Jackie at that time, and that he too had gotten out of the El Camino at Jackie's house and then into the passenger side of Ric's Volkswagen.

Weaver denied any role in Mrs. Black's murder or any knowledge of what had transpired. But after the investigators started asking him about ***Jackie's*** role and how she gets her money, the recording of the interview abruptly ended at his request:

> Weaver: …. I don't know anything. Ya'll [sic] think I do. I'm sorry I put off that impression. It's not like
>
> Ashabranner: It's what other people tell us.
>
> Callaway: It's not you putting off that impression. Okay.
>
> Weaver: Can you stop that [the recording] just a second?
>
> Recorder turned off.

Id. No documents have ever been produced to explain what Weaver told the investigators after the tape was turned off.[49] But the partial transcript shows he said nothing about Charlie Flores, although he had spent considerable time with Jackie before his interview—including the entire night before.

At Charlie's trial, Sgt. Ashabranner noted that, after SID participated in interviewing Weaver, they "went and contacted **Roy Childs**, which is Ricky Childs brother." 38 RR 193 (emphasis added). ***No one at trial asked how these SID agents knew Ric's brother.*** Nor was it disclosed what Ric's brother told law enforcement. A memo purportedly summarizing SID's role in the Betty Black murder investigation mentions only that investigators interviewed "Deborah Howard" early

[49] Weaver did not testify at the Flores trial.

on in its investigation after learning from Ric's brother Roy that Deborah was one of Ric's girlfriends. AppX8. The memo does not mention that Roy Childs had *also* given law enforcement the name "Charlie Flores." That information can only be gleaned by comparing the Farmers Branch PD file (produced in 2016) to records obtained from another law enforcement agency in Arlington.

We do know that Doug went back to the Farmers Branch police station that day; and in an interview conducted around 12:30 p.m. with Detective Callaway, he "voluntarily" gave additional information "to solve this case." DX3. A transcript of this interview was made. *Id.* In this second interview, Doug again explained that he had seen Ric get into the driver's side of a multicolored Volkswagen after Jackie had been dropped off at her mother's house, right before that same car was observed outside of the Blacks' house under two miles away. *Id.* Doug also described the Volkswagen's faded, flamboyant paint job in vivid detail. Doug repeatedly said that he "couldn't see anyone in the passenger side." *Id.* And he informed Detective Callaway that the only thing Jackie had told him that morning when he asked where Ric was going was "she really didn't know, that he said he was going to go get doughnuts and be right back." *Id.* But "he never came back." *Id.* Doug again claimed ignorance regarding Jackie's whereabouts, claimed her demeanor seemed fine, and claimed that he was not sure whether she had been using drugs—all of which was untrue. *Id.* Perhaps most notably, although Doug was clearly trying to ensure that

the police understood that Ric had been involved and was also trying to protect both himself and Jackie, Doug made no mention of Charlie Flores or made any suggestion that Jackie had reported being afraid of a Hispanic male with whom she had done a drug deal before Betty Black's murder. *Id*. Doug had every reason in the world to put Charlie's name out there if Jackie had made the slightest suggested that he might have been involved; but that did not occur.

Finally, that evening, investigators decided (at last) to see what Ric was doing at his grandmother's house at 11807 High Meadow. 38 RR 193. Yet they decided *not* to take him into custody at that time—even though they knew Ric had an active warrant and knew or should have known that the murder had occurred ***while Ric was out on bond for yet another crime***.

The investigators approached the house after noting "a subject that resembled Childs, through the front den window of the residence." AppX8. Officers knocked on the door, which was not fully closed, but Ric slammed the door shut. The investigators then retreated to their vehicles and began conducting surveillance for the next several hours. 38 RR 193-94. By then, it was already about 8:45 p.m.—over twenty-four hours after Ric had been established as the prime suspect. *Id.*

Until Ric tried to flee during the early hours of January 31, 1998, the investigators engaged in some astonishing passivity.

After finally beginning surveillance at 11807 High Meadow that night, police sat back when, "[a]t approximately 9:10 P.M, a brown and tan Chevrolet El Camino arrived" and a "white female known to investigators to be Jackie Roberts, exited the vehicle and entered 11807 High Meadow." AppX57; *see also* 36 RR 186 (investigator acknowledging that they knew Jackie from "past dealings").[50] Jackie, also then a suspect in Mrs. Black's murder, was allowed to enter the residence—where she stayed with Ric for ***three hours***. *Id.*

There is no way to confirm what Jackie and Ric discussed during those three hours on January 30th, when they both knew that they were suspects in the Black murder investigation. According to a partially recorded interview with Ric Childs, he flippantly claimed that he and Jackie were having sex during that time. SXR101. According to a statement taken from Jackie several days later when she was in police custody, she had gone to Ric's grandmother's to ask him what had happened: "Because he had a Volkswagen and then she's [Mrs. Black's] murdered." Ex. 8. In that statement, Jackie claimed that Ric had said: "Nothings [sic] going on, nothing at all. Just be quiet and quit freaking out!" Then, apparently, he had asked "real calmly," "Was she alive or was she dead?' And when Jackie told him that Mrs. Black was indeed dead, he responded "She's in a better place."

[50] Investigator Stanton, with Farmers Branch PD's SID, testified during the Flores trial on cross-examination that those undertaking the surveillance knew Jackie by sight "[b]ecause we were familiar with Jackie and from dealings with her in the past." 36 RR 186.

In yet another interview, the record of which was never produced by the State,[51] Jackie told investigators that, during this meeting, ***Ric had admitted that he had shot Mrs. Black***. Ex. 9. And in a partial recording of one statement, Jackie claimed that Ric had also acknowledged that "they killed the dog too." He then reputedly advised her that he wasn't going anywhere because "nobody saw what we did." He then "advised [Jackie] to keep [her] mouth shut." Ex. 8.

Moreover, in this interview's account of the discussion between Ric and Jackie, Ric threatened Jackie, seemingly, with recourse to Charlie, and emphasized this threat by reference to Charlie's ethnicity: "this guy was a member of the Mexican Mafia" and they "would just kill" her and her kids if she said anything. *Id.* But Jackie shared this "Mexican Mafia" concept with the police in an interview days *after* she had spent three hours huddled up with Ric while the police observed passively from a distance. Whether Ric really did make this ad hominem suggestion about Charlie being affiliated with the "Mexican Mafia" is impossible to know. But there has never been any evidence that Charlie was in fact affiliated with the "Mexican Mafia," a highly organized prison gang that originated in the California prison system in the 1950s. Nor is there any evidence he was ever affiliated with any

[51] These notes were part of the production of the investigative file obtained by a journalist in response to a FOIA request. *See* Casey Tolan, *Meth, Hypnosis, and Murder: An Incredible True Story of Race and Punishment on Texas' Death Row*, Splinter (May 10, 2016), *available at* https://splinternews.com/meth-hypnosis-and-murder-an-incredible-true-story-of-1793856732. These documents were later obtained by Charlie Flores's post-conviction counsel. *See* Ex. 24.

gang. Nor is there any evidence that, before her arrest, Jackie had told Doug, Alan Weaver, Terry Plunk, Judy Haney, or her own mother about any suspicion that Charlie might have been involved. (Because Jackie knew that she and Ric had left Charlie at his trailer in Irving hours before she had returned to Emeline Street.)

In recounting these events at trial, Jackie claimed that she had not thought that Ric was involved in killing Betty Black when she went to meet with him during this January 30 heart-to-heart—which strains credulity in light of the facts then in her possession. At the very least, by the time she met with Ric, she knew that Doug had gone to the police the night before and told them that Ric owned the Volkswagen seen outside of the Blacks' house; she knew that Doug was urging her to go to the police herself; she knew she had set up a drug deal for Ric that had left the guy who had put up the money (Charlie) upset about being shorted; and she knew that the attempted burglary was going to be easily linked to her as a result of her relationship with Ric. 38 RR 145-146, 170-171, 164. Her only motivation to risk meeting with Ric (instead of going to the police) was to brainstorm some way that they could push culpability elsewhere, which is what occurred.

During this extended period, when Jackie and Ric had plenty of time to coordinate their stories, another strange thing was observed without any intervention by police: "At approximately 11:10 P.M., a white male, later identified as Mack Salmon, Richard Childs['] uncle, arrived at the location. . . . At approximately 11:30

P.M., Mack Salmon exited the residence and ***entered Jackie Robert's Chevrolet El Camino***. Salmon ***removed a black backpack*** from the Chevrolet El Camino and then went back inside the residence." *Id.* (emphasis added).

During the Flores trial, the jury did not learn anything about what had gone on between Ric and Jackie during those three hours; indeed, Jackie told the jury, falsely, that she was only there with him for "[a]bout 45 minutes." 38 RR 147. The jury did learn that a man had been observed retrieving a black backpack from Jackie's car that was later found on Ric Childs—but only during the defense's case. Jackie flat-out denied that she knew anything about Ric's backpack being taken out of her car and brought into the house. 38 RR 146; 38 RR 194-195. But at trial, the defense called Investigator Ashabranner, who had been part of the surveillance team; he acknowledged this perplexing sequence of events:

> Q. Okay. Now, did you see anyone exit that house later on?
>
> A. Yes, we did.
>
> Q. And would that have been Max Salmon?
>
> A. Yes, he did.
>
> Q. About 11:30 he came out; is that correct?
>
> A. That's correct.
>
> Q. And retrieved something from that El Camino and went back in?

A. Yes, he did.

Q. And that would have been a black bag?

A. I believe it was a black backpack.

Q. Backpack. And Jackie Wilson was still in there -- I mean, Jackie Roberts was still in the house at that time?

A. That is correct.

36 RR 195-96. No one asked Sgt. Ashabranner why the police had allowed this to occur.

3. On January 31, 1998, Ric was finally taken into custody and, while denying any knowledge of Mrs. Black's death, became a pawn in a plan to implicate Charlie Flores.

Aside from their evidence tampering, there is no record of what Ric and Jackie did during those three hours when they were left alone together in Ric's grandmother's house on High Meadow while the police stood by. But when January 30th became January 31st, around "12:11 AM.," police officers observed: "Jackie Roberts exited the residence and drove away from the residence, in the Chevrolet El Camino." AppX8; 38 RR 196. Although the Farmers Branch SID investigators (Stanton, Koehlar, and Ashabranner) were "familiar" with her from "previous

dealings," and she was suspected in Betty Black's murder, she was not stopped. 34 RR 185-189.[52] The police just let her go.

Soon thereafter, officers observed another white male, later identified as Robert Peters, drive up to the house on High Meadow in an old blue Chevy truck.

Peters went inside. Soon thereafter, Ric came out of the house, wearing some of the same clothes and a hat that Peters had just been wearing. Ric was also carrying ***the black backpack*** that Ric's uncle had removed from Jackie's car and brought inside. Ric then drove off in the truck that Peters had been driving—wearing Peters' jacket and cap. 38 RR 196-198. At that point, the police decided to make a move at last.

At 12:40 a.m., Ric was arrested. Upon arresting him, police found an opened box of CCI Blazer .380 caliber ammunition, a 50 round box containing 36 cartridges "inside pouch of black backpack" in the truck he was driving. AppX8. A CCI Blazer .380 caliber bullet and casing had been recovered from the crime scene and were

[52] No one ever explained to the jury what those "previous dealings" may have been. No records of such "previous dealings" have ever been produced to the defense.

identified as the *exact* ammunition that had been used to kill Betty Black. *See* DX10 (SWIFS ballistics report); 35 RR 256.[53] This CCI Blazer .380 caliber ammunition was found along with other property, including a checkbook in the name of Jason Clark (who lived across the street from Jackie on Emeline Street). AppX57.

When officers searched Ric again at the police station, they found a plastic bag with a "white powder substance" hidden in his right boot. *Id*. At that time, he was charged only with possession of a controlled substance.

At the Farmers Branch police station, Detective Callaway tried to interview Ric. SXR101. A transcript suggests that the interview commenced at 2:24 a.m. after Ric signed a document with Miranda warnings. Callaway opened the interview by mentioning Ric's previous arrests but made clear that they wanted to talk about "a murder case." *Id.* Ric seemed quite stoned, struggling to articulate his words and unaware of the date. In this interview, he admitted to having dropped Jackie Roberts off at the Emeline Street house the morning that Mrs. Black was murdered. But he claimed that he had then driven to wake up his girlfriend and "get her to work." *Id.* He said that this girlfriend "Vanessa" had been waiting for him at his grandmother's house. *Id.* In other words, Ric did not admit to having anything to do with Mrs.

[53] The State did not offer this ballistics report into evidence or elicit from any of its witnesses' testimony that the identical ammunition used to kill Betty Black had been found on Ric Childs when he was arrested. The defense offered the report in its case-in-chief but did not develop this critical fact either. 38 RR 91.

Black's murder and instead manufactured an alibi for himself: claiming that he had gone directly from Jackie's house in Farmers Branch to see another girlfriend (Vanessa) at his grandmother's place in North Dallas. In this interview, Ric also claimed that he was on a motorcycle at the time (perhaps knowing that Alan Weaver had left Jackie's house on a motorcycle about the same time). During the short interview, Ric admitted to owning several vehicles, but initially lied about whether his collection included a Volkswagen. He then admitted that he did have a Volkswagen after all—but falsely claimed that it was lime green. *Id.*

Ric also made several references to being in pain, claiming his "finger hurts real bad." His explanation of the injury is decidedly incoherent:

> I was shot, (unintelligible) Irving took me, incarcerated me like two days after it happened. Um, they transferred me into Dallas. They tried to take me to Dallas. Dallas told them no you can't, we won't accept him. You'll have to take him to Parkland. Took me back to Irving and released me out in front of the Police Department. They didn't want to fuck with it. (unintelligible) warrant that I have out of Dallas.

Id.[54]

[54] Many years after trial, a record was discovered that clarifies that this is one moment about which Ric was being somewhat truthful. *See* Ex. 5. Yet that did not stop Ric from telling Farmers Branch investigators, a few days later, a fantastical tale that the injury to his finger had been caused by a "[g]unshot wound to the head" for "[n]ot paying Charlie, man." SXR101. But, as explained below, by February 5th, it had been made eminently clear to Ric that law enforcement wanted him to accuse Charlie Flores of any and every misdeed Ric could dream up.

At 3:25 p.m. that day, an affidavit, signed by Farmers Branch officer Jerry Baker, was submitted to a Dallas County Magistrate, seemingly when Ric was brought before that magistrate to be apprised of his rights. Ex. 49. When the affidavit was prepared, Ric had not yet acknowledged any role in Mrs. Black's murder. Therefore, Officer Baker's affidavit relied mainly on these assertions: (1) Ric owned a Volkswagen that matched the "color scheme" that had been described by witnesses; and (2) his picture had been picked out of a photographic line-up by one of the Blacks' neighbors (Jill Barganier), identifying Ric as the driver seen emerging from that Volkswagen outside of the Blacks' house. The Baker affidavit also noted that Ric had left the Emeline residence "the morning of the offense" and that Ric had been seen "with a firearm of the same caliber, that [law enforcement] believed fired the fatal shots." Ex. 47.

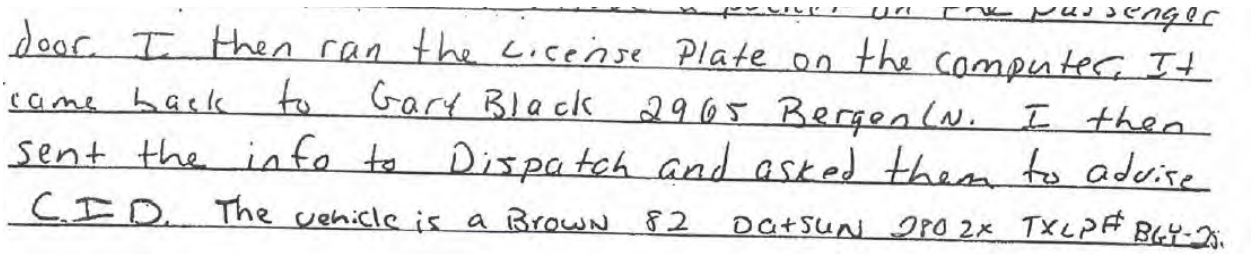
Meanwhile, that morning, SID and CID investigators had searched 11807 High Meadow (Ric's grandmother's house). The search yielded several things: most notably, a .44 magnum revolver. 36 RR 197. They also retrieved six .44 magnum shells from inside the revolver, two boxes of .357 magnum shells stashed in two different bedrooms, and a pair of gloves. 36 RR 197-202. The .44 magnum revolver was found "located on the top shelf of" a little room at the end of a short hallway, "probably eight foot" up. 36 RR 202. The officer who had found the revolver

explained that she had had to stand on something to be able to see the shelf where the gun had been stashed. *Id.* The gun was fully loaded at the time. 36 RR 203.

SID investigators Ashabranner and Koehlar also interviewed Mack Salmon at the residence. Salmon told them that Ric owned "a purple Volkswagen Beetle," owned a .380 caliber pistol, and had a girlfriend named "Vanessa" whose white Chevrolet Camaro was then parked in the driveway. AppX8. Salmon very helpfully provided Vanessa's phone number. *Id.* SID's records do not show whether Salmon was asked why he had taken a black backpack out of Jackie's El Camino the night before—the very backpack that had been found on Ric when he was arrested soon after he drove away from the house on High Meadow.

4. The night of January 31, 1998, was a very busy evening with events unfolding at several locations.

A Farmers Branch PD record from January 31, 1998, produced years after trial, shows that Farmers Branch officers responded to some kind of alarm at a commercial property located at 14235 Inwood that evening. Upon answering the call, officers noticed "a brown 82 Datsun 280ZX." AppX57. The steering column had been broken, the radio appeared to be missing, and the interior had been ransacked. *Id.* Upon running the license plate, the officers found that the car belong to the murder victim's son, Gary Black:


door. I then ran the License Plate on the computer, It came back to Gary Black 2965 Bergen LN. I then sent the info to Dispatch and asked them to advise C.I.D. The vehicle is a Brown 82 DATSUN 280 2x TXLP# BGY-2

Id. The matter was referred to CID—then investigating the murder of Gary Black's mother. But no records have ever been produced documenting CID's investigation of this incident or that otherwise suggest who might have been trying to break into another one of Gary Black's cars the night after Ric had been taken into custody as part of the murder investigation.[55] On information and belief, there were rumors circulating that Black had hidden some of his drug money in various vehicles he had left behind.

An event that seized the police's attention that night was Charlie Flores's attempt, along with his girlfriend Myra's brother, Jonathan, to destroy the rather conspicuous car that Ric had abandoned outside of the trailer in Irving where Charlie was then living. Charlie engaged in this activity before he knew he was considered a suspect in a murder investigation, but after he had learned that the police were looking for Ric's car. Ex. 4. A long-suppressed record, created by Detective Callaway, states that Charlie was, by that day, already a suspect "in the Capital Murder at 2965 Bergen Ln., Farmers Branch, Tx." AppX9.

[55] The police file contains at least one other report about a car in the are being stolen or vandalized that was linked somehow to the Black murder investigation where Callaway was the point person. AppX57.

The State insisted at trial (and during the adjudication of Charlie's first subsequent state habeas claim) that Farmers Branch did not know Charlie's name or identity until after they had interviewed Ric's girlfriend Vanessa Stovall later that night.[56] But, as discussed below, there is a good faith basis to believe that Farmers Branch learned Charlie's name from Roy Childs Jr., Ric's brother, the day before they interviewed Vanessa.

In any event, it was only because Charlie had already become a suspect that law enforcement was able to connect him so quickly to the arson incident reported by **James Jordan**, who ultimately testified for the State at the Flores trial.

Upon scrutinizing the underlying records, which trial counsel never did,[57] it is obvious that James Jordan could not have identified Charlie Flores without law enforcement's help.[58] After Jordan had engaged in a high-speed chase of the fleeing SUV, Jordan and his friend eventually abandoned the chase and flagged down an officer with the Arlington PD. According to the officer, Jordan stated that they "had

[56] Officer Baker, who was involved in interrogating Vanessa, lied about when he came to be aware that Charlie Flores was a suspect. During the Flores trial, he testified that he had not known of Charlie during the February 4th hypnosis session with Jill Barganier, despite the fact that he *had* to have known of Charlie by at least January 31st, since he was in the room when Vanessa reputedly mentioned him. *See* Section VII below; *see also* Claims IV & VI.

[57] Perhaps because Charlie never denied trying to burn Ric's Volkswagen, his lawyers never thought to investigate this matter. Moreover, they did not have access to the police file before trial since it was not turned over until 2016. It is unclear when the defense received any documents related to the arson incident.

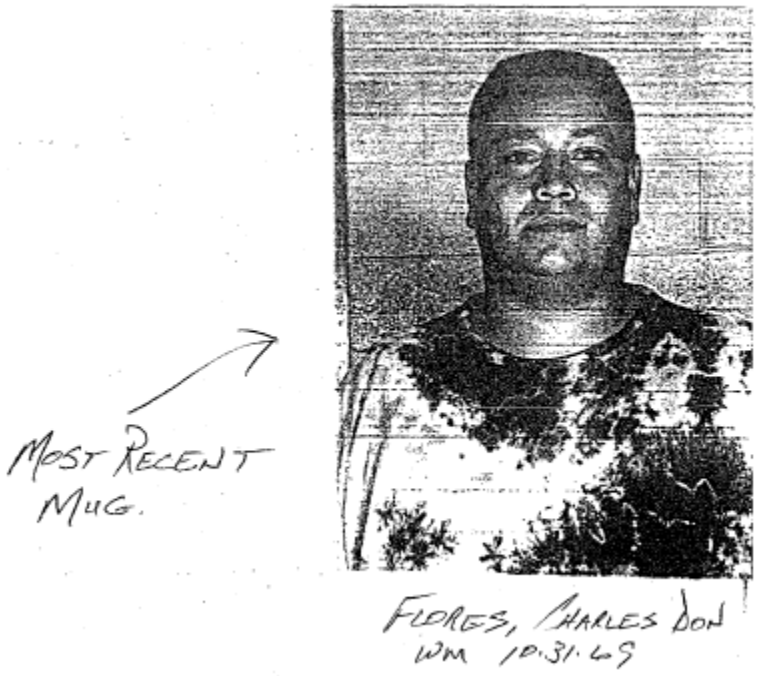
[58] The night of the incident, Jordan told the police a story very different from the one ultimately shared with the jury at trial. *See* Section V.A.

just witnessed a 'guy throw a bomb.'" SXR100. Jordan described the guy as a "W/M 6'0". 220. Long black hair." *Id.* (Charlie weighed more like 270 pounds and did not have long black hair but very short black hair; Jonathan, however, had shoulder-length brown hair.) Jordan identified the car in which this person had sped off as a red or maroon Isuzu Trooper. *Id.* (The car was in fact Myra Wait's Suzuki Sidekick.) According to the officer's notes, Jordan described chasing after the vehicle "at a high rate of speed" until the suspect "reached out of the driver's window of his vehicle and began firing a weapon in their direction." *Id.* Jordan "was adamant about the caliber of the weapon" but he was "unable to describe the finish of the weapon or if it was a handgun, rifle or anything like that." *Id.*

By the time Jordan had flagged down the Arlington police officer, the Grand Prairie PD and fire department had already gotten involved at the scene of the arson and sent out a broadcast about the Volkswagen to other police forces. At some point between that night and before Jordan was presented with a photo lineup on February 4th, a connection was made between the Volkswagen burnt on I-30 and the Volkswagen wanted in the Black murder investigation. SXR100. A Grand Prairie Fire Department record indicates that a connection was made linking the arson on I-30 and the capital murder investigation that very night. And soon thereafter, Callaway, lead investigator on the Black murder case, also contacted an Arlington PD detective. Callaway informed his colleague in the neighboring municipality that,

as part of the capital murder investigation, Farmers Branch PD had already been maintaining surveillance on the Suzuki that had likely been involved in the arson incident. *Id*.

Farmers Branch PD also obtained a recent mugshot of Charlie from Irving PD:



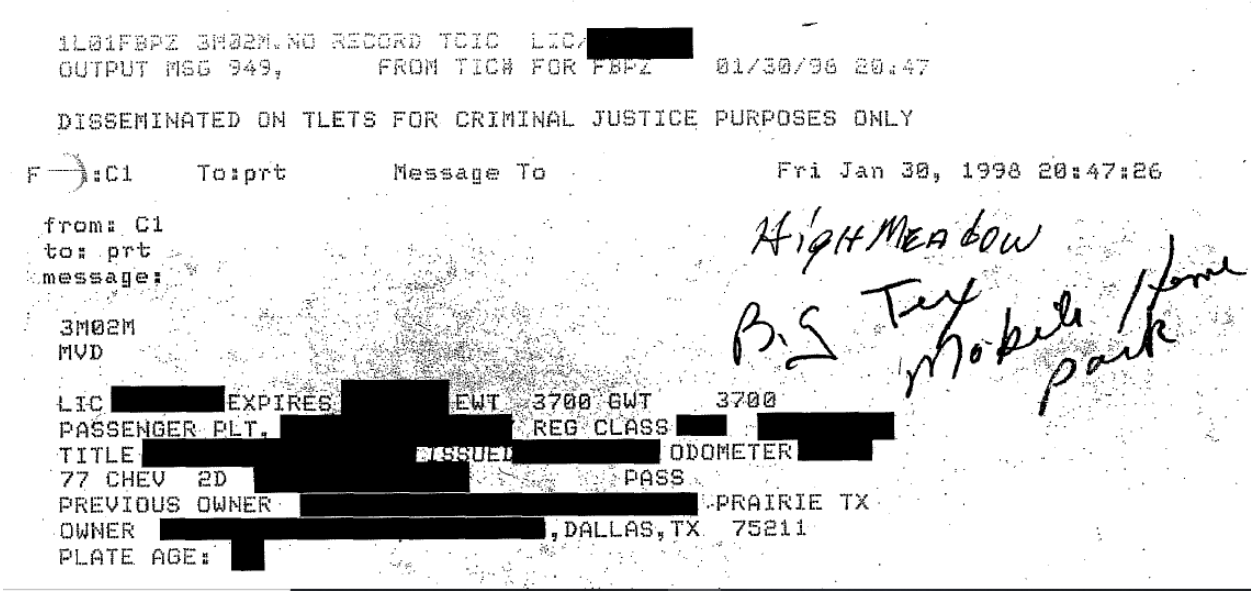
AppX57.

Therefore, by the time Vanessa Stovall, the girlfriend whom Ric had mentioned in his initial interview, arrived at the Farmers Branch police station around 11:00 p.m. on January 31st, the Farmers Branch team had already settled on Charlie as the second perpetrator—***absent any physical or testimonial evidence linking him to the murder***. AppX8; 35 RR 84-85.

On information and belief, Vanessa was intimidated by law enforcement, who told her that Ric was in serious trouble, and then allowed her to talk to him alone. The jury at Charlie's trial did not hear anything about what Vanessa said to her long-time boyfriend, her first love, while alone with him at the police station; nor did the jury hear anything about how the police had intimidated her. The jury did not hear how she urged Ric to say whatever he needed to say to help himself out. But records do show that, before that night was over, Vanessa confirmed Ric's (false) alibi about meeting her at his grandmother's house the morning that Mrs. Black was murdered. And Vanessa added a new detail. She introduced a man named "Charlie" into the story, reputedly telling police that he had arrived at 11807 High Meadow (Ric's grandmother's house) with Ric in a "purple Volkswagen Beetle" the morning of January 29, 1998, "at approximately 6:45 AM." AppX8. According to a police record, Vanessa "described 'Charlie' as a large Hispanic male with short hair and wearing glasses. Stovall advised that she believed that Charlie lived in the Big Tex trailer park, that is somewhere in the city of Irving." *Id.*

It is unclear how Vanessa would have known that Charlie was living in "the Big Tex trailer park" somewhere in Irving, since there is no evidence that Vanessa had ever visited Charlie or anyone else there. But buried in the police file, produced many years after the trial, one can find a notation, in the lead detective's handwriting,

referring to “Big Tex Mobile Home park” on a document that had been printed out the day *before* Vanessa was interviewed:


1L01FBPZ 3M02M.NO RECORD TCIC LIC/[redacted]
OUTPUT MSG 949, FROM TIC# FOR FBPZ 01/30/98 20:47

DISSEMINATED ON TLETS FOR CRIMINAL JUSTICE PURPOSES ONLY

F[redacted]:C1 To:prt Message To Fri Jan 30, 1998 20:47:26

from: C1
to: prt
message:

3M02M
MVD

LIC [redacted] EXPIRES [redacted] EWT 3700 GWT 3700
PASSENGER PLT. [redacted] REG CLASS [redacted]
TITLE [redacted] ISSUED [redacted] ODOMETER [redacted]
77 CHEV 2D [redacted] PASS
PREVIOUS OWNER [redacted] PRAIRIE TX
OWNER [redacted], DALLAS, TX 75211
PLATE AGE: [redacted]

Highmeadow
B.J Tex Mobile Home park

AppX57. The date this record was printed, January 30, 1998, was the day *after* Mrs. Black’s murder and the day *before* Vanessa was interviewed by Officer Baker and others. AppX8.

Before Vanessa (supposedly) brought up “Charlie” during her custodial interview with Baker and SID investigators on January 31st, no one (other than Roy Childs, Ric Childs’ brother) had given police the name or description of a Hispanic male in conjunction with the Betty Black murder investigation. All of the witnesses canvassed in the Blacks’ neighborhood who had reported seeing two men get out of the Volkswagen outside of the Blacks’ house the morning of the crime had only reported seeing two “white males” with “long hair” who looked similar. AppX10. None of those witnesses had said anything such as: one guy was white, one was

Hispanic; one was thin, and one was considerably heavier; one had really long hair, and one had really short, shaved hair; one had a beard, and the other was cleanshaven.[59] Yet that would have been an obvious way to describe Ric Childs and "Fat Charlie" if they had in fact been the two men who had gotten out of Childs' Volkswagen together outside of the Blacks' house:

AppX57.

But by January 31st—*before* Charlie stupidly tried to destroy Ric's Volkswagen on I-30, *before* Vanessa Stovall was interviewed, *before* Jackie Roberts was taken into custody and interviewed, and *before* Ric was expressly told in a recorded interview that the police wanted him to inculpate Charlie—a plan seems to have already been hatched to make Charlie the fall guy. There is reason to believe

[59] Also, Charlie Flores then wore glasses whenever he needed to be able to see. Ex. 4.

that this plan may have been set in motion when SID investigators got Charlie's name from Ric's brother Roy, who did not actually know Charlie. SXR100; Ex. 4.

Notably, the police contacted Vanessa because Ric had brought her up during his initial interview—apparently, to try to give himself an alibi by saying that he had dropped Jackie off and then gone to "wake up" Vanessa at his grandmother's house and "get her to work." SXR101. However, contrary to their later assertions, SID investigators had likely *already* gotten Charlie's name from Ric's brother, Roy Childs Jr. No interview notes or records of any kind have ever been produced documenting that interview with Roy, or how and why he came up with the name of "Charlie Flores," whom his brother Ric had met in the early 1990s in Irving and then tracked down in late 1997 when he learned that Charlie had started selling drugs; this reunion occurred at the same time that Ric met Jason Clark and Jackie through Doug, and infiltrated their circle.

5. On February 1, 1998, nothing happened (apparently).

Mysteriously, neither the State nor any of its agents have ever produced any records showing any significant investigative activity on February 1, 1998. A summary memorandum prepared by the SID team does not mention the day at all. AppX8. By that day, Ric was in custody; but Jackie was still roaming freely. Therefore, it is hard to conceive that all members of both the SID or CID teams took the day off.

6. February 2, 1998 yielded more information inculpating Ric and Jackie.

At around noon, SID investigators interviewed Deborah Howard. 38 RR 199. They had gotten her name from a previous conversation with Ric Childs' brother, Roy Childs, who, like Deborah, lived in Irving. AppX8. Deborah told the investigators that the last time she had seen Ric, he was driving a Volkswagen Beetle, and advised that he carried a handgun, which she described as a small, black automatic. Deborah agreed to go to the Farmers Branch police station to provide a statement.

Relying on Deborah's lead, SID investigators found Jeff Burgess, who confirmed that Ric had in fact bought a 1973 purple Volkswagen Beetle from Burgess, who had met Ric through someone who sold methamphetamines for him. That person, Johnny Russell, was also found; he confirmed that he sold drugs for Ric, that Ric had recently bought the purple Volkswagen Beetle, and that Ric "always carried a black steel .380 caliber semi-automatic hand gun, in the small of his back." *Id*. Johnny Russell also claimed that Ric sold methamphetamines for a guy named "Charlie" who lived with his girlfriend in Irving. AppX57. But SID left this fact out of its summary of its investigation.

That evening, Deborah wrote out and signed an "Affidavit" on a Farmers Branch PD form stating that Ric had been driving a "purple and pink" Volkswagen

Beetle that he had gotten from a man named Jeff Burgess. She also noted that, when Ric had moved out about three weeks before, he had asked her "what I would do if I knew where $100,000 was." He had told her "it was drug money and the guy was in jail and the money was at this guy[']s parents['] house." *Id*. Plainly, Ric had been referring to Gary Black's drug money.

As it turns out, Deborah Howard also knew Charlie Flores through Ray Graham. But she was not seemingly asked by investigators about Charlie or Ray Graham—although she had shared with the investigators that she had met Ric *through* Ray Graham and they had started "seeing each other about 10 or 11 months ago," soon before Ric re-introduced himself to Charlie and then proceeded to infiltrate Gary Black's circle in Farmers Branch. *Id.*

Farmers Branch PD also obtained several arrest warrants on this day.

Belatedly produced police records show that a warrant was issued for Robert Peters, who had tried to help Ric make his getaway. *Id*. Peters was arrested on February 2, 1998, but he was released a few days later, when Farmers Branch PD decided not to charge him with anything—although law enforcement had observed him bring clothes and a truck to Ric Childs to enable his attempt to flee. Thus, neither Robert Peters, Jackie Roberts, Mack Salmon, Ric's grandmother, nor anyone else was charged or threatened with indictment for assisting Ric's attempt to evade arrest. By contrast, Charlie's elderly Hispanic parents were not just thrown in jail and

threatened with prosecution, they were indicted and were still being prosecuted when Charlie's case went to trial.

Additionally, on February 2nd, Farmers Branch PD obtained arrest warrants for Ric and Jackie. Ex. 47; Ex. 15. The arrest warrant for Jackie accused her of "Criminal Conspiracy (Capital Murder)." *Id.*

According to Doug's trial testimony, he went back to the police station yet again that day and was threatened with arrest for conspiracy if he did not help police locate Jackie (whom police themselves had let drive away two days before). 35 RR 48-49. At trial, Doug claimed that, after he got back to his apartment from that latest trip to the police station, he found Jackie at his place, passed out, after having consumed a large quantity of Xanax. 34 RR 165-166, 246-247. Doug called the police to report her whereabouts,[60] then took off before the police arrived. 35 RR 248.

There are no records documenting law enforcement's interactions with Jackie on this day, once she was apprehended at Doug's apartment. But one long-buried document, FBPD's "Case Chronology," dated February 2, 1998, refers to "several interviews": "After several interviews [Jackie] admits Childs tells her they killed Betty Black." AppX9.

[60] During a second day of testimony, Doug adjusted his story to try to make it look better for Jackie—suggesting that he only called the police after discussing it with her first. 35 RR 50.

7. On February 3, 1998, both Ric and Jackie were in custody, but law enforcement's goal was to press them to implicate Charlie Flores.

By this date, SID acknowledged it had obtained a mugshot of Charlie Flores from Irving PD. AppX8. But Detective Callaway had actually obtained an older mugshot from the Tarrant County PD database several days before. SXR100. It is unclear if either picture of Charlie was shown to any witnesses on this day; but records produced in 2016 show that Jill Barganier tried and failed that morning to make a second identification. AppX13; AppX14; AppX16; AppX22; AppX24; AppX25. No record was made (or at least kept) of what photos she was shown.

According to a handwritten note made by a Farmers Branch officer (not produced before trial), Jackie was "watched" from 2:00 - 5:00 p.m. AppX57. Jackie had seemingly been transferred via ambulance from the police station to Parkland Medical Center for "back pain." In the ambulance, she reportedly said: "I know where Charlie is if the [sic] want to know" and "make sure you tell the investigators I need to talk to them." *Id.* It is now plain that, after she had been taken into custody, she had been told that law enforcement was interested in hearing more about Charlie.

Another patrol officer who was assigned to watch Jackie that day reported that she mentioned feeling scared because "they think I murdered my mother in law." AppX57. The report further states that Jackie admitted that she had been seeing Ric Childs and had been in his Volkswagen. She also apparently reported several things

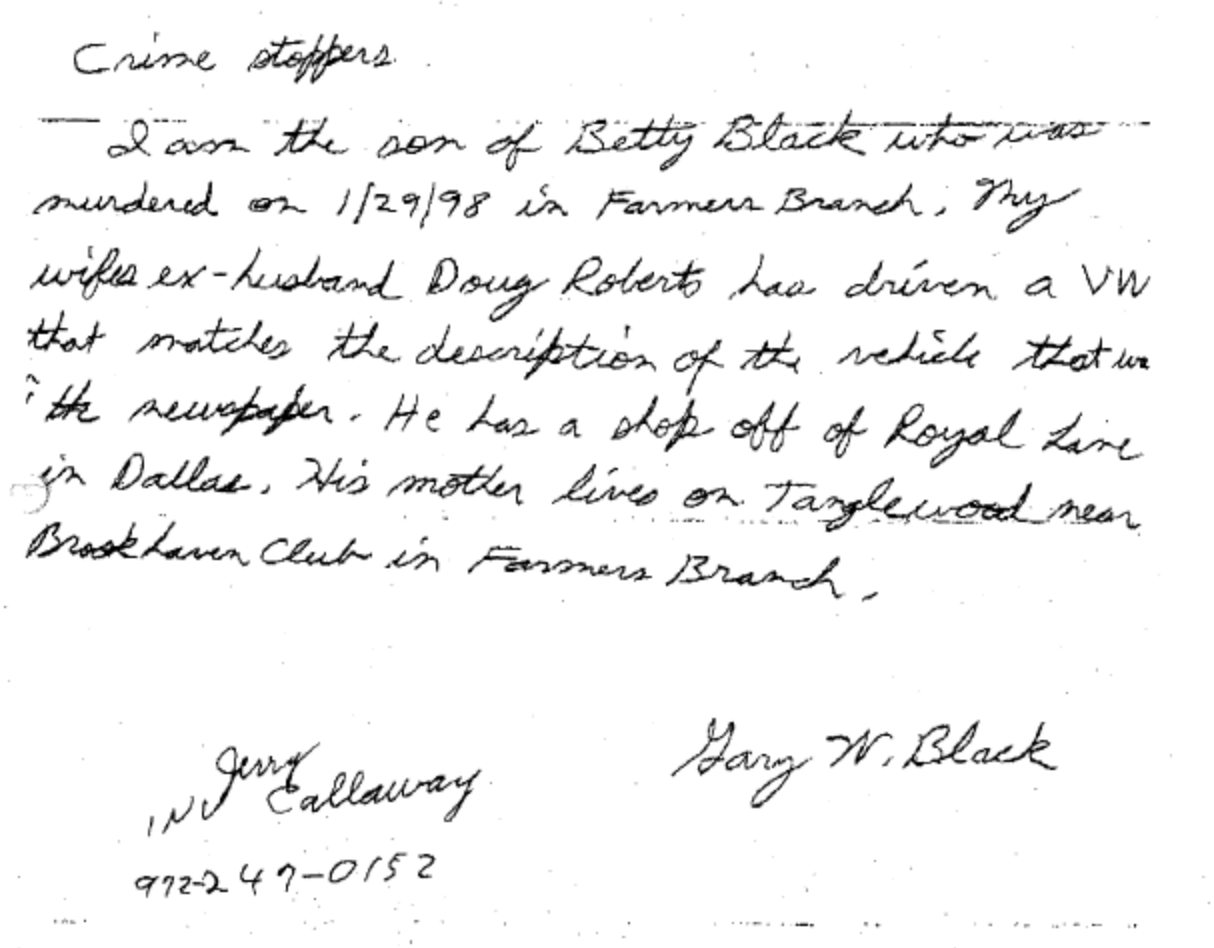
that did not come out at trial, such as that Jason Clark, her friend and neighbor, was supposedly working "for" Ric and this work involved stealing "some stereos" that he stored sometimes in her El Camino and sometimes in his Volkswagen. Jackie made a vague allusion to the drug deal involving Charlie and how, afterwards, he had gotten mad, thinking he had been shorted. *Id.* She was then given a shot of pain medication and passed out. *Id.*

Meanwhile, Vanessa Stovall continued to cooperate with Detectives Callaway and Baker, signing a "Consent to Search" form to allow access to her apartment and to any vehicle on the premises. SXR1.

That night, officers went to Jill Barganier's house and arranged for her to return to the police station yet again in the morning for a "hypnosis" session to help her do a second composite sketch, this time of the passenger she had seen getting out of Ric's Volkswagen and, hopefully, make an identification. 4 EHRR 82.

8. On February 4, 1998, law enforcement made a push on multiple fronts to manufacture evidence to link Charlie Flores to Mrs. Black's murder.

On February 4th, Gary Black sent a fax to "Crime Stoppers" from prison (not produced until 2016), making it clear that he wanted investigators to look at Doug Roberts' potential involvement:



Crime stoppers

I am the son of Betty Black who was murdered on 1/29/98 in Farmers Branch. My wifes ex-husband Doug Roberts has driven a VW that matches the description of the vehicle that was in the newspaper. He has a shop off of Royal Lane in Dallas. His mother lives on Tanglewood near Brookhaven Club in Farmers Branch.

Jerry Callaway
972-247-0152

Gary W. Black

Ex. 50. But by then, law enforcement had already fixated on Charlie Flores as the second perpetrator, ***absent any evidence***. Thereafter, investigators became more aggressive about developing evidence that would support their preferred narrative.

That morning, Jill Barganier arrived at the Farmers Branch police station. She submitted to a hypnosis session conducted by Officer Serna with the second investigator on the Black murder case, Officer Baker, sitting in. During the hypnosis session, Mrs. Barganier was asked multiple leading questions—including whether either of the two men she had seen getting out of a Volkswagen had short "shaved" hair. AppX26. She continued to say that the passenger was a white male with long,

wavy brown hair, “like his friend’s,” but felt his eyes were brown. Right afterwards, she created a composite sketch of her memory of the passenger, which did not look anything like Charlie Flores:

Immediately thereafter, police showed Mrs. Barganier a photographic lineup featuring pictures of ***Hispanic males with short, shaved hair***, including Charlie Flores’s most recent mugshot, which Callaway had previously obtained from the Irving PD:

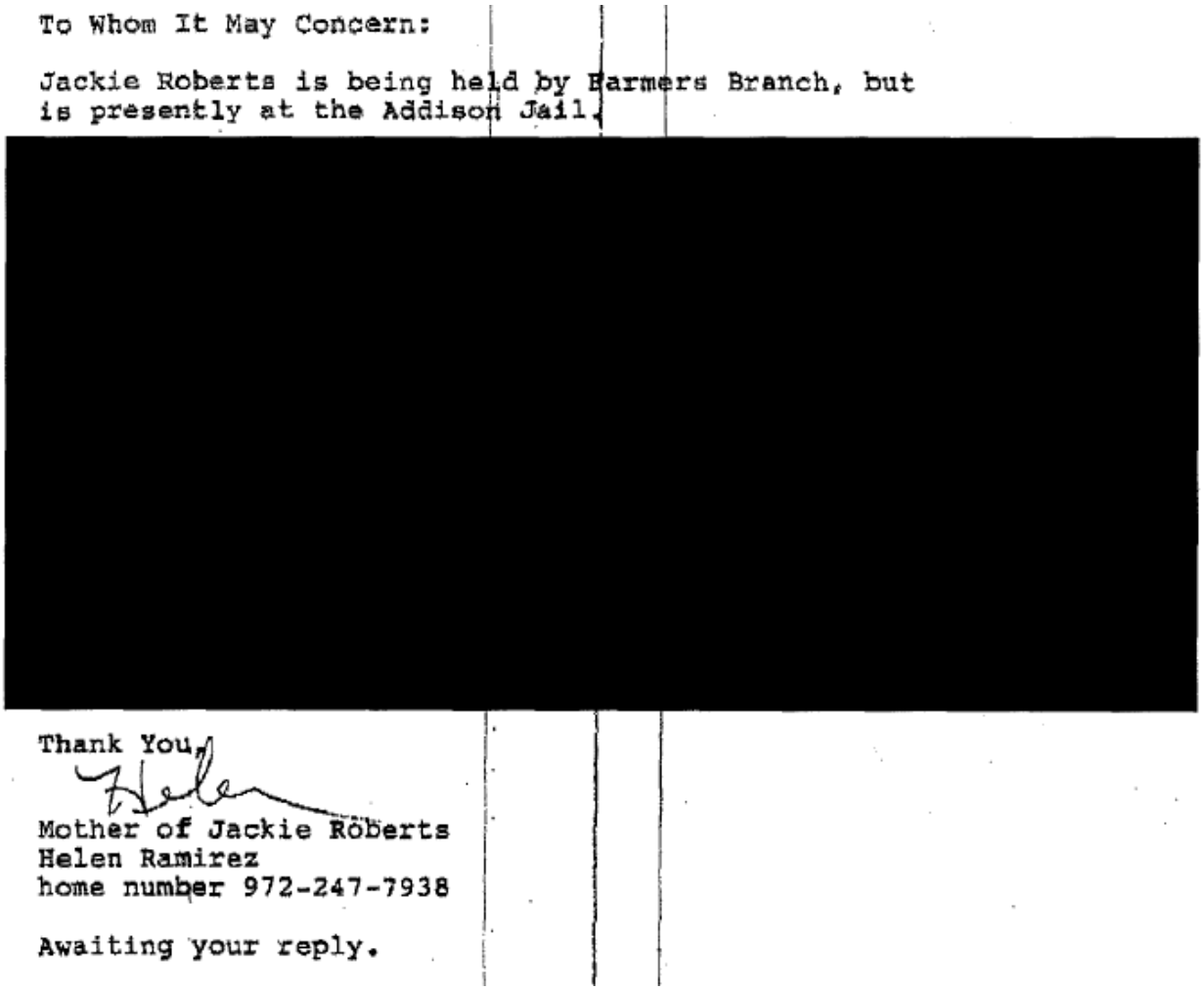
The highly suggestive process that law enforcement engaged in to try to push Mrs. Barganier toward law enforcement's preferred suspect was not uncovered until 2017, while litigating a challenge to the "science" used to justify the hypnosis session conducted to help her "remember more." *See* Section VII below.

That same day, other CID investigators went back to the Blacks' house to check the carpet where Mrs. Black's and the dog's bodies had been found. Apparently, they decided, four days after-the-fact, that they ought to look for any defect that might provide clues as to the second bullet that had killed the dog. 35 RR 251. But when they arrived at the house, they found that the carpet in the living room had already been ripped up and removed. They made some phone calls that afternoon

to find out where the carpet was. *Id.* As it turns out, it had been removed by a company retained to do remodeling and thrown in a dumpster.

Meanwhile, SID Investigators Koehlar and Ashabranner contacted Jackie at the Addison[61] Police Department where she was being held for an unknown reason. The belatedly produced police file includes a typed note sent from Jackie's mother (Helen Ramirez), presumably to one of the investigators while Jackie was being held in the Addison jail; but the belatedly produced record is almost entirely redacted:

[61] Addison is yet another municipality in the Dallas metroplex, just northeast of Farmers Branch.



To Whom It May Concern:

Jackie Roberts is being held by Farmers Branch, but is presently at the Addison Jail.

[redacted]

Thank You,
Helen
Mother of Jackie Roberts
Helen Ramirez
home number 972-247-7938

Awaiting your reply.

AppX57. Nothing in the police or DA files that were eventually produced reflects any other communications with Jackie's mother Helen Ramirez; nor did she testify at trial. Therefore, what she tried to convey to investigators on her daughter's behalf at that crucial moment in the investigation is unknown.

According to SID, Jackie agreed at some point that day to be transported back to the Farmers Branch facility for another interview. Jackie was then shown "a photograph of Charles Don Flores," and she supposedly confirmed that this was Ric's friend "Charlie." AppX8. During the interview, she again offered to take

investigators to Charlie's trailer. AppX8. The SID investigators seemingly took her up on the offer and, reportedly, arrived to find two white males and a white female moving furniture. Jackie reputedly pointed out Myra's car. The SID investigators informed CID's Officer Baker of this development; and Baker promised to set up surveillance at the trailer. *Id.* Other records, however, indicate that the trailer and Myra's Suzuki had been under surveillance since at least January 31st. AppX9.

Back at the police station, the interviews of Jackie continued. However, only part of one interview was transcribed (or at least only one transcript has ever been produced). Ex. 8. The transcript does not capture the "hours and hours" of interviews that Jackie said were conducted with her over the course of several days. 38 RR 159. Moreover, according to the face of the record, Jackie began to give the statement at 6:50 a.m. and it was not completed until 7:09 p.m.—***a span of over twelve hours***. *Id.* Because the two-and-a-half page "transcript" plainly does not reflect twelve hours of discussion, a fair assumption is that this "transcript" reflects Jackie's best attempt to deliver a statement whose substance was the product of a great deal of negotiation with her interrogators.

It is clear from the way the statement begins that Jackie was trying to provide a narrative that had already been agreed upon with law enforcement. And by then, law enforcement had convinced her that Charlie was a very scary person who was involved "with people like that," *i.e.*, "the Mexican Mafia." Ex. 8. In truth, Charlie

has never been involved with the "Mexican Mafia" or a gang of any kind; nor has he ever been classified as a gang member either during his one brief stint in Texas state prison before his current incarceration or during his many years on Texas's death row.

Jackie began her prepared statement by admitting to being part of a drug-deal-gone-bad and then tried to explain what had happened afterwards. Her speech was very pressured, and she repeatedly interrupted herself and went off on tangents. For instance, she insisted that she had told Ric repeatedly: "I know where we can get the money." *Id.* She said she had told him she "just needed a day." It seemed very important to her to convince her interlocutors that she had told Ric that *she* could get the money—as opposed to directing him to go get the money. In one exchange, an investigator pressed her to explain whether she had given "them" a map to the Blacks' house,[62] and she admitted that she had:

> Sgt. Ashabranner: Ok, the map. Did you draw them a map; telling them how to get there?
>
> Jackie: I did.
>
> Sgt. Ashabranner: Ok.
>
> Jackie: I did.

[62] It is unclear from the record how the SID investigators had learned about the map since Doug Roberts had thrown it away on January 29th before going to the police. Presumably, Doug and/or Jackie had told them about the map to the Blacks' house that had been in Ric's backpack *before* the point in the multi-hour interview with Jackie and thus Sergeant Ashabranner was able to circle back to this detail once they decided to try to record a statement.

> Sgt. Ashabranner: You drew them a map telling them how to get to Mr. and Mrs. Black's house.
>
> Jackie: That's, that's where I had to go to get the money.

Id. This admission invites the question: Why would she need to draw anybody a map to show where *she* needed to go to get money? Plainly, she did not want to admit that she had directed others, including the man with whom she was having a sexual relationship while her husband, the Blacks' son, was away in prison, to the Blacks' house to steal his drug money. At trial, she denied that she had drawn such a map; and then denied that she had drawn it for Ric.

Aside from trying to minimize her own role in her mother-in-law's demise, Jackie's primary job in making this statement was to explain what had happened between the hours of 3:30-7:00 a.m. in the morning—in a narrative that included Ric *and* Charlie. The investigators tried to direct her to provide the sequence of events that they were looking for. But her presentation was a jumble of details punctuated by some rather obvious falsehoods—for instance, stating that the drug deal she had set up for Ric had happened at Terry Plunk's house in Garland[63]—instead of near Love Field at Judy Haney's apartment, as she and other witnesses testified at trial. *Id.*

[63] Garland is another municipality within Dallas County about 20 miles from Farmers Branch.

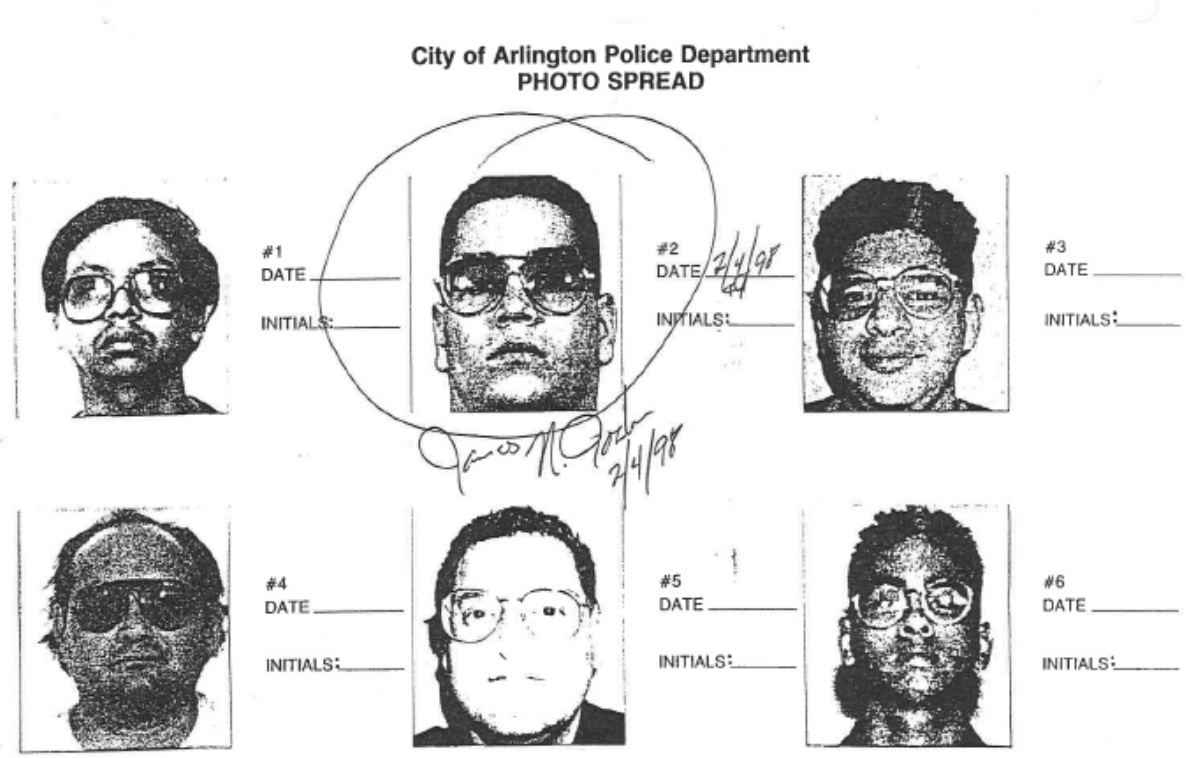
Jackie's recorded statement includes other information inconsistent with her ultimate trial testimony. She described, for instance: sitting in her car outside of Charlie's trailer while he was inside "with his friends;" Ric coming out sweating; her telling him she can "get the money;" then Ric getting out of the car and going back into the trailer—which is quite different from what she described at trial.

Jackie described how eerily calm Ric had been while threatening her to keep quiet because she might "find [her] kids dead in an alley and [her]self too!" *Id.* Additionally, she expressed amazement that Ric "could have been like that or that he was involved with people like that"—the implication being scary Hispanics like Charlie Flores. *Id.*

One of the most telling comments in her stream-of-consciousness speech would be easy to miss. At one point, she said to the investigators: "***You know that guy, Charley***." *Id.* (emphasis added). Certainly, Jackie did *not* know Charlie; she admitted that she had never seen him before in her life until Ric showed up at her house with him when they were supposed to meet up with Terry Plunk. Therefore, the only reasonable inference from this statement is that, during her many hours with law enforcement, investigators had purported to "know" Charlie and what a "bad cat" he was. SXR101.

While Jackie was endeavoring to give a statement that dramatically minimized her role in the crime, officers in another municipality met with James

Jordan. He was shown a photo lineup that included Charlie Flores's picture in it. Jordan reputedly picked Charlie out as the man he had seen "toss a burning object into the Volkswagen on 1-31-98[.]" SXR100. Perplexingly, on that date the physical description Jordan again provided of the suspect was quite different from the photo of Charlie Flores that he supposedly picked out of the photographic lineup. Jordan had signed an affidavit, noting that this incident had happened "after dark" and that the stranger whom he had seen had "**dark hair down to about his collar**, light beard and mustache as though he had not shaved in several days, **no glasses**, no hat[.] *Id.* (emphasis added). Yet, as with Mrs. Barganier, he was presented with a photographic lineup containing pictures that did not match his description of the perpetrator. Here is the photographic lineup from which he supposedly picked Charles Flores:



It is clear, in light of Jordan's initial description and the written statement given on this day, that Jordan could *not* have picked Charlie out of this lineup, because no one in the lineup resembled the person he had described seeing (who was likely Jonathan Wait). Charlie did *not* have dark hair down to his collar, did not have a beard or mustache (and in fact has always been unable to grow any), and always wore glasses if he wanted to see. Ex. 4.

Jordan added a few other details in his written statement. He claimed he had seen someone in the passenger seat but he "could not see that person well enough" to know "if that person was a male or a female or black or white." *Id.* Jordan also claimed that he had been "approximately 40 yards behind" the vehicle when the driver fired shots; and he now admitted that he "did not actually see the firearm due

to the distance and darkness." *Id.* Yet somehow, despite the distance, darkness, and the frenetic nature of the encounter, he was supposedly able to pick a picture of Charlie Flores out—depicted with short, shaved hair and wearing glasses—four days after the incident.

9. On February 5, 1998, investigators with the SID narcotics unit asserted their authority over Ric to try to obtain a narrative that would reduce Ric's culpability and inculpate a person from whom he had been obtaining drugs.

SID, the narcotics unit, took charge of interviewing Ric while, the morning of February 5, 1998, CID investigators Stephens and Callaway visited the business that had pulled the carpet out of the Blacks' house, which had been on the floor underneath Betty Black's slain body. These investigators found the carpet in a dumpster. 35 RR 240, 251. They reputedly identified a "defect" in the carpet, but did not examine the padding—which had gotten wet and started to fall apart as they tried to pull it out of the dumpster. 35 RR 250, 252. The "defect" was later described as "a cut approximately two and a half to three inches long" in the underside of the carpet. 35 RR 252-53. Pictures were supposedly taken of the carpet, but these were not available at trial. 35 RR 251.

The main event that day, however, involved trying to induce Ric to make a written statement inculpating Charlie Flores.

According to the partial transcript of the February 5, 1998 interview, the recording began at 11:53 a.m., and eventually led to Ric signing a "Voluntary Statement" at 2:20 p.m. the next day—well over 24 hours later. SXR101. Little is known about what transpired during that 26-hour period when Officer Baker and SID investigators Koehlar and Stanton were trying to get Ric to sign a statement. Of these three, only Stanton testified before the jury during the Flores trial, and Stanton was not asked anything about interrogating Ric Childs.[64] *See* 36 RR 172+. Stanton was asked only about the pre-arrest surveillance and denied knowing Ric Childs before that.[65] His supervisor, Sergeant Ashabranner, called to testify by the defense, however, acknowledged that the department, including the SID team that Stanton was on, had prior experience with Ric Childs—including knowledge of his brother, Roy Childs, whom they contacted the day after the murder; seemingly, it was Roy Childs who was the first person to give them the name Charlie Flores, and the name of Ric's girlfriend, Deborah Howard, well before the February 5th custodial interview took place. 28 RR 192-193. Additionally, the partial transcript of the

[64] The transcript of the January 31, 1998 custodial interview with Ric does not appear to have been produced to defense counsel; it is unclear if the February 5, 1998 transcript was produced until after all evidence had closed and the parties were waiting for the jury's punishment-phase verdict.

[65] Stanton admitted only that his department had had "dealings with [Jackie] in the past" and thus they recognized her when she had shown up at Ric's grandmother's on January 30th, the day after the murder while the house was under surveillance. 36 RR 186.

February 5th interview itself indicates that the Farmers Branch investigators had history with Ric (which has never been disclosed).

The incomplete nature of the 26-page transcript of the February 5th interview is evident because, after one of the investigators said that they had a statement that they "want you to go ahead and sign," and after Ric said that he was "not sure," they turned off the recording device while acknowledging that the interview is "going to take a while." *Id.*[66] Although incomplete, the record of the last known recorded interview with Ric is illuminating in many ways. *Id.* Most importantly, the transcript shows that the investigators had strong opinions that Charlie Flores was "a pretty bad cat" and they wanted Ric's help in getting Charlie. *Id.*

The transcript of the interview begins with Investigator Koehlar urging Ric to identify Charlie and, seemingly, showing Ric a picture of some kind. Koehlar also referred to a previous interview that Ric had had with the Farmers Branch CID team, for which there is no record, in which Ric had apparently demanded they "prove" his involvement in Mrs. Black's murder. The goal by February 5th was to urge Ric to protect himself by pushing liability onto Charlie whom they eagerly, and falsely, characterized as a member of the "Mexican Mafia":

> Do you know this guy here? Charlie? I wasn't in there, okay, when CID interviewed you last, and they basically said you said prove it. So, we've proved it. The reason I'm talking to you now is Charlie's a pretty bad cat, alright.

[66] The transcript also makes clear that Ric Childs knew the interview was being recorded.

> We've talked to some people about you, you know, uh, some people say, you know, we haven't ever seen Ric display that kind of demeanor before act that particular way. It's not something we can say about Charlie, Charlie's a bad cat. We've heard all kinds of rumors about Charlie being in the Mexican Mafia, and you know, going over to the house that night after the drug deal and picked up some guns and shit like this and went and that house is full of pretty nasty characters and shit.[67] I'm going to tell you right now, there's going to be two ways of walking into prison. You're going to walk through those prison doors as a dead man walking, or you're going to walk through those prison doors as a man with some hope. I'm being honest with you, man. I'm not bullshitting with you. Ricky, you're fucked.

SXR101. Over and over again, the interrogators insisted that Charlie was the "bad cat" they wanted. As CID member Officer Baker put it: "We're going to put this asshole down, man. Trust me." *Id.* And if Ric would just do his bit, the investigators repeatedly promised to protect him: "You're in the safest place you can be right now." *Id.*

[67] This reference to "nasty characters" seems to refer to Charlie's friend Waylon Dunaway and his mother, a paralegal, who lived at a house on Glenwick near Myra and Charlie's trailer in Irving. This SID investigator's comment suggests that the Glenwick house and Charlie's circle may have been on their radar *before* Mrs. Black's murder, likely because of the drug activity in which Charlie and Ric were involved. No records have ever been produced, however, showing cooperation between narcotics investigators with the Farmers Branch SID and similar investigators in Irving, so as to explain why Farmers Branch agents would have been investigating drug activity in another municipality. The commonality is Ric himself—who was then dealing drugs in both Irving and Farmers Branch; also, we now know that Farmers Branch SID had some history with Ric's brother Roy too—and were compelled to go to him for information soon after Betty Black's murder.

The interview transcript shows that the investigators did share some truthful information with Ric—such as the fact that they had his Volkswagen and proof that he owned it. But the emphasis was largely on how he and Jackie were "looking at the needle," how he was "fucked," and how he was "in deep shit"—unless he cooperated in implicating Charlie Flores. *Id.* Most of the interview consisted of leading questions and creates the impression that they had told Ric in advance what they wanted him to say: that he and Charlie had gone to the Blacks' house using a map provided by Jackie; Charlie had shot Mrs. Black with a .380; and Ric had shot the dog with a .44 magnum. They wanted to record him saying these words and then wanted him to sign a statement. But teasing out the plan is challenging because Ric's responses to leading questions were often incoherent or contradictory.

Part of why Ric struggled was that, even after having been in jail for several days and thus, presumably, off drugs, he remained muddled: "Man, you know, if you've been high and you go to sleep, you know, you don't…" and "I don't know when Thursday morning [when Betty Black had been shot] is, man." *Id.*

There are also the not-so-subtle nudges from the investigators reminding Ric of the part he needed to play:

- "I have a theory about this, but you gonna have to need me, to help me out as far as Charlie goes."
- "Now when we, when we go pick his [Charlie's] ass up we're not going to say shit about you. We may not even talk to that motherfucker. It depends on what you [Ric] tell us."

- "We've talked to Jackie."
- "Rick, can you do this for us? Can you do this for us?"
- "We've been working on this."

Id.

Then, when Ric balked, saying: "***You make me do this shit, man***," Koehlar came right back at him, reminding him: "Ricky, here's the deal, ***like I told you before***. Right now is coming to Jesus time. Okay?" *Id.* (emphasis added).

Despite the manipulations, Ric ended up providing a little resistance about some things the investigators were trying to put in his mouth. For instance, when asked about going to some house, which SID investigators seemed to have been watching, to pick up guns the night before Mrs. Black's murder, Ric said they already had guns; and when asked of Charlie "How deep is he in the mafia?" Ric had nothing to say except "I'm scared."

But the investigators had ample evidence that Ric was hardly an honest broker. Quite the contrary—he showed them that, in addition to being weak and drug-addled, his impulse was to minimize and then, once busted, attempt to shift blame to Charlie (or anyone else) regardless of the facts. For instance, in an exchange about an attempt to break into a car the same night of the drug-deal-gone-bad, Ric tried to shift responsibility for that incident onto Charlie too—until Investigator

Koehlar revealed that they already knew that Ric had been the one who had set up that particular criminal enterprise:

> Koehlar: You all went to the apartment complex that night and tried to steal a Z?
>
> Childs: Yeah. Yeah.
>
> Koehlar: Okay.
>
> Stanton: What were, were you trying to get something out of the Z or steal the Z?
>
> Childs: Get out of it.
>
> Stanton: What were you trying to get out of it?
>
> Childs: ***I don't know. It was Charlie's deal.***
>
> Koehlar: There's a lot of damage to it, Rick. We're just trying to establish what the deal is.
>
> Childs: ***I don't know. It was Charlie's.*** I-I don't know.
>
> Koehlar: Tell us what happened when you went up to the Z.
>
> Childs: Uh.
>
> Koehlar: Did - what did Charlie tell you to go over there?
>
> Childs: Yeah, and, uh, then he just took the key he had when it started.
>
> Koehlar: ***Okay. Let me tell you this. Rick. We know that you had that car Monday and we know that you went down and tried to make some keys for it. I just want to tell you that.***

Childs: Keys wouldn't work. [finally, an honest response]

Koehlar: Okay.

Id. (emphasis added).

The stunning revelation buried in this exchange—so easy to miss due to all of the information that has never been produced—is SID Investigator Koehlar's admission that they (law enforcement) knew that Ric had been engaged in a criminal act involving "the Z" several days ***before*** Mrs. Black's murder: "***We know that you had that car Monday[.]"*** *Id.* Mrs. Black was murdered on *Thursday*, January 29, 1998; Ric was apprehended on *Saturday*, January 31, 1998. Therefore, the *Monday* to which Koehlar was referring was undeniably January 26th, the Monday *before* Mrs. Black's murder.

That Farmers Branch investigators had been watching Ric and knew that Ric "had that car Monday" before Mrs. Black was murdered and knew he "went down and tried to make some keys for it"—are very mysterious facts. At the very least, this unexplained history suggests a motive on law enforcement's part to downplay Ric's role in Mrs. Black's death. Certainly, it is clear that the investigators did not care to dwell on his habit of breaking into cars or even his role in the drug-deal-gone-bad; they only wanted Ric to put Charlie at the Blacks' house and explain who had had what gun upon entering the Blacks' house. But Ric had trouble keeping law enforcement's story straight. When Ric acknowledged that he had "a .380,"

Investigator Koehlar quickly jumped in to correct him: ".44 that's at you grandma's house? … Is that – that's yours?" *Id.*

Indeed, whenever Ric seemed to go off on a tangent that did not fit with the story law enforcement had already decided to go with, they cut him off and tried to redirect him toward the point he was supposed to make—that, upon entering the Blacks' house, he had been armed with the .44 and used it to shoot the dog:

> Koehlar: Let's do this. When you all went in the garage, you went in there and you opened up you went….
>
> Childs: Tried to open the garage. The garage door wouldn't open. I went in and touched….
>
> Koehlar: Tell us about the potato, Ric.
>
> Childs: Stuck the potato on the end of the gun.
>
> Koehlar: Huh.
>
> Childs: On the one I had, the .44.
>
> Baker: So you shot the dog with the .44? How many times?
>
> Childs: One. It was a .44, brother.

Id.

In addition to putting a different gun in his own hand, which Ric seemed to find very amusing, Ric also gratuitously claimed that Charlie, not he, was the person who had been drinking a beer upon exiting the Volkswagen. This seemingly minor

detail was problematic because the neighbor (Jill Barganier), who had already IDed Ric as the driver of the Volkswagen had, by then, repeatedly said that the driver, a tall white male with "pretty eyes," had been the one drinking the beer. *See* Section VII below.

Later in the same interview, Ric ended up accidentally admitting the truth—that the .44 found at his grandmother's house had ***not*** been used in the Blacks' house—then he promptly went back to shucking all responsibility and even joking about the murder weapon:

> Baker: Did you already have a gun?
>
> Childs: I had my .44, but I didn't use – ***but my .44 was never used.***
>
> Stanton: We've had a lot of people tell us you had a .380
>
> Childs: No, sir. I had a .25 and I gave it back. Jackie got my .38 and the .380.
>
> (Laughing)
>
> Childs: She got mad at me and, uh…
>
> Koehlar: Tell me something. (Laughing) That .380 ammunition that's in your bag, that's the ammunition that was used in the [Blacks'] house. How did that get in your bag?
>
> Childs: I don't know, man. **He had my bag up till that night when you all picked me up**, and we were in the El Camino. And then, Charlie was in the El Camino, too.

SXR101 (emphasis added).

The above exchange is especially interesting because there is an unexplored reference to another male ("he") who supposedly had Ric's "bag up till that night when" Ric was picked up by the police. That "he" was plainly not Charlie Flores—even within the context of the false story Ric was trying to spin to make his interrogators happy. Ric had left that bag with Jackie, and she had it when she pulled up at Ric's grandmother's house on High Meadow in her El Camino, while the house was under surveillance; the officers then watched Ric's uncle go out to the El Camino and retrieve that bag; the officers then watched as Ric left the house on High Meadow with that bag—containing an open box of bullets that were an exact match for the one that had been used to kill Mrs. Black. 36 RR 180-183. No one has ever suggested that Charlie had been riding around in Jackie's El Camino after her one encounter with him, or that Charlie magically had access to Ric's bag "up till that night when" Ric was picked up by the police. But other people had spent time in Jackie's El Camino after Mrs. Black's murder on January 29th and before Ric's arrest on January 31st—including Jackie and her friends: Doug Roberts, Terry Plunk, and Alan Weaver. But none of those druggie friends—or any other white males in their circle, such as Jason Clark or Ray Graham—were ever seriously investigated as potential co-conspirators, even though Doug in particular engaged in highly suspicious behavior in the days soon after the murder. The investigators did not ask

Ric to explain who the "he" was whom Ric claimed "had my bag up till that night when you all picked me up[.]" The investigators either failed to ask this rather obvious follow-up question because they were incompetent *or* because they already knew who "he" was (perhaps Doug Roberts, with whom they had history and who had already come into the police station multiple times since the murder).

The February 5th interview with Ric had nothing to do with getting at the truth about what had happened to Mrs. Black, however. The police were working to get Ric to sign off on a story that Ric knew was not true: that Charlie was with Ric when he went to the Blacks; that Charlie was the rampaging Mexican Mafia "asshole;" that Charlie used a .380 to shoot Mrs. Black; and that Ric used a .44 to shoot the dog. Therefore, the investigators never pressed Ric (or Jackie, or anyone else) about the movements of Ric's black backpack, which contained rounds of the same ammunition for a .380 that had been used to kill Betty Black, and which was found in the possession of a person (Ric) who, as several people had reported, commonly carried a cheap .380 handgun. *See, e.g.,* 34 RR 265-266; 36 RR 234-235.

After the investigators decided that they had gotten as much out of Ric as they could for their recording, they again raised the issue of him signing a statement:

> Koehlar: You've done real good, allright. And you – you know I don't have to tell you you're in deep shit. Okay? Right now there's different levels of shit. Okay? It just depends you gotta pick your level and figure which one you want to be in.

Childs: Man, (unintelligible)

Koehlar: You've been forthright for us, and everything's cool. Okay? Uh, what we would like to do is get a statement from you.

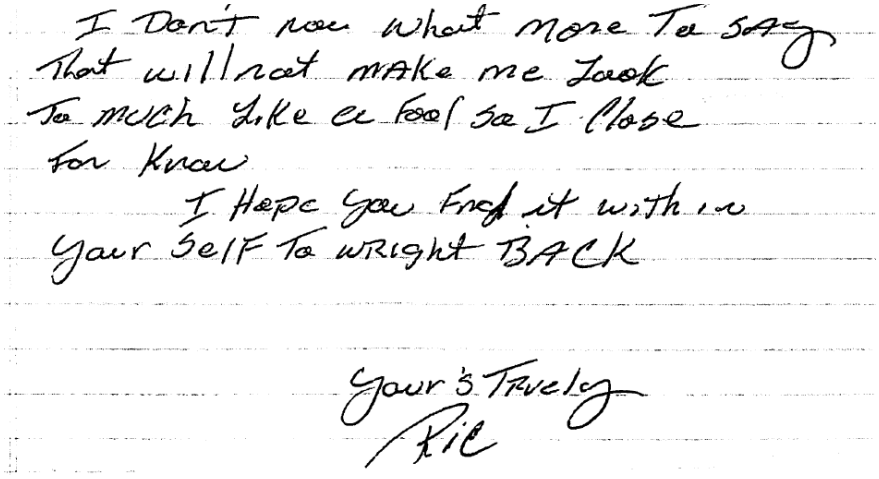
Childs: (Unintelligible)

Koehlar: We can, you know, if that's what you want. We'd like you to write it in your own hand, but if you want us to…

Childs: I can't write, man. I hurt my hand.

SXR101.

As far as we know, Ric never did write out a statement himself. But the injury to his finger may have been a pretext. Letters Ric wrote while in jail, which were buried for years in the DA's file, suggest he was only marginally literate:


I Don't now what more To say
That will not make me look
To much Like a fool So I close
For Knaw
I Hope you find it with in
Your Self To wright BACK

Your's Truely
Ric

Ex. 22. Or Ric may not have wanted to provide a written statement because, at the time, he had some compunction about lying that blatantly in writing. In the end, he just initialed a statement typed up by law enforcement. SXR101.

The investigators also wanted to make sure that Ric would agree to work directly with the prosecution. So, Officer Baker asked, "Ric, I tell you, I do want to do one thing. Uh, would you have any problems sitting down talking with the District Attorney."

Ric replied, "No, I'm not…you know, you know…."

Despite the cryptic nature of Ric's response, Baker said: "Trust me, man. We know."

Whatever it is that they all seemed to know about Ric sitting down with members of the DA's Office, those details have never been shared with Charlie Flores. No notes of any interview between any members of the prosecution team and Ric Childs have ever been produced. Then again, no notes of ***any*** interviews between fact witnesses and members of the prosecution team have ever been produced—despite repeated requests. *See* Procedural History.

The transcript of the February 5, 1998, interview ends with Ric claiming that his wounded hand was caused by "a gunshot wound to the head" because he owed money to Charlie. He then expressed fear that Charlie was going to go after his girlfriend Vanessa once he found out what Ric had said. This particular detail is interesting, because it was Vanessa who had already been corralled by law enforcement to inject "Hispanic Charlie" into the narrative. Ric must have been told what she had said, either while talking alone to Vanessa or while talking to

investigators when the tape was not rolling. That is why he expressed fear for her—not for his other girlfriends such as Jackie Roberts or Deborah Howard. The investigators, however, were unmoved by all that; they just wanted Ric to sign the statement they have typed up:

> Koehlar: He's not going to know shit.
>
> Baker: Trust me. Vanessa – Vanessa's moved back in with her father and she's safe. Yeah, we're already taken care of that.
>
> Koehlar: Ric, what we're gonna do now is, uh, … satisfied with it, you know, we want you to [go] ahead and sign it. Allright?

Id.

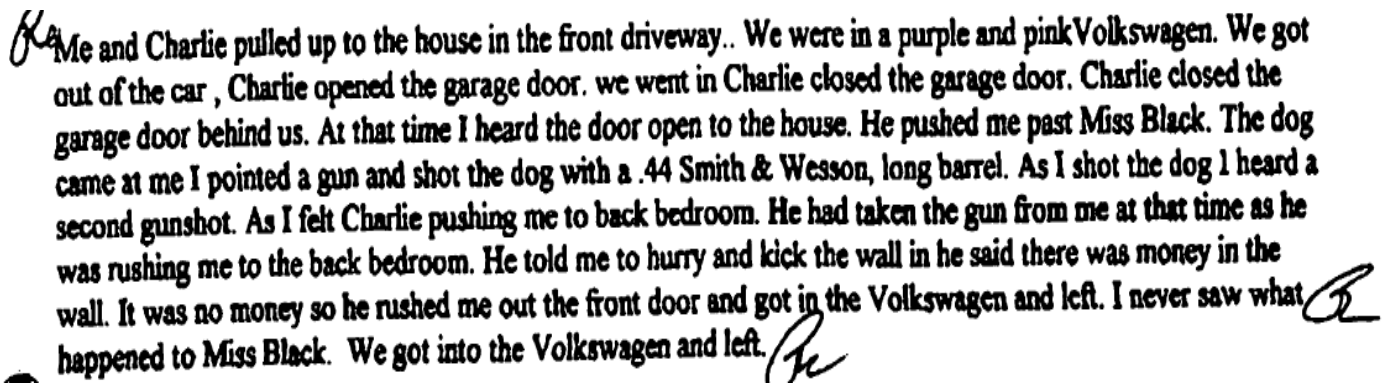
But Ric yet again balked: "I'm not sure." *Id.*

Then Koehlar acknowledged "It's probably gonna be awhile"—and ceased recording. *Id.*

The same day of the partially recorded interview, Ric was indicted for the capital murder of Elizabeth Black. The indictment mentions some of his priors from 1989, but not a recent possession-of-controlled-substance-with-intent-to-deliver charge, for which his attorney had posted a $1,000 bond, which had been forfeited when Ric had failed to appear in court the week just before Mrs. Black's murder.

10. On February 6, 1998, having obtained statements from Jackie and Ric, law enforcement sought to apply pressure to induce others to implicate Charlie.

On February 6, 1998, after a marathon interrogation of Ric, most of which was not recorded, Ric signed a "Voluntary Statement" that had been typed up by law enforcement. It was witnessed by Detective Callaway who, according to the partial transcript, had not been present the day before. The statement captures the narrative that law enforcement had been pushing for, and which would eventually be the template for the State's narrative pressed at the Flores trial:


Me and Charlie pulled up to the house in the front driveway.. We were in a purple and pinkVolkswagen. We got out of the car , Charlie opened the garage door. we went in Charlie closed the garage door. Charlie closed the garage door behind us. At that time I heard the door open to the house. He pushed me past Miss Black. The dog came at me I pointed a gun and shot the dog with a .44 Smith & Wesson, long barrel. As I shot the dog I heard a second gunshot. As I felt Charlie pushing me to back bedroom. He had taken the gun from me at that time as he was rushing me to the back bedroom. He told me to hurry and kick the wall in he said there was money in the wall. It was no money so he rushed me out the front door and got in the Volkswagen and left. I never saw what happened to Miss Black. We got into the Volkswagen and left.

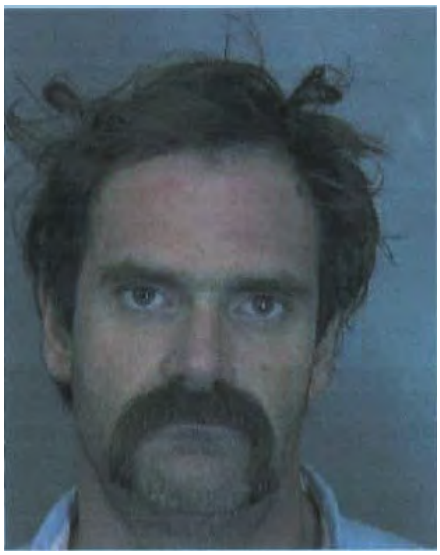
SXR101. In this statement, Ric put Charlie with him at the scene, had Charlie opening and closing the garage door; had Charlie pushing Ric away from Mrs. Black and then pushing him toward a back bedroom, implying that Charlie was the one who shot Mrs. Black (while claiming that he, Ric, had not even seen this); had Ric shooting the dog "with a .44 Smith & Wesson, long barrel" only because he claimed that "the dog came at" him; had Charlie then taking Ric's gun and directing all of Ric's movements until they got into the Volkswagen and left. Every sentence in the

statement pushes responsibility elsewhere, as if Ric had been no more than a helpless puppet. *Id.* The statement was almost entirely false.

On this same day, February 6, 1998, Jackie appeared before a magistrate and was then booked into the Dallas County jail. Ex. 51. But despite her central role in the crime, Jackie was not prosecuted. Instead, she was groomed to be the key spokesperson for the State's version of events in the Flores trial. *See* Section IV.A.

That same day, Farmers Branch PD also received a response from the Texas Department of Criminal Justice to a query about Charlie Flores and were told: "Our records do not indicate any confirmed gang activities." Ex. 52. But that did not put the breaks on the push to place responsibility for Betty Black's murder on him.

Admittedly, Charlie's impulsive decision to flee when he learned that he was viewed as a suspect in a murder investigation made it easy to cast him as the villain. That day, the public was formally invited, through a *Dallas Morning News* article, to provide information leading to his arrest; and a reward was offered. Charlie was described as "about 6 feet tall and 260 to 270 pounds. He has short dark hair and wears glasses[.]" *Id.* That description was accurate—but bore no resemblance to the neighbors' description of Ric's accomplice as a "similar" looking "white male" with "long hair." That is, someone who looked more like Doug Roberts:



The same day that Ric signed a statement implicating Charlie in Betty Black's murder (and indeed suggesting that Charlie had fired the lethal shot), Myra was apprehended by SID investigators Ashabranner and Koehlar. They had been conducting surveillance on her mother's house at 304 Crystal Court in Irving, near the trailer where Charlie, Myra, and her three girls had been living. AppX8.[68] The SID memo noting this surveillance does not mention that Myra's mother, Connie Wait, had been acting as an informant—even before Betty Black's murder. The SID memo, does, however, support Myra's report that, because she refused to cooperate,

[68] The SID memo suggests that investigators had learned of the Crystal Court address on February 2nd from a man named Johnny Russell who also lived in Irving. AppX8. In addition to telling law enforcement that Ric had bought a purple Volkswagen and "always carried a steel 380 caliber semi automatic hand gun, in the small of his back," Russell had also apparently advised that Ric sold meth "for a Hispanic male named 'Charlie'" who "lived with his girlfriend on a street named Crystal Court, in the city of Irving." *Id.* Russell told them to look for "a small red car parked in the driveway." *Id.*

she was taken into custody under the pretext that she had unpaid traffic tickets that had resulted in DPS warrants. *Compare* AppX8 *with* Ex. 13.

11. On February 7, 1998, narcotics investigators wrapped up their involvement in the Black murder investigation, after getting a statement from Charlie's girlfriend Myra.

At the Farmers Branch police station, Myra was interrogated by several men, including Detective Callaway. The investigators demanded that she provide information about Charlie's whereabouts. She was held overnight. They kept threatening her—particularly with the prospect that she would lose custody of her kids if she did not cooperate.

The next day, Myra wrote out and signed a statement, dated February 7, 1998, about what had happened the previous morning before she was taken into police custody, stating that Charlie had told her that he had not been involved. Ex. 39. Although Myra was repeatedly interrogated and harassed thereafter, this was the only statement *she* ever wrote in her very distinctive handwriting. *Id.*

Meanwhile, a phone record in the police file (not produced until well after trial) shows that Jackie was continuing to signal her eagerness to help the Farmers Branch investigators every way she could. She sent a message, from jail, through her mother, to advise SID Investigator Stanton "she forgot to tell him something else." AppX57. No record of that follow-up conversation with Stanton has ever been

provided—just as no notes of the vast majority of interviews that law enforcement and members of the DA's Office conducted with Jackie have ever been produced.

At this juncture, SID investigators, after continuing unsuccessfully to locate Charlie, were "released from the case." AppX8.

B. SID Investigators Created a Misleading Memo that Buried Evidence of Ric and Jackie's Central Roles and Pushed a False Narrative Casting Them as Pawns of Charlie Flores.

One of the few documents produced to the defense before, or at least during trial, is an undated, 8-page memo by SID investigators Ashabranner, Stanton, and Koehlar. *See* AppX8. The memo purports to describe their role in the murder investigation. Other evidence, produced decades after the fact, casts serious doubt on the memo's accuracy. But more than mere inaccuracies, comparing the SID memo to details found in other contemporaneous documents reveals a calculated intent to mislead.

First and foremost, the SID memo does not mention that, the day after the murder, on January 30, 1998, when SID investigators contacted Ric's brother Roy Childs, he was the first person to give them the full name "Charlie Flores," a fact that can only be gleaned by comparing the Farmers Branch PD file (produced in 2016) to records obtained from the Arlington PD.

The SID memo creates the false impression that the first person to mention a "large Hispanic" male named "Charlie" was Vanessa Stovall during a custodial

interview the night of January 31, 1998. Moreover, the memo falsely states that they did not "positively identify the subject 'Charlie'" as Charles Don Flores until February 3rd. But Detective Callaway had seemingly told Grand Prairie Fire Department that the arson of the Volkswagen on I-30 had been perpetrated by a suspect in the Black murder investigation. That information enabled Arlington PD to open an assault case against Charlie and later enabled law enforcement to "assist" James Jordan, who had witnessed the arson, to pick Charlie out of a photographic lineup, even though Charlie did not resemble in any respect the description that Jordan had provided police on the night of the incident or a week later.

The SID memo also creates the false impression that investigators did not have Charlie's full name and a photo until they obtained one from the Irving PD on February 3, 1998. Yet other records suggest that they already knew Charlie's name and had gotten a mugshot from Tarrant County's mugshot database on January 31, 1998, right after the arson incident.

Additionally, the SID memo, in describing investigators' interview with Ric's girlfriend Deborah Howard on February 2nd, leaves out some key inculpatory information that she had provided about Ric—particularly, that he had been obsessing about drug money hidden in a house weeks before Betty Black's murder. This information suggests that Ric (and likely Jackie and Doug) were contemplating the burglary well before January 29, 1998.

The SID memo, in describing Jackie's words upon being arrested around 9:45 p.m. on February 2, 1998, quotes her as volunteering that she was "scared that Charlie [was] going to kill [her] for what" she knows and that she thought "Rick did what he did, because he [was] scared of Charlie too." AppX8. Yet none of the individuals close to Jackie who had been with her during the ***five days*** between the murder and her arrest—Doug Roberts, Alan Weaver, Helen Ramirez, Terry Plunk—told investigators that Jackie had expressed fear of someone named "Charlie." The only fear she had expressed had to do with being implicated in her mother-in-law's murder. AppX57. The evidence shows that she only brought up Charlie days later, *after* she was in custody (when investigators were already looking to pin Betty Black's murder on Charlie).

The SID memo describes several interviews with Jackie for which no transcripts or other records have even been produced. The memo then purports to describe a February 4, 1998 interview that was partially transcribed. The SID memo claims that Jackie provided a detailed, precise description of her movements in the early hours of January 29th: doing a drug deal in Garland, going to Charlie's trailer in the "Big Tex" trailer park in Irving, going to a house in Irving to get guns, then going to an apartment complex where Ric and Charlie "tried to steal a Chevrolet Z-28 Camaro." Yet Jackie provided *none* of these details in her recorded statement, other than the incorrect detail that there had been a drug deal in Garland. She never

mentioned observing an attempt to steal a car, yet alone this specific car. This was the car that Ric had tried to steal, which was something that law enforcement knew independently of Jackie. In fact, SID somehow knew that Ric had had access to that particular car the Monday *before* Mrs. Black was murdered—and never disclosed these facts.

The SID memo also credits Jackie with providing the name of Charlie's girlfriend "Myra" and identifying her car. Yet Jackie did not provide that information, and in fact denied knowing Charlie's partner's name until some time later (as she was being groomed to testify for the State in Charlie's trial).

The SID memo also purports to describe the interview that Investigators Stanton, Koehlar, and Baker conducted with Ric on February 5, 1998, an interview that was partially transcribed. The SID memo includes a long narrative that purports to summarize what Ric had "reported." The narrative, however, bears ***no*** resemblance to the incoherent, self-serving mumbles that Ric provided in response to investigators' leading questions in that interview. For example, the SID memo claims that, right after officers read Ric his rights, Investigator Koehlar showed Ric some pictures of Charlie, and Ric was asked: "Do you know who this is?" and Ric responded "yea, that's Charlie"—which bears no resemblance to the way the interviewed opened, per the transcript quoted above. *Compare* SXR101 *with* AppX8. The SID memo obscures the unsavory and leading nature of the entire

interview and how information that later became important to the State's case against Charlie at trial originated with law enforcement, not Ric himself.

The SID memo not only fabricates a coherent story *for* Ric, the memo also does not include information that the State would later treat as central to its timeline. The chronology that the SID memo claims Ric provided does not mention going with Charlie to his grandmother's house to "wake up" Vanessa Stovall. That is, the SID memo's dramatically spruced-up narrative, which had purportedly come from Ric, does not include a supposed trip up to North Dallas the morning of January 29, 1998 with Charlie, about which Vanessa later testified at trial. Vanessa supposedly provided this information when interviewed on January 31st, and it makes little sense that, if it had actually happened, Ric would not have also mentioned it. But the author(s) of the SID memo, in attributing to Ric a story without an extraneous trip to North Dallas that (as would be evident at trial) did not match up with other witnesses' timelines, seem to have forgotten to make sure that all of the fictions were consistent.

IV. THE STATE'S TRIAL PREPARATIONS INVOLVED BURYING UNHELPFUL EVIDENCE AND MANUFACTURING INCULPATORY EVIDENCE THAT ULTIMATELY DID NOT ADD UP.

The preparations for the Flores trial were not a quest for justice, but another phase in the cover-up and redirection of blame. The chief agent of this phase was

ADA Jason January, formerly of the Dallas County DA's Office. For example, January personally:

- groomed an accomplice (Jackie Roberts) to provide false testimony and serve as the State's star witness in the Flores trial;
- manufactured "corroborating" evidence to prop up Jackie's narrative;
- muscled up dubious evidence through a combination of coercion and undisclosed promises of leniency;
- abused the grand jury and adjudicatory process to pave the way for an extraordinary plea deal for co-defendant Ric Childs; and
- withheld discovery until the 11th hour—and then disclosed documents cherry-picked, and even crafted, to support the State's theory of culpability and hide the truth.

A. Jackie Roberts Was the State's Deeply Flawed Star Witness at the Flores Trial.

On March 22, 1999, the presentation of evidence was to begin. That morning, *The Dallas Morning News* published an article featuring a quote from ADA January. He shared that Jackie would be testifying and represented that "[h]er testimony will clear up the motive in this offense." Ex. 38. Jackie's trial testimony was apparently supposed to accomplish three things: (1) deny her own culpability in the burglary-murder; (2) characterize herself and her boyfriend Ric as victims of the boogeyman, Charlie Flores; and (3) put Charlie *with* Ric throughout the night of January 29, 1998, until around 7:00 a.m. Jackie did her best; but keeping a bunch of lies straight was evidently challenging.

1. At trial, Jackie told a jumbled tale trying to account for a critical period several hours before Ric's Volkswagen was seen outside of the Blacks' house the morning of the murder.

Jamie Dodge, a witness for the State, testified that Charlie was hanging out in the trailer he lived in with Myra and her kids in Irving until around 2:45 a.m. 34 RR 83, 86. Then Ric and Charlie went to Farmers Branch, met Jackie, and got into her El Camino; she drove them to Judy Haney's apartment to meet Terry Plunk for a hurried drug deal. Other evidence suggested that the Blacks' home in Farmers Branch was invaded sometime between 6:30-7:00 a.m. At trial, Jackie was the only witness who tried to explain what she, Ric, and Charlie supposedly did during a critical three-hour period on January 29, 1998. Jackie had to fill in the three hours or so *after* the drug deal with Terry Plunk, between approximately 3:30 and 7:00 a.m. And her task was to put Charlie with her and Ric throughout that time.

By the time of the Flores trial, she had come up with a convoluted tale—liberally mixing fiction in with sparse fact.

At trial, Jackie claimed that she had not known where they were going when they left Judy Haney's in her El Camino. According to Jackie, they went directly to a trailer park in Irving. 34 RR 135-136.[69] Jackie testified that she, Ric, and Charlie

[69] Jackie said that, inside, she observed three children sleeping in the front room (Myra's girls) and a man who "had long hair, a moustache, real thin … and didn't say a word." 34 RR 135-136. This detail is not in Jackie's "voluntary statement," and no one at trial explored who this thin mystery-man with long hair may have been, if he even existed.

went into the back bedroom, where Jackie saw a woman sleeping, whom she later learned was Myra Wait. In that room, Charlie took out scales and weighed the drugs. 34 RR 137-139. Jackie described Charlie becoming irate because he felt they had been shorted in the drug deal.[70] 34 RR 134-135. Jackie created the impression that this anger was inexplicable and scary—and that that was why she ended up volunteering to come up with money to appease him. 34 RR 137. She did not admit that the drug deal she herself had arranged had actually resulted in a shortage. In her version, Charlie was simply "ranting and raving and raising hell" asking for something "totally ridiculous"—but she was afraid, and so promised she could get him the money. 34 RR 138-140. At trial, she added some extra drama not part of any pre-trial statement, claiming that Charlie put a gun to her head and, although she thought he was "joking," described him asking how much her "connect" would give him for her head. She claimed she responded: "not a damn thing." 34 RR 137-139.

Jackie estimated that they were in the trailer for "about 45 minutes," which seems significantly exaggerated, even if one accepts Jackie's version of what happened in the trailer, while Myra and her girls were there sleeping. But one of Jackie's objectives was to try to account for the passage of time.

[70] This one fact corresponds with what Myra Wait reported to Charlie's trial counsel: that she was woken up by an argument in the trailer between Ric, Charlie, and some woman. Ex. 36.

She then described leaving the trailer with Ric, getting into the El Camino with him, and deciding with him to get money from the Blacks. 34 RR 140; Ex. 8. Jackie provided no explanation as to how Charlie ended up back in the El Camino with her and Ric. 34 RR 143-144.

Jackie's story at trial was that, *after* the three of them left Charlie's trailer together, she, Ric, and Charlie went to some other, unidentified house in Irving where Ric and Charlie "picked up weapons." 34 RR 143-144.[71] Jackie further testified that, after this, they drove to another apartment, somewhere in Irving, where they stayed for "25 minutes" while she waited in the car, until Ric and Charlie came back "sweating" and like they were "running from something." 34 RR 146. Neither Jackie's pre-trial statement nor her trial testimony suggest that she witnessed an attempted theft of a Camaro Z28.[72]

The latter incident seems to refer to an event that had actually occurred on the way *from* Judy Haney's apartment out to Irving. While driving to Irving, Ric had pulled into an apartment complex in Irving and used a key to get into a Camaro Z28, an event that law enforcement was somehow aware of and had brought up during

[71] Ric, in one of his partially recorded custodial interviews, denied that they went anywhere to get weapons, even though officers pressed him with leading questions to provide this information. SXR101. Ric never provided any coherent, let alone comprehensive, account of the events of January 29, 1998 in any record ever produced.

[72] The SID memo falsely attributed this information to her, when it was law enforcement that had this information before the interview.

the February 5th custodial interview with Ric. SXR101. Aside from this happening on the way *from* Haney's apartment out *to* Irving, not on the way *from* Irving, Jackie's estimate that this took "25 minutes" is another patent exaggeration. But stretching the time, and suggesting that this event had happened *after* they left the trailer, allowed Jackie to have something to say about what she, Ric, and Charlie were supposedly doing during that 4:00-7:00 AM window.[73]

But Jackie needed to account for yet more time. Thus, she invented a dramatic story about a trip to a gas station. She described her terror while waiting for Ric and Charlie, fearing that they were going to rob the place. She testified that she decided to try to drive off while Charlie was inside paying for the gas and Ric was at the pump. She described herself "push[ing] on the gas pedal" and "[t]he gas went flying everywhere," and, somehow, Charlie, with super-human powers, saw this from inside the convenience store and came running, pulled her by the hair, and threatened her by stating "bitch, where do you think you're going?" 34 RR 147-148. For good measure, she also added a sequence describing Ric and Charlie casually going back to talking about "the money situation," presumably ignoring the gas that had been

[73] On information and belief, Jackie and Ric left the trailer together in her El Camino around 4:00 a.m. and spent the next two hours doing drugs and planning the burglary in tandem with Doug Roberts, Jason Clark, Ray Graham and/or some other white male in their circle with long hair. Meanwhile, Charlie was asleep in the trailer with Myra.

sprayed all over Ric, as well as Jackie's El Camino. 34 RR 148.[74] No other evidence was offered to corroborate Jackie's fanciful gas station story, although, presumably, had this incident occurred, surveillance video could have easily been obtained.

Additionally, Jackie devised a scene in which she tried to appease Charlie while they were all in her car together—insisting that, if they would give her a day, she could get "the money." Then, according to Jackie, Charlie demanded assurance from Ric that she was good for it. Jackie insisted that Ric had vouched for her whole crew, quoting him as saying: "I've known her friends and I know her ex-husband,[75] and what she's saying is true, that [she] could, in fact—" 34 RR 150. ADA January, however, cut her off. She was putting too much emphasis on her own role in the home invasion. But a moment later, she again insisted that Ric "confirmed that he knew I had the money, that he knew I had some money. And I told him that just to give me some time. I told him I wouldn't need a lot of time, just a day, one day." 34 RR 151.

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[74] During one extended interrogation soon after her arrest, Jackie mentioned a stop at a gas station saying only: "And that's when I tried to get away, but I was to [sic] scared to move." Ex. 8. In this same statement, she also described going out to Garland to meet Terry Plunk for the drug deal, a claim inconsistent with her trial testimony as well as that of Terry Plunk and Judy Haney, all of whom testified that the drug deal with Ric and Charlie happened in Judy Haney's apartment near Love Field. It is possible that Jackie and Ric went to Terry Plunk's house in Garland after leaving Charlie's trailer seeking more drugs and/or a second person to join Ric in burglarizing the Blacks' house.

[75] This embellishment is perplexing because it was Jackie's ex-husband Doug who had run to the police the night of the murder to ensure Ric became a suspect. Nothing has ever been produced to illuminate a history between Ric and Doug. The only evidence is an oblique reference in Jason Clark's testimony before the Grand Jury that ADA January suppressed. Ex. 12.

One truthful aspect of Jackie's trial testimony is that Ric did know about the money hidden at the Blacks' house. Jackie did not admit, however, that Ric had known about this money "for a long time," as he and several other witnesses had told law enforcement. SXR101. It is a reasonable inference that one reason why Ric infiltrated Jackie's circle at the end of 1997 or beginning of 1998 may have been precisely because he had learned from Doug (and/or others) that Gary Black had hidden a lot of money from drug sales in his parents' house and in various cars before he went to prison.

In any event, Jackie's testimony that *she* was promising to get money does not compute unless one somehow believes her strained insistence that she did not really draw a map to the Blacks' house for Ric to use, although she had admitted to doing so to SID investigators before trial.

Even if Jackie's chronology—unsubstantiated by any other evidence—had been true, the events in and around the trailer in Irving do not add up so as to explain the passage of three or so hours from approximately 3:30-7:00 AM. Unfortunately, Jackie was not challenged at trial about the many blocks of time, starting on January 28th through the night of her arrest on February 2nd, when her whereabouts and actions were unaccounted for. Nor was she asked to explain what was said to and by her during the "hours and hours" of custodial interviews conducted with her after her arrest. 34 RR 161. And, of course, the facts of the solicitous attention paid to her

by the DA's office and, particularly, by lead prosecutor Jason January, including their weekly meetings, were not put before the jury; these facts were concealed.

2. Jackie gave false testimony to obscure her own culpability.

At trial, Jackie did all she could to minimize her own role in the events that had led directly to Betty Black's death. She denied that she had ever said anything about believing that Gary's drug money was hidden "behind the medicine cabinet." Ex. 9. But both Jackie and Gary had told Callaway about Jackie's belief that his drug money was hidden in the bathroom walls—however, this fact was not disclosed to the defense; and considering that whoever had broken into the Blacks' house with Ric had torn the medicine cabinets off of the bathroom walls, this nondisclosure was quite material. At trial, she expressly denied having told Ric that money was "in the walls in the bathroom":

> Q. Would you know of any reason why the burglars at your in-law's house would have gone to the bathroom walls in particular?
>
> A. No, I don't.
>
> Q. Did you tell Rick Childs that the money was behind the medicine cabinet in the bathroom?
>
> A. No, I did not.
>
> Q. On any occasion?
>
> A. On any occasion.

38 RR 119. During the Flores trial, Jackie also claimed that Gary had only suggested vaguely that it was hidden in "several different places," such as "[i]n the attic, in the wall, in the safe"—and she pointedly denied knowing "what wall." 38 RR 118. She even denied knowing that the burglars had torn up the bathroom walls. *Id.*

Of course, the defense could not impeach Jackie with the handwritten notes showing that she had not only told Callaway and ADA January about her belief that the money was "hidden in the walls, behind the medicine cabinets," but had also said far more: that Ric had confessed to shooting Betty Black and that Jackie had admitted to being culpable in planning the burglary. She could not be impeached to that effect ***because Callaway's handwritten notes were not discovered for another two decades***.

Before or during trial, the State had given the defense only a copy of Jackie's "Voluntary Statement;" but it only showed that she had admitted to drawing a map for Ric showing how to get to the Blacks' house. But ADA January solicited testimony to try to obscure even that admission:

Q. All right. At some point did you tell the police that you had drawn the map for them, for Rick Childs?

A. Yes, I did.

Q. Was that true?

A. No, sir, it wasn't.

Q. Okay. Now, why would you tell them that?

A. After hours and hours of...

Q. Were they asking a lot of questions?

A. (Witness nods head up and down.)

34 RR 161. When the defense tried to revisit this topic when Jackie was recalled to the stand, she continued to deny what the Voluntary Statement plainly suggested that she had said. 38 RR 121. Moreover, ADA January vociferously objected to the inquiry. *See, e.g.*, 38 RR 122 ("MR. JANUARY: Well, Your Honor, I'm going object to that, because this whole conversation is in a larger context. That's what she's trying to explain. And to pick out that one response – "). After his objection was overruled, ADA January persisted, relentlessly fighting to keep the jury from hearing that his star witness had expressly admitted to Sgt. Ashabranner on February 4, 1998, that she had drawn a map to the Blacks' house for Ric. 38 RR 123-133. The defense was ultimately allowed to confront Jackie with her previous admission to law enforcement as reflected in her "Voluntary Statement;" but on the stand, she insisted that this previous admission was incorrect. 38 RR 133-135. She insisted that the map to the Blacks'—which Doug had found in Ric's back pack, which Ric had

left in Jackie's El Camino the morning of the murder—had been drawn for a babysitter. 34 RR 159-160.[76]

ADA January knew the truth—that Jackie had drawn a map for Ric, and had planned the burglary with him. Yet ADA January concealed the admissions Jackie had made in his first interview with her. Then, during trial, he even sought to rehabilitate her on this point, calling a witness to shore up her incredible testimony that the map to the Blacks' house had been drawn for a babysitter. Indeed, the State's lone rebuttal witness at trial was Elaine Dixon, yet another meth-user living at Jason Clark's house, across the street from Jackie, who had been sleeping with Jackie's ex-husband Doug. 39 RR 19-20. She was the "babysitter" for whom Jackie had supposedly drawn a map with directions to the Blacks' house. Her testimony, facially incoherent and incredible, was supposed to rehabilitate Jackie, who had repeatedly denied telling investigators that she had drawn a map to the Blacks' house *for Ric*. 38 RR 131-35. But Elaine's testimony added no more than an admission that she was "real bad at reading maps." 39 RR 17.

The absurd "babysitter" testimony was not the only instance of ADA January's efforts to prop of Jackie's false testimony. He seems to have arranged for Doug to change his testimony midstream to smooth over inconsistencies between

[76] Ric, by contrast, told investigators that Jackie had drawn a map "in the car, on the way there." SXR101.

his testimony and Jackie's. During cross-examination, Doug had initially acknowledged that Jackie had made ***no mention of Charlie Flores during any of his multiple conversations he had had with Jackie after they learned about the murder***. 34 RR 289-291. But when he returned to the stand the next morning to finish his testimony, he suddenly changed this tune—claiming that Jackie had said she was scared of Ric *and* Charlie. 35 RR 32-33.[77]

In addition to taking steps to try to shore up Jackie's credibility with testimony from some of her drug-addicted friends, ADA January took the unusual step to get Jackie a rush copy of the transcript of her direct examination to study before she was recalled for cross-examination. 38 RR 111-113.

Because she had had this unusual opportunity to review her previous testimony before her cross-examination began, she was invited to correct any mistakes she felt she had made in her previous testimony. Most of her corrections were relatively trivial—such as adjusting the year when she had married Doug Roberts. 38 RR 112. But one of her do-overs was extremely significant—and quite suspect: "I stated that the Defendant had the largest gun, he had the largest gun, but not the largest handgun. Ric Childs had the largest handgun. The Defendant had the smaller one." 38 RR 113. This "correction," made after she had gone over her

[77] Of course, Doug could not avoid admitting that he had said nothing about Charlie Flores when he went to the police on January 29th or January 30th.

previous testimony and, most probably, after conferring with her "mentor" ADA January, served to make her testimony fit the narrative the State had been pushing since Opening Statements. As explained in Section VI below, beginning with its Opening Statement, the State had argued, falsely, that Ric, armed with a "bigger gun," had shot the dog, and Charlie, armed with the "smaller gun," had been the one who shot Mrs. Black—knowing that Jackie had told them, long before trial, that Ric had shot Betty Black.

Seemingly, there were few limits to what ADA January was willing to do to prop up the story that his star witness had been coached to spin. Perhaps both he and Jackie believed that perjury was a small price to pay to ensure that Hispanic "bad cat" Charlie Flores took the fall for Betty Black's murder and that Jackie avoided liability as a party to a conspiracy to commit crimes culminating in her mother-in-law's murder.

B. Because Jackie Was an Accomplice, as a Matter of Law, Her Testimony Had to Be Corroborated.

Even though Jackie was groomed to provide evidence placing Charlie with her and Ric together for several hours right up until the time of the murder, the State still had a problem. Only a small part of her testimony trying to account for the hours from 3:00–7:00 AM was corroborated by anyone. The basic fact of the drug-deal-gone-bad was corroborated by Judy Haney and Terry Plunk, although their

descriptions differed from Jackie's in some critical details. More importantly, the only corroborated details of her story about what happened around 6:30-7:15 AM, about the same time Ric's Volkswagen was seen outside the Black's house, are that (1) she was dropped off at the Emeline house at that time and (2) Ric was the one who dropped her there. That corroboration was provided by her ex-husband and friend, Doug Roberts. ***No one*** corroborated Jackie's (fictional) story that Charlie was still with Jackie and Ric at that time.

ADA January was aware at the outset of trial that the timeline they planned to present did not add up. In his Opening Statement, he referred to it getting "a little complicated." 34 RR 35. That was quite an understatement.

Jackie's trial testimony—and only *her* trial testimony—put her, Ric, and Charlie together from 3:30 AM until around 7:00-7:15 AM, when the two men supposedly dropped her back at the Emeline house and left in Ric's Volkswagen. 34 RR 153. This testimony is critical because it placed Ric and Charlie together at the right time, in the right vehicle, in the right neighborhood to permit an inference that they were the two men whom neighbors saw going into the Blacks' house through the garage. That is, if the jury believed Jackie had been more or less accurate, and if they believed that Ric had sped the 1.6 miles directly from the Emeline Street house to the Blacks' house on Bergen Lane, then Jackie's testimony might have supported

the inference that Ric *and* Charlie were the two men observed by neighbors getting out of a strange Volkswagen before Mrs. Black was killed.

The problem with this version of events is twofold. First and foremost, ***it is not true***. *See* Ex. 4. Second, although ADA January did his best to obscure the fact, Jackie had been viewed as an accomplice; therefore, her testimony had to be corroborated. *See* TEX. CODE CRIM. PROC. art. 38.14 ("A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.").

The evidence that Jackie was an accomplice was extensive. Jackie had motive, intent, and opportunity to plan a burglary of the Blacks' house *before* she set up the drug deal for Ric involving Terry Plunk, Judy Haney, and Charlie in the wee hours of January 29, 1998. The State was well aware of evidence exposing her knowledge and culpability, but worked hard to suppress all that it could. In addition to suppressing her most damning pre-trial admissions, ADA January knew that Jackie had reputedly given Ric the Blacks' garage door opener and that a garage door opener had been found inside the Blacks' garage in an odd location; January, right before trial, seemingly tried to engineer evidence to show that a garage door opener

had not been needed to get into the garage. Those efforts only leaked out during the testimony of one of the investigators. *See* 35 RR 259-261.[78]

Based on what is now known about what ADA January knew from the outset about Jackie's culpability and about the proactive efforts to manipulate evidence, it is probable that ADA January elected not to pursue an indictment against Jackie precisely because he was trying to obscure his accomplice problem. However, the problem was compounded, not mitigated, by other witnesses' pre-trial statements.

C. Doug Roberts, a Possible Co-Conspirator, Could Only Do So Much to Bolster Jackie's Story.

Another problem with Jackie's version of events was that it had been inadvertently undermined at the outset by her ex-husband, Doug Roberts, who claimed to have been at the Emeline house (waiting to take their son to school) on January 29, 1998, when Jackie returned after being out all night. Doug initially told law enforcement that Jackie had returned home at about 6:30 a.m. At the Flores trial, he tweaked the time to 7:00 a.m., seemingly to match her testimony. He also claimed at trial that he was sleeping on the couch in the front room when he was awoken by the sound of a car door slamming, and that as he went to the door to let Jackie in, he saw Ric (and only Ric) get into the driver's side of his Volkswagen and drive off. 34

[78] CID investigator Stephens admitted on cross that, in the month of January of 1999, he had gone with ADA January, ADA Davis, and their investigator Jim Rizzy to the Blacks' house to "test" the garage door for the first time and had tried to raise it manually. (Stephens could not say if the garage door was in same condition as a year before at time of Mrs. Black's death.)

RR 236-38; 34 RR 277; 34 RR 271. Doug did not testify about seeing a second person get out of the El Camino or into the passenger side of Ric's Volkswagen.[79]

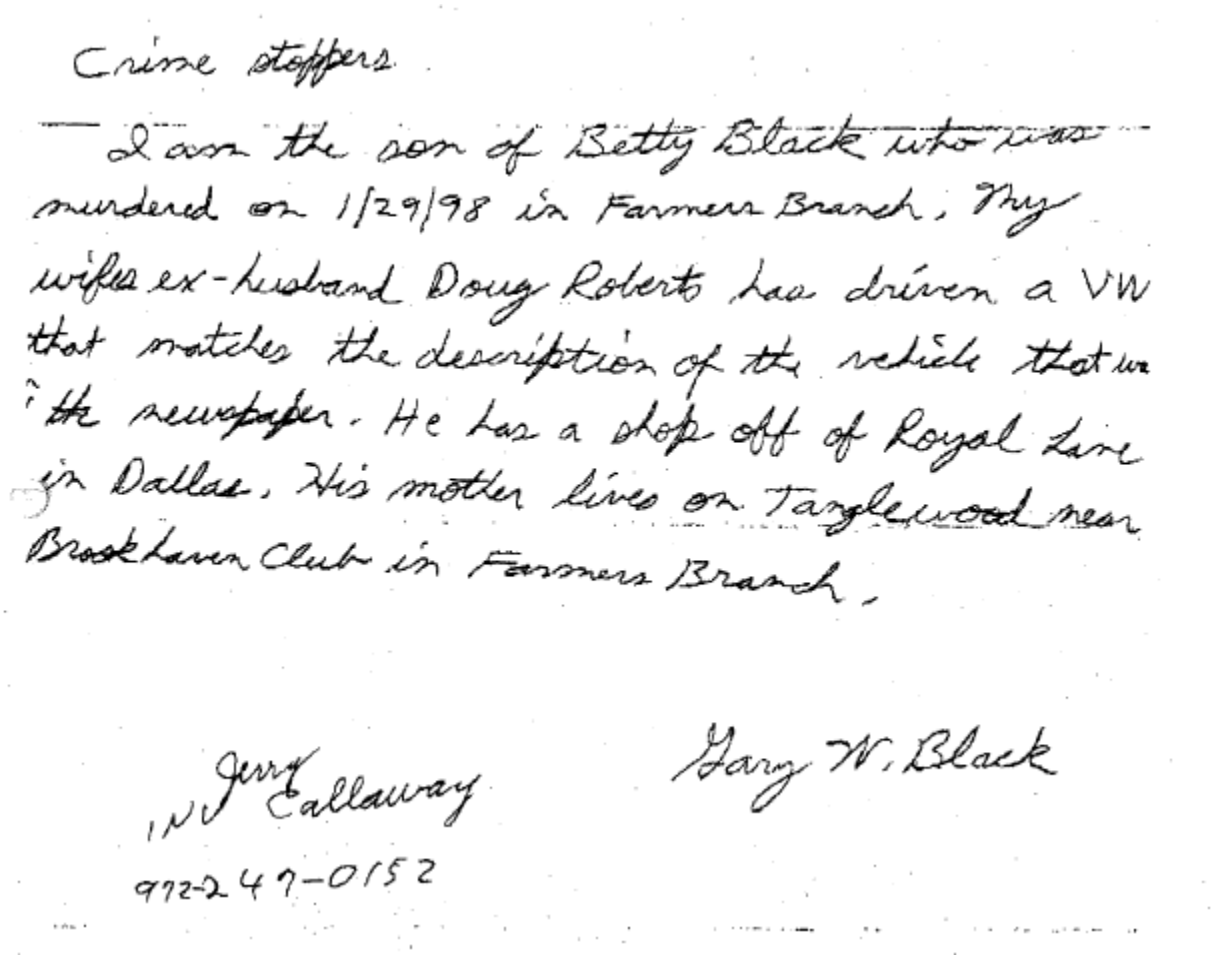
Doug could not later back Jackie up about a second person because he was already locked in. Additionally, unlike Jackie's unsupported assertions, Doug's report that there was only one individual (Ric) in the Volkswagen when Jackie was dropped off was actually corroborated by information that his friend Alan Weaver had provided to law enforcement the day after the murder—but which was not disclosed to the defense at trial.[80] Although the defense did not know it at trial, Weaver's description of the car doors gave the lie to Jackie's testimony that Charlie was with Ric at the time.

Doug may not have seen a second person because *he* or one of Jackie's other cohorts is the person who drove to the Blacks' house the morning of the murder. At least that seems to have been the initial hunch of the Blacks' own son, Gary Black, who had known Doug since high school. In a fax sent from prison, dated February

[79] In the State's guilt-phase Closing Argument, ADA Davis falsely stated that Doug had testified to seeing "Richard Lynn Childs … getting into the passenger seat of the vehicle." 39 RR 53. One might assume this was a slip of the tongue, but for the other numerous misrepresentations made to the jury during his argument.

[80] Callaway's notes from his interview with Alan Weaver on January 30, 1998 corroborated Doug's initial report suggesting that only Ric and Jackie had returned to Helen's/Jackie's house in the Volkswagen. But these notes were withheld, and instead, a transcript of only part of the interview with Weaver was produced, which does not include the information about the car doors. *Compare* Ex. 48 *with* SXR101.

4, 1998, Gary Black made it clear that he wanted investigators to look at Doug Roberts' potential involvement:



Crime stoppers

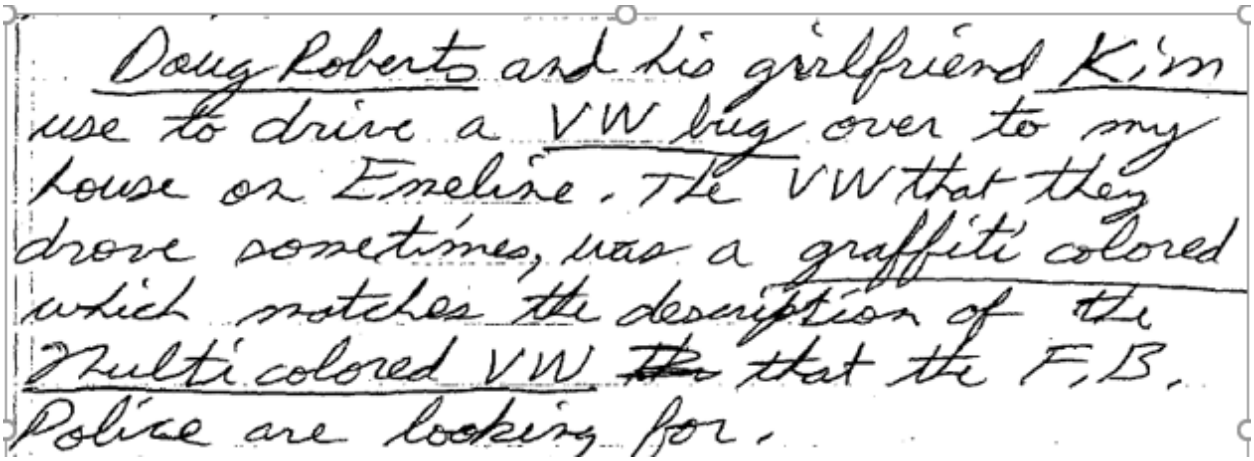
I am the son of Betty Black who was murdered on 1/29/98 in Farmers Branch. My wife's ex-husband Doug Roberts has driven a VW that matches the description of the vehicle that in the newspaper. He has a shop off of Royal Lane in Dallas. His mother lives on Tanglewood near Brookhaven Club in Farmers Branch.

Jerry Callaway
972-247-0152

Gary W. Black

Ex. 50. But that document was not produced to the defense.

Similarly, Gary wrote to his family members naming Doug as someone to investigate:


Doug Roberts and his girlfriend Kim use to drive a VW bug over to my house on Emeline. The VW that they drove sometimes, was a graffiti colored which matches the description of the Multi colored VW ~~the~~ that the F.B. Police are looking for.

Ex. 53. Nor was that produced to the defense.

Doug had been the first person in Jackie's circle to go to the police the very day of Mrs. Black's murder after he learned that a multi-colored Volkswagen Beetle had been observed by neighbors. He was the one who first told investigators, on January 29th, of a link between Ric Childs and that Volkswagen seen outside of the crime scene. It is unclear if law enforcement ever considered Doug to be a suspect; so much of his role remains shrouded in mystery.[81] A few years after the Flores trial, Doug was shot in the face at point-blank range and died. That crime does not appear to have been solved. 4 EHRR 57-58; Ex. 55.

[81] About a year after the Flores trial, Doug was involved in a high-speed crash while intoxicated, in a car that seems to have belonged to Gary Black. Although arrested for DWI and reportedly observed going about 100 miles an hour when he drove headlong into a wall, the charge against Doug was soon reduced to an "obstructing a public passageway" case and then dismissed. Ex. 54. There is no indication why, despite ample evidence noted in the arrest warrant showing that Doug had been driving while very intoxicated, the charges against him were dismissed. But summary dismissal of serious charges against Doug Roberts is a pattern suggested by his criminal records. *See id.*

Certainly, Doug's eagerness to go to the Farmers Branch police, with whom he had history, as soon as he learned that Ric's car had been observed outside of the Blacks' house is unexplained. Most of Doug's interactions with Farmers Branch PD were not recorded and no notes were made (or at least produced). But we know that he raced to the Farmers Branch police station around 9:00 p.m. on January 29th to report having seen Ric drop Jackie off and then leave the Emeline house in a Volkswagen. AppX8. Tellingly, no documents suggest that Jackie reported to Doug, her ex-husband and close friend, that she was anxious about some guy name Charlie who had just left with Ric. According to Doug, when asked, she had just said that she had been out "messing around" and Ric was off to "get donuts." 34 RR 152.

Because no one, other than Jackie, plainly an accomplice, claimed that Charlie was in the Volkswagen with Ric around the time that two men were observed getting out of the distinctive vehicle and entering the Blacks' home, the State needed something else.

The "solution" the State latched on to was Vanessa Stovall, one of Ric's other girlfriends.

D. Vanessa Stovall Did Not Bolster, But Confounded Jackie's Story.

Late at night on January 31, 1998, Vanessa Stovall had been summoned to the Farmers Branch police station. She was told by police that her long-time boyfriend, Ric Childs, was in custody. Seemingly, police also told her that, earlier that same

day, Ric had told them that he had been with her on the morning of January 29, 1998. Specifically, Ric had told investigators that, after dropping Jackie off, he "went to wake up" Vanessa "and get her to work." SXR101. He had also told them that Vanessa "was at my grandmother's house waiting for me and I woke her up[.]" *Id*. Ric had, at that time, insisted that this happened "right after I dropped Jackie off in the early morning" on January 29th "something like" 6:30 or so. *Id.* Notably, in describing this event on January 31, Ric made no mention of Charlie being in the car with him that morning. Considered objectively, the story was Ric's attempt to spin an alibi for himself. *See id.* It also reflects that Ric had not yet been told that it was in his interest to implicate Charlie.

When Vanessa arrived at the Farmers Branch police station around 11:00 p.m. that day (January 31, 1998), it was about four hours ***after*** the Farmers Branch PD had learned that the Volkswagen Beetle that they had been looking for had been involved in an arson incident on I-30. Moreover, there is a good faith basis to believe that Vanessa was interrogated by officers who had already been pointed in Charlie Flores' direction by Roy Childs Jr., Ric's brother.

On information and belief, 25-year-old Vanessa Stovall was treated aggressively by law enforcement. After being sufficiently terrified, she was allowed to confer privately with Ric during which she urged him to do whatever he needed to do to help himself. At some point during the night, she reputedly gave the

investigators the name and a description of Ric's "Hispanic" friend "Charlie" whom she had met one or two times. AppX8.

No recordings or transcripts were made of the custodial interviews conducted with Vanessa late at night in the Farmers Branch police station. Nor does she seemed to have signed anything while in custody—or at least nothing has ever been produced. We only know that a custodial interview took place because of a fleeting reference in the SID memo. *See id*. That memo is the first record of any *witness* injecting Charlie into the story of what had supposedly happened soon before the Blacks' home was invaded.

What was said to Vanessa to induce this "cooperation" is unknown. But it seems clear that she was told what Ric had told his interrogators earlier that day: that he had driven to his grandmother's house to wake up Vanessa and "get her to work." And whatever transpired during her initial interview at the police station, her willingness to cooperate extended beyond that one night. A few days later, on February 3, 1998, she signed a "Consent to Search" form to allow Detectives Callaway and Baker access to her apartment and to any vehicle on the premises. SXR1.

Soon thereafter, Vanessa worked with ADA Jason January too. The extent of their interactions is unknown. But on September 9, 1998, he presented her to the Grand Jury. Ex. 56. Her Grand Jury testimony consisted almost entirely of what Ric

had allegedly told her after he was in custody as a suspect. 35 RR 58. That is, her function before the Grand Jury was to be a mouthpiece for an actual suspect who was eager to shirk blame. She had no personal knowledge of what had happened at the Blacks' house on January 29, 1998. In hindsight, ADA January seemed to be seeking to put (false) testimony before the Grand Jury to create a paper trail to support his theory that Charlie Flores had not only been present at the Blacks' house but had shot Mrs. Black, which is what the State argued at trial (and contrary to what Jackie originally told investigators, per Callaway's suppressed interview notes).

Aside from eliciting a false story from Vanessa before the Grand Jury, ADA January used her at trial to try to corroborate Jackie's testimony that Ric and Charlie had been together in Ric's Volkswagen soon before that Volkswagen was seen outside of the Blacks' house. She was likely motivated by assurances that her testimony against Charlie would accrue to Ric's benefit—or at least insulate herself from prosecution for her own drug offenses.

On March 23, 1999, Vanessa told the jury in the Flores trial that she had known Ric for eleven years, dating him off and on since she was a teenager. 35 RR 59-60. She had lived with him for 4-5 years—up until January 1998 (the month that Mrs. Black was murdered).[82] 35 RR 61. In the preceding six months before that, she

[82] Deborah Howard also claimed that Ric had been living with her up until January 1998. 38 RR 174.

had met Charlie a few times. She could recall no specifics. 35 RR 62, 65. But somehow, at trial, she had very specific recall about the morning of January 29, 1998. She claimed that at around "6:30" in the morning, the following happened: She was sleeping in a back bedroom at Ric's grandmother's house on High Meadow; Ric crawled into bed with her and woke her up; they then went out to the kitchen/dining room, where Charlie was waiting; they all sat there "just talking, talking about the person that I was staying with at the time. Talking about me going to work;" next, they "did some drugs"—smoking some meth using "either a straw or a dollar bill," Vanessa couldn't "remember exactly"—but she felt like they wrapped up in about fifteen minutes, until "about 6:45 or 7:00" when she went to work. 35 RR 71-75. Putting aside the difficulty of seeing how all of these things, plus her getting dressed for work, supposedly happened in the span of 30 minutes, that was her story at trial. 35 RR 71-76. She also insisted that, even without a watch, she knew this all started at 6:30[83] because Ric had told her the time when he crawled into bed with her and she then "verified it" by looking at a clock when they went into the kitchen. 35 RR 89. (The SID memo, in describing Vanessa's custodial interview, stated that she said Ric arrived at "approximately 6:45;" thus by trial, she

[83] By contrast, according to the SID memo prepared not long after she was interviewed, she supposedly "advised" that she had "observed" Ric and Charlie arrive at 11807 High Meadow at "approximately 6:45 A.M. . . . in a purple Volkswagen Beetle." AppX8.

seems to have added this detail about having "verified" that the time was actually 6:30). *See* AppX8.

Vanessa's story, which had been born of Ric's initial attempt to create a false alibi for himself, by trial created other problems for the State, even though it was intended to corroborate accomplice Jackie's testimony. Both Jackie and Doug had testified that Ric had dropped Jackie off at 13412 Emeline Street in Farmers Branch around 7:00-7:15 a.m. 34 RR 153, 277. Ric (with or without Charlie) could not also have been several miles away with Vanessa, at 11807 High Meadow in North Dallas, before and during the same window of time supposedly described by Jackie and Doug. (Both timelines are also difficult to square with the Blacks' neighbors' reports, which placed Ric at the Blacks' home at Bergen Lane between 6:45-7:00 a.m.) Vanessa's testimony did not corroborate Jackie's; it contradicted it.

In short, when the Flores trial began, the State had two of Ric's girlfriends trying to put Charlie with Ric in Ric's Volkswagen, but at two different places at the same time. Thus, that testimony was *not* corroborating, but self-negating.[84]

[84] The prosecutors do not seem to have thoroughly appreciated the contradictions between Vanessa and Jackie's testimony about Ric's whereabouts until the middle of trial. Their bizarre attempt to correct this problem was to argue in closing that the two men in the Volkswagen had driven to the Blacks' house and gotten out of the car *twice*—first when Mrs. Barganier saw them and then again about 30 minutes later. 39 RR 53-56. This improvised amendment made little sense, but was just another instance of tweaking the "evidence" on the fly to try to make the manufactured pieces fit together.

V. TO BOLSTER A CASE THAT RESTED ON CONTRADICTORY, CIRCUMSTANTIAL EVIDENCE FROM TWO OF THE CO-DEFENDANT'S GIRLFRIENDS, AND NO DIRECT EVIDENCE LINKING CHARLIE TO THE CRIME SCENE, THE STATE MUSCLED UP DUBIOUS EVIDENCE THROUGH A COMBINATION OF COERCION AND UNDISCLOSED PROMISES OF LENIENCY.

During the run up to the Flores trial, the State, with ADA January running the show, corralled a motley collection of highly unreliable witnesses, and coerced them into providing testimony that might help the State obtain a conviction. This unsavory cast of characters included: a vigilante motorist who seemed to have changed his observation to match police suggestions (James Jordan); a meth addict implicated in several crimes, including being an accomplice in destroying evidence (Jonathan Wait Jr.); a petite drug addict, who was terrified of going to prison, caught in repeated, flagrant violations of the terms of his probation (Homero Garcia); a drug addict who supported his habit by offering himself up as an informant (Jonathan Wait Sr.); and a drug addict and dealer whose home had been raided, producing significant drugs and drug paraphernalia (Judy Haney).

A. The State Used the Eager James Jordan to Provide False Testimony, While Concealing That Law Enforcement Had Led Jordan to Implicate Charlie Flores.

Not long after ADA January's first (known) meeting with Jackie Roberts on February 12, 1998, law enforcement circled back to James Jordan. Jordan was the driver who had observed the attempt to destroy Ric's Volkswagen on January 31, 1998 on I-30 in Grand Prairie. Jordan pursued the culprits before and after someone

in the fleeing car fired shots in his direction. He then flagged down an Arlington police officer; and Arlington PD proceeded to open an aggravated assault case arising from Jordan's complaint that he had been shot at; and that complaint became more evidence at trial supposedly demonstrating that Charlie was guilty of murdering Betty Black and deserved the death penalty. The State's overzealous quest for evidence to inculpate Charlie led its agents to induce Jordan to reach conclusions, and assign blame, contrary to the facts, as Jordan originally reported them. The way the State's agents stretched to make Charlie *more* culpable of one crime, to increase the odds that the jury would assume he was guilty of a *different* crime, is yet more evidence of the lengths the State was willing to go to convict an innocent man.

Jordan had made a highly suspicious identification of Charlie Flores on February 4, 1998, reputedly picking Charlie out of a photographic lineup. Yet, as explained in Section III above, Charlie's photo did not look anything like the description of the perpetrator that Jordan had given to law enforcement the day of the incident: "W/M 6'0". 220. Long black hair." SXR100. Charlie was Hispanic, weighed over 270 pounds, and had very short, shaved hair.

On February 26, 1998, about a month after the incident, Jordan was asked to write out a witness statement. *Id*. In his statement, he described having seen "this suspect ignite and throw something into a multicolored V.W. Bug." *Id.* But several

weeks before, at the time of the incident, he had described the Bug as "grey"—and in fact, before the arson, it had been spray-painted black. *Id*.; Ex. 4. In the interim, it seems that Jordan had learned that the Volkswagen had originally been "multi-colored," and so, consciously or unconsciously, adjusted his reputed "observation" accordingly—just as he had adjusted his observation of the "suspect" to match a photo of Charles Flores instead of the person he had actually described the night of the incident.

The only reason that the photographic lineup, prepared on or before February 4, 1998, had featured a picture of Charlie Flores is because an Arlington detective had been contacted by Detective Callaway of Farmers Branch soon after a police bulletin had gone out about the burned Volkswagen on January 31, 1998. SXR100. The details that Callaway shared with the Arlington detective are outlined in a "Case Report" created by that detective. *Id.* Any notes Callaway may have made about interactions with this neighboring police department have never been produced.

According to the Arlington PD records, Callaway had reported that the Farmers Branch PD had *already* been "maintaining surveillance of a red Suzuki 4DR Sport Utility vehicle," Myra's car, which had been involved in the encounter with James Jordan (which Jordan had incorrectly identified as an Izuzu Trooper). *Id.* Callaway also advised Arlington PD that "the suspects that burned the vehicle" were suspects in his capital murder investigation. *Id.* The Arlington Case Report also notes

that Hispanic "Charlie," who wore glasses, lived in the Big Tex trailer park—where Farmers Branch PD had already been "maintaining surveillance." *Id.* The Arlington Case Report further reveals that Ric Childs' brother Roy Childs had given Charlie's full name to FBPD. *Id.* No record of any interview with Roy Childs has ever been produced, but (as discussed above) Sgt. Ashabranner testified that this interview took place on January 30th, the day after the murder, which, in conjunction with the Arlington PD case report's revelation that Roy gave FBPD Charlie's name, raises the reasonable inference that Roy Childs was the first individual to present Charlie as a potential individual to investigate, and that he did so on January 30th, the day before FBPD's custodial interview with Vanessa and the day before Charlie tried to get rid of Ric's Volkswagen. Callaway shared all these details with the Arlington PD *before* Jordan was shown the photographic lineup on February 4th. SXR100.

The Arlington Case Report on Jordan's aggravated assault case makes clear that the decision to include Charles Flores in the photographic lineup shown to Jordan came from Farmers Branch PD. How else would Arlington PD have ever known to include a photo of Hispanic Charlie Flores, who had shaved hair and routinely wore glasses, in a photographic lineup based on Jordan's meager description that the perpetrator was a "W/M 6'0". 220. Long black hair"? *Id.*

Most likely, the person whom Jordan had observed that night in the dark was actually Jonathan Wait who had long hair, had assisted in towing the Volkswagen,

and had ultimately fired the shots at Jordan's car. Ex. 4. But the State had no interest in Jonathan Wait. Therefore, he was not charged—and his picture was not obtained. Instead, as explained below, he was later cultivated as a witness for the State.

Farmers Branch PD had decided that Charlie was the person who would take the fall for Betty Black's murder. And at trial, ADA January gladly exploited Jordan's manufactured identification to help make the State's case that Charlie was trigger-happy. ADA January had to have known that Jordan's identification of Charlie as both the driver and the shooter who had fled from the burning Volkswagen was implausible—requiring that someone driving an SUV at high speed could simultaneously lean out a window and fire shots back over his left shoulder toward someone speeding behind him. Moreover, ADA January had to have recognized that Jordan's trial testimony did not match the statements he had made to police at the time of the incident in numerous, material ways:

Initial Police Report[85]	**Jordan's Trial Testimony**
Police report shows incident occurred around 7:35 PM on January 31, 1998 (thus after sunset)	"it was late in the afternoon" and "before the sun went down" 37 RR 14
Stopped "100 yards" away from the Volkswagen	Claimed to stop within "[t]hirty feet" of the person standing by the Volkswagen 37 RR 17

[85] *See* SXR100.

Observed what "appeared to be a W/M, 6'0", 220, long black hair"	Identified Charles Flores easily because he had gotten "a good look" 37 RR 18
Described Volkswagen as "grey"	Described car as "multi-colored, very old, beat up Volkswagen bug" 37 RR 18
Identified the second car as an "Izuzu Trooper"	Identified the second car as a "Suzuki Samurai, one of those little stupid looking cars" 37 RR 19
Told police he had stopped because he saw "a guy throw a bomb" and believed he was up to "no good"	Claimed he slowed down because he had been raised to be a "good Samaritan" 37 RR 17-19
No claim of this nature	Claimed person "looked directly at" him 37 RR 20
"stated that the suspect apparently did not aim the first shot at them, rather firing it over the front of their vehicle"	Claimed he was so close when the first shot was fired that he "felt the percussion" 37 RR 28
"they were unsure if the second shot was aimed directly at them or over their vehicle"	Described the second shot as "[h]e tried to take better aim" and Jordan claimed he was close enough to see the person shooting with his right hand over his left shoulder 37 RR 30

In short, there are ample indications that Jordan was a willing pawn in distorting the truth, both to make his implausible identification of Charlie seem plausible, and to make Charlie's actions seem considerably more reckless.

ADA January willingly sponsored Jordan's false testimony at trial about Charlie being the shooter because it reenforced the larger narrative that the State was pushing. It was the State's goal to convince the jury that "bad cat" Charlie Flores should be convicted and sentenced to death for a murder that ADA January knew Ric Childs had actually perpetrated.

To further obscure the fact that Farmers Branch PD had worked with Arlington PD to *lead* James Jordan to identify Charles Flores, ADA January called Officer Timpf, an arson investigator with the Grand Prairie Fire Department, to testify right after Jordan. 37 RR 63. Timpf claimed that they—meaning, the Grand Prairie Fire Department—took "about four days to determine" that the Volkswagen belonged to Ric Childs. 37 RR 71. But this was misleading—as ADA January had to have known. While Grand Prairie Fire Department, which impounded the burnt Volkswagen, may not have figured out who owned the Volkswagen for "about four days," Callaway of Farmers Branch PD made the connection and shared that information with a detective in the Arlington PD before Jordan made his identification, and Arlington PD then charged Charlie Flores with the aggravated assault perpetrated against Jordan (by Jonathan Wait). SXR100. Charlie was charged

as the shooter, not because this is what the evidence suggested, but because that would help Farmers Branch's murder investigation.

By January 31, 1998, Farmers Branch PD had obtained a mugshot of Charles Flores from the Tarrant County database, *before* an interview took place with Ric Childs' girlfriend, Vanessa Stovall, and soon after the Volkswagen was set on fire on I-30. SXR100. That interview with Vanessa was only cryptically referenced in the SID memo, which was carefully crafted to obscure how Charlie came to be implicated during the Black murder investigation. No one—not the investigators and not the DA's Office—wanted it known that Charlie Flores's full name had been given to SID by ***Ric Childs' brother***, absent any evidence that this brother, son of former Irving police officer Roy B. Childs, had any personal knowledge of how Betty Black had been murdered, and that there is a good faith basis to believe that Roy, not Vanessa, was the first individual to point FBPD in Charlie's direction.

B. The State Used the Accomplice Johnathan Wait to Provide False Testimony to Bolster Jordan's Story.

At trial, the only corroboration of Jordan's story came from Jonathan Wait, Jr., Myra's brother. Despite Jonathan's involvement in the attempt to destroy the Volkswagen on January 31, 1998, he was not charged, or, seemingly, even investigated. (If he had been investigated, it would have been ascertained that he, not Charlie, had fired shots toward James Jordan; and he, not Charlie, matched the

physical description of the shooter that Jordan had given to the police the day of the incident.)

Aside from firing shots toward Jordan and assisting Charlie in trying to destroy the Volkswagen, Jonathan had some other things hanging over him. Per his own testimony at the Flores trial, he had been hanging out at Charlie's trailer in the hours before Betty Black's murder "shooting crank" with Ric. 36 RR 251-252. Additionally, he had been driving a car on January 30, 1998, when Irving police officers pulled him and Homero Garcia over just before midnight. Police recovered a .380 pistol and drugs as a result of the stop. Yet Jonathan was not charged with anything arising from that incident either. Instead, it seems that he was more useful as a witness for the State against Charlie if he appeared to have a cleaner history.

Jonathan provided a few pieces of inculpatory testimony for the State. For instance, he testified that, at some point that night before Mrs. Black's murder, Charlie had asked to borrow a car because he and Ric had to go to Farmers Branch. 36 RR 253. But the fact that Charlie and Ric went together to Farmers Branch to meet Jackie was not disputed. As such, Jonathan's main job at trial was to explain how Ric's Volkswagen Bug came to be parked beside the on-ramp of I-30 near West 19th in Arlington, Texas on January 31, 1998. 36 RR 267. In Jonathan's version, Myra and Charlie came to pick him up in her Suzuki, saying they needed help towing Ric's Volkswagen. 36 RR 263. Also, in Jonathan's version, the Volkswagen had

already been moved to the parking lot of Charlie's father's roofing company; Jonathan said he did not ask any questions, he was just told that they needed his help to tow it and so he "figured it broke down or something." 36 RR 263. Jonathan described standing by while Charlie spray-painted the Volkswagen black. 36 RR 264. In Jonathan's version of events, Charlie also did all the work of backing the Suzuki up and strapping on the Volkswagen, while Jonathan stood by passively. 36 RR 266. Jonathan admitted only to getting in the Volkswagen to steer it as it was being towed. *Id.*

After they pulled over on I-30, Jonathan claimed that Charlie unstrapped the Volkswagen and poured gas in it—while Jonathan had "no idea" that was going to happen. 36 RR 267. And in Jonathan's version, Charlie then went "back to [Myra's] truck to get a piece of paper, lit it, went back to the car and threw the paper in there in the bug and caught it on fire." 36 RR 268 And, reputedly, all of this happened while Johnathan stood by on the side of the freeway. He then described Charlie running to jump back into the Suzuki as a strange car pulled up. 36 RR 268.

Jonathan was so eager to describe all actions as emanating from Charlie, and Charlie alone, that Jonathan initially failed to account for his own movements. But, once asked, he admitted that he had gotten into the Suzuki too, but he falsely claimed that Myra was "in the back seat of the Suzuki" and he "was in the passenger seat"—

seemingly to obscure the evidence that he had been the person who had shot out of the driver's side rear window toward Jordan's car. 36 RR 268.

James Jordan had said nothing about seeing three people in the car or about seeing a second man standing outside of the Volkswagen. But like Jordan, Jonathan claimed that Charlie, while driving, took out something "like a .38 or something, revolver," then rolled down his window and shot "down the highway." 36 RR 269. Jordan claimed there had been two shots; Jonathan, by contrast, claimed there had been "[p]robably five or six." 36 RR 269. All that Jonathan could offer to explain how Charlie pulled off this feat was that Charlie was "just driving and shooting." 36 RR 270.

Except in the movies, being able to drive an SUV at high speed after dark, while also rolling down the window, leaning out, and firing off shots, while looking backwards over one's shoulders, would be almost insurmountably challenging. The credibility of Jonathan Wait's self-interested narrative was not, however, subjected to *any* adversarial testing at trial. When ADA January passed the witness, Lollar responded for the defense: "Your Honor, we reserve Cross-examination of this witness." 36 RR 276. But Jonathan was not recalled, and thus was never cross-examined about the numerous incredible aspects of his testimony or forced to clarify the role he had actually played and what motives he may have had to distort the truth.

Charlie had never denied working with Jonathan to destroy Ric's Volkswagen; nor had he denied driving the Suzuki SUV away from the scene. He did, however, deny that he was the one who had shot at Jordan. Ex. 4. But the opportunity to expose this false testimony at trial was hindered by the misleading and inadequate disclosures made by the State.

C. The State Used the Terrified Homero Garcia to Provide False Testimony, While Concealing the Extreme Leniency Shown Him in Exchange.

Aside from Ric's girlfriends' self-contradicting attempts to place Charlie in Ric's Volkswagen right before Betty Black's murder and Charlie's involvement in trying to destroy that Volkswagen nearly three days later, the State must have sent word to law enforcement that the case still seemed tenuous—especially since no physical evidence of any kind linked Charlie to the crime scene.

After a seemingly suicidal attempt to avoid being taken into custody, Charlie was apprehended on May 1, 1998. When arraigned, he pled not-guilty. Although his desperate, self-destructive attempts to avoid capture are not admirable, they do not prove he was guilty of an entirely different crime. Perhaps that explains why the state turned to Homero Garcia.

Homero Garcia, a.k.a. "Medal," was one of two witnesses at trial to testify that Charlie had supposedly admitted to being present at the Blacks' house. Homero also claimed that Charlie had said that he "had shot the dog."

Homero came up with this story months after-the-fact while FBI agents and local law enforcement were interrogating him. This interrogation took place after Homero had been awake for days, 36 RR 228-229, while he was strung out on drugs, and when he was quite aware that the State was seeking the death penalty against Charlie, then in custody. He, as a felon on probation who had been caught with drugs and a firearm, was looking at some serious prison time himself. He, a young man who was only about 5'4" and 140 pounds, had not yet been to prison at that point. Ex. 57. According to one of his friends, Homero was "a little guy" and a drug addict, "the kind of guy who would say whatever he thought he needed to to get out of trouble." Ex. 34 ¶5. His susceptibility to pressure from law enforcement was not explored at trial. (Nor did State actors admit that any pressure had been applied.)

More importantly, it was not disclosed at trial, or discoverable until years later, that Homero's testimony was not only coerced, but was rewarded with a non-

suit of a serious felony and then a release from probation for another felony charge, despite chronic probation violations.

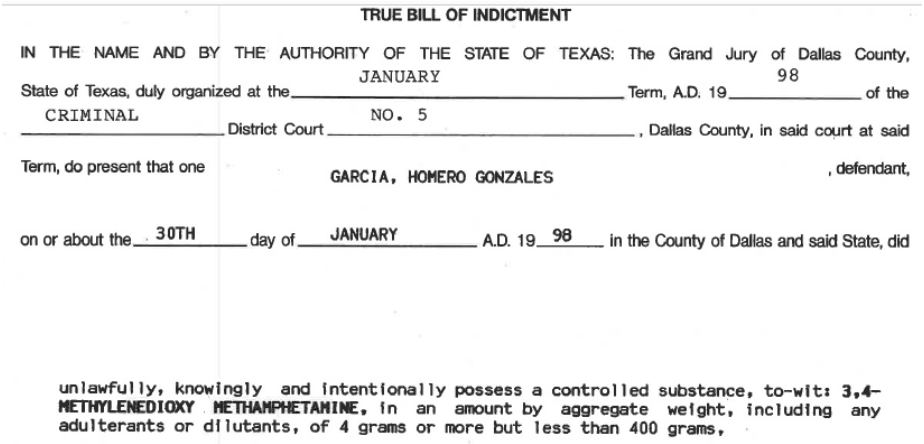
Homero did not position himself to receive such favorable treatment by a pattern of redemptive behavior. He was simply a scared, ignorant, drug addict who proved to be easy to manipulate once he found himself in serious hot water.

On January 30, 1998, close to midnight, Homero had been riding around with Jonathan Wait in Irving, Texas. Homero was then on probation, and his license had been suspended. The two were stopped by Irving police off of 183 and Belt Line Road at a poolhall parking lot for an expired registration. According to a police report made the next day, Homero had been caught in possession of a Browning .380 caliber semi-automatic, a magazine of ammunition, and a container with Xtacy pills. Ex. 58. He had tried to fling the contraband out of the window. The police, however, had not been fooled. *Id.*

Once caught, he confessed that these items belonged to him. Homero was then booked into jail, but he bonded out later the next day. At that time, Homero had said nothing suggesting he knew of a connection between Charlie and Mrs. Black's murder.

About a week after Homero and Jonathan Wait had been pulled over, a warrant was issued for Homero. *Id*. By that point, Ric Childs and Jackie Roberts had been taken into custody in conjunction with the Betty Black murder investigation,

and Charlie Flores had fled to Mexico. Homero had still said nothing about having received a confession of some kind from Charlie on January 30, 1998. By February 16, 1998, Homero was indicted for the drug possession case, but was not indicted for having been a probationer in possession of a firearm:



TRUE BILL OF INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS: The Grand Jury of Dallas County, State of Texas, duly organized at the JANUARY Term, A.D. 19 98 of the CRIMINAL District Court NO. 5, Dallas County, in said court at said Term, do present that one GARCIA, HOMERO GONZALES, defendant,

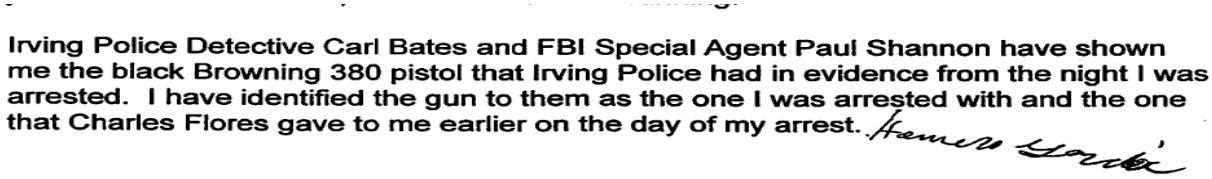
on or about the 30TH day of JANUARY A.D. 19 98 in the County of Dallas and said State, did

unlawfully, knowingly and intentionally possess a controlled substance, to-wit: 3,4-METHYLENEDIOXY METHAMPHETAMINE, in an amount by aggregate weight, including any adulterants or dilutants, of 4 grams or more but less than 400 grams,

Id. Thereafter, Homero bonded out of jail again.

About three months later, a couple of weeks after Charlie Flores had been apprehended, Homero was again taken into custody on a bond forfeiture. This was on or before May 18, 1998. At this point, he was interrogated by FBI agents who had been working with Detective Callaway on the Flores case. Homero was likely informed that Betty Black had been shot using a .380 pistol—similar to the one he had been caught with on January 30th, soon before midnight; he was likely told he was facing serious consequences—perhaps even a conspiracy charge related to the murder—if it turned out that his .380 was the murder weapon. He was certainly told that law enforcement was interested in information to inculpate Charlie.

The interrogation was conducted at the Irving police station. The interrogation was not, however, recorded. But at 12:50 p.m., a typed "Affidavit" was witnessed by FBI agent Paul Shannon and Irving police officer C.R. Bates. The Affidavit had been typed up by law enforcement, and Homero signed by the last paragraph:


Irving Police Detective Carl Bates and FBI Special Agent Paul Shannon have shown me the black Browning 380 pistol that Irving Police had in evidence from the night I was arrested. I have identified the gun to them as the one I was arrested with and the one that Charles Flores gave to me earlier on the day of my arrest.

Ex. 45. This Affidavit that had been typed up for Homero stated that:

- Charles "always carries a gun" including "a black 380 caliber pistol" but "Rick also had a black 380"
- "Charles was driving a multi-colored Volkswagon [sic]" (although everyone else understood that it was Ric who was driving this car).

Id. The Affidavit also describes some of what had happened on January 30, 1998, when Homero was pulled over and found with a Browning .380 pistol, a loaded .380 magazine, and a cannister of drugs. The Affidavit does not, however, mention the drugs with which he had been caught (and which formed the basis for the case for which he had been indicted).

The focal point of the Affidavit was a description of how he had obtained the gun. According to the Affidavit, Charlie had given Homero the Browning .380 in a trade earlier in the day when he had been pulled over by Irving police officers—*i.e.*, on January 30, 1998. The Affidavit states that Charlie made this trade while

confessing that he had "gone to a house to get some money" with Ric, but things had gone wrong: Charlie had "shot the dog" and Ric had "shot an old lady." *Id*. The Affidavit further states that Charlie had told Homero "that [Charlie], Myra and Johnny Wait spray painted the VW and then went out and burned it." *Id.* The fact that Ric had been arrested in connection for Mrs. Black's murder, that Charlie had been involved in trying to destroy Ric's Volkswagen, that Charlie had fled, and that he had recently been apprehended, were all widely reported in the local news before Homero was picked up around May 18, 1998 and held by law enforcement until the Affidavit was signed. *See* Ex. 38.

At some point after signing this Affidavit, Homero was again released from jail. That same day—May 18, 1998—Irving PD sent the .380 Browning found on Homero to SWIFS. A reported dated July 28, 1998, shows that the .380 Browning was ***excluded*** as the murder weapon. But by then, Homero had already signed the typed-up Affidavit.

A few months later, on September 30, 1998, Homero was pulled over by Dallas police officers and attempted to flee on foot. He was arrested again. Ex. 58. Yet by January of 1999, while voir dire was underway in the Flores case, Homero signed a Judicial Confession in the meth possession case. *Id.* He also signed an "Agreement to Forfeit" the weapon he had been unlawfully carrying and that had been taken from him on January 30, 1998. *Id.* That weapon—the Browning .380—

was later admitted into evidence during the Flores trial. 36 RR 223; SX 64. It was admitted into evidence although it had, by then, ***been categorically excluded as the murder weapon***. DX10. It seemed that the State hoped that the jury would be more inclined to believe that Charlie had been at the Blacks' house armed with *some* .380 caliber pistol if they were staring at a *different* .380 pistol that he had once owned.

Homero Garcia had been subpoenaed to testify for the State at the Flores trial. He was asked about the substance of his Affidavit, including the representation that Charlie had told him that he had "shot the dog" while giving him a Browning .380 pistol. 36 RR 220, 222. Homero also described how he had been arrested and found in possession of that .380 pistol. 26 RR 222. When he was asked about his Affidavit, he said: "I don't recall telling the FBI half of this stuff." 36 RR 228. ADA January implied that he was a reluctant witness because Charles was his "friend." 36 RR 231.

The defense's cross-examination was short. It established only that Homero had also supposedly said that someone, he could not remember who, had told him, he could not remember when, that Jackie had given them a garage door opener, a detail not found in his Affidavit. 36 RR 238.[86] The cross-examination ended with

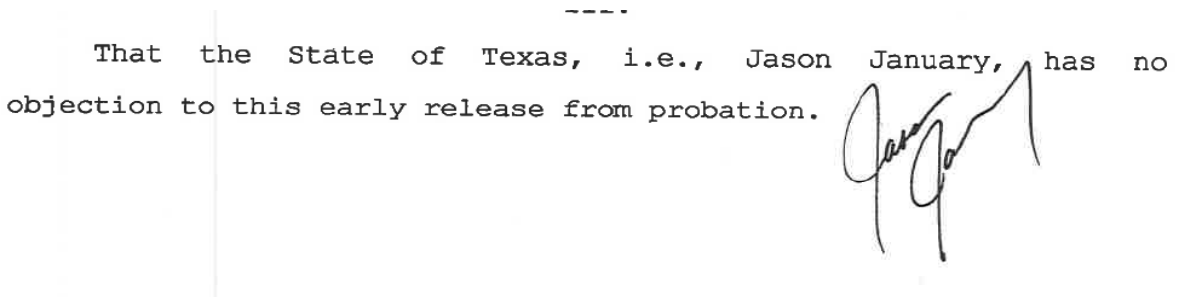
[86] Tellingly, in his guilt-phase closing argument, ADA January seemed to admit that Homero was a liar, but nevertheless urged the jury to rely on those statements in his highly suspect "Affidavit" that were helpful to the State. 39 RR 98 (arguing, in seeking to rebut the suggestion that Jackie had supplied a garage door opener, "And Homero said, well, that's what I heard. That's part of the story I heard. From Charlie? Oh, you know, even Homero can't bring himself to lie this bad.").

the assertion that the witness might have to be recalled. 36 RR 239. But when the defense tried to do so a few days later, Homero could not be found. 38 RR 68. The State's investigator was asked to put on the record the multiple efforts he had undertaken to try to get Homero Garcia back to court, which had proven to be unavailing. 38 RR 68-71. When Homero was finally located and ADA January announced that he was in the courthouse, defense counsel failed to seize the opportunity to finally confront Homero's unreliability. 39 RR 14-15. Therefore, the jury did not learn of the circumstances that had prompted him to sign the Affidavit other than an oblique reference to him being "up for about four days" before he signed. 36 RR 228-229.

Even if the defense had put Homero back on the stand, the defense would not have been able to develop evidence of the exceedingly favorable treatment he was to receive *after* his testimony. That evidence, never disclosed, has only been ascertained by digging into court filings unrelated to the Flores case. That evidence shows first that, although Homero had been on probation at the time of his arrest on January 30, 1998, he was only charged with possession of a controlled substance, not for the unlawful possession of a firearm too. Second, he was able to plead guilty and accept a sentence of no more than the probation he was already serving. Third, a few months after his trial testimony, although he had been arrested for probation violations in the interim, the State sponsored a motion generously modifying the

conditions of his probation, in the form of a referral to a drug treatment center instead of *revoking* his probation, as the circumstances warranted. Ex. 58. He received no additional punishment.

When Homero was again caught violating virtually all of the conditions of his probation, a motion was finally filed to revoke his probation. *Id*. **But** someone in the Dallas County DA's office intervened thereafter on Homero's behalf: a motion was filed to *withdraw* the State's motion to revoke Homero's probation. *Id*. Even better for Homero, a "Motion for Early Release and Dismissal" was filed. *Id*. One must dig deep into the clerk's records to see how Homero's fate unfolded—and to see who was responsible. But the Motion for Early Release and Dismissal is explicit: Homero was being given this extraordinary gift because he had been "**a witness for the State in the State of Texas vs. Charles Don Flores**." *Id.* And the person who had approved giving Homero this special gift was Jason January:

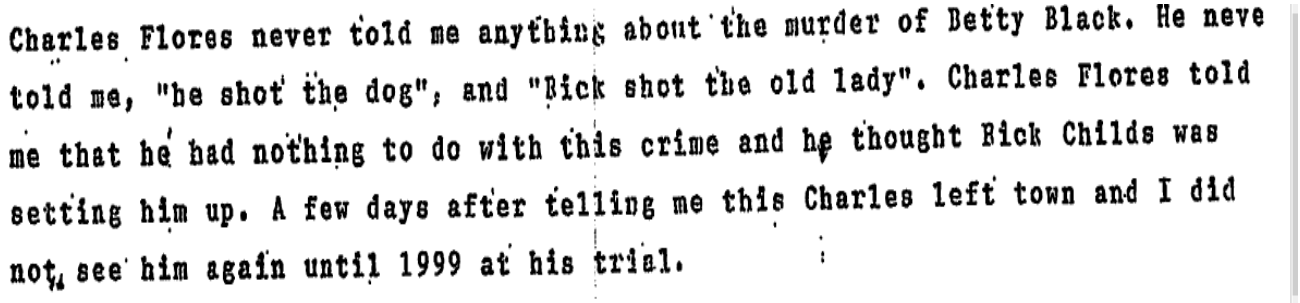

That the State of Texas, i.e., Jason January, has no objection to this early release from probation.

Id. By this date—July 21, 2000—Charlie Flores had been on death row for over a year, and Ric Childs had had his own case resolved through an extraordinary plea

deal. *See* Section I, above. But ADA January was ensuring that Homero would feel beholden long afterwards.

Unfortunately for Homero, ADA January left the DA's Office soon thereafter. Within a year, Homero was arrested again, charged with possession of a controlled substance, and ultimately convicted. That pattern would continue over the years—such that he eventually had to do prison time.

At some point, however, Homero seems to have felt a bit of remorse. On April 24, 2003, he signed a statement that explained how January had pressured him to testify against Charlie. Ex. 59. The statement also recants the critical inculpatory part of his testimony:


Charles Flores never told me anything about the murder of Betty Black. He neve told me, "he shot the dog", and "Rick shot the old lady". Charles Flores told me that he had nothing to do with this crime and he thought Rick Childs was setting him up. A few days after telling me this Charles left town and I did not see him again until 1999 at his trial.

Id. Although Homero admitted that he had succumbed to pressure from ADA January, neither he nor any state agents ever disclosed the precise way that Homero had been compensated for his false testimony.[87]

[87] Ironically, by the time the Flores trial started, the State was not content with testimony suggesting that Charlie had been present but had only "shot the dog." The State preferred the concept that Ric had shot the dog and done so with a .44 Magnum weapon. *See* Section VI below. Therefore, the "confession" testimony provided by Homero Garcia was actually in tension with other testimony that the prosecutors had worked hard to craft, particularly from Charles Linch. Nevertheless, ADA January was careful to ensure that Homero would feel indebted and,

D. The State Used the Ever-Eager Professional Snitch Jonathan Wait Sr. Who Had Manufactured a "Confession" Anecdote Well After-The-Fact to Ingratiate Himself to Law Enforcement.

In addition to Homero Garcia, the only other individual who testified at trial about a "confession" was Johnny Wait Sr. ("Wait Sr."), Myra's and Jonathan's estranged, drug addicted father. 37 RR 76. Wait Sr. testified that he had only met Charlie Flores in January 1998 (the month that Mrs. Black was murdered), yet, for some reason, Charlie supposedly confided in this virtual stranger, admitting that he had been involved in this crime but had "only shot the dog." 37 RR 76, 83, 85, 93, 94. Wait Sr. described Charlie, whom he barely knew, coming over to his house in far east Dallas for no apparent reason a few days after Betty Black's murder and asking Wait Sr. to drive him to an auto parts store. 37 RR 82-83, 85. Wait Sr. claimed that he then confronted Charlie with an article about Betty Black's death because Wait Sr.'s son Jonathan[88] had told Wait Sr. that Charlie had been responsible. 37 RR 82. Aside from this unlikely "confession," Wait Sr. also claimed that, during one of the few other occasions when he had met Charlie, Charlie had "just volunteered" to show him "a little gym bag with several weapons in it." 37 RR 78, 77.

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presumably, keep his mouth shut about both the pressure that had come to bear on him to perjure himself and the sweetheart deal he had received in return.

[88] Jonathan's testimony does not support this.

Wait Sr. claimed that he called the Farmers Branch police immediately after Charlie left his house and gave them information about his vehicle, the license plate number, and which direction he had gone. 37 RR 86. Wait Sr. also stated that he called Farmers Branch "[b]ecause they were the people that I had been in contact with that were looking for him quite actively." *Id*. If the events that Wait Sr. described had happened, it seems perplexing that Charlie was not apprehended and instead succeeded in driving out of the country. There is no record that Wait Sr. made a call stating that Charlie had made any such confession—although there are records, produced long after trial, that Wait Sr. had been very energetic about trying to cooperate with law enforcement, hoping to collect the reward being offered for information leading to Charlie's arrest. AppX57.

The jury was told, by Wait Sr. himself, that he had begun "to cooperate with the Farmers Branch Police … extensively" early on—perhaps even before Betty Black's murder. 37 RR 87. But the jury did not hear that, although police and FBI records indicate that Wait Sr. was indeed making calls trying to volunteer helpful information, nothing in those records suggests that Wait Sr. had gotten a "confession" from Charles Flores at any point. For instance, an FBI report, which was not produced before trial, states that lead investigator Callaway had reported to FBI agents only that "MYRA WAIT's father, JOHNNY WAIT, is periodically providing information to him regarding the possible whereabouts of the subject,

CHARLES FLORES." Ex. 60 (capitalization retained). The FBI report shows that the FBI was familiar with Wait Sr.; he was described as "a drug abuser" who "probably in the past has bought drugs from the subject, CHARLES FLORES." *Id.* The report also notes that Wait Sr. had "been a Drug Enforcement Agency (DEA) informant in the past." *Id.*

Wait Sr. acknowledged at trial that he started trying to inform as soon as he realized that Charlie Flores was a suspect. 37 RR 87. Quite possibly, Farmers Branch investigators sought to link Charlie to Betty Black's murder almost immediately, absent any evidence, because Wait Sr. had informed law enforcement that Charlie was selling drugs in Irving, perhaps soon after meeting Charlie a few weeks before Betty Black was murdered. In any event, during the year between Wait Sr.'s attempts to help law enforcement apprehend Charlie and Wait Sr.'s appearance at trial, he had not shared the story of Charlie having supposedly "confessed" to shooting the dog.

On cross-examination, the jury learned that Wait Sr. was known by at least three different aliases, such as: "Jason Edward Kessler," "Christopher John Whitney," and "Jason Edward Richards;" that he had been in the Federal Witness Protection Program "in exchange for [his] testimony" in a litany of cases that he described as "homicides, arsons, extortions, drug dealing, et cetera, et cetera;" that he had been "possibly" using cocaine, marijuana, alcohol, and amphetamines in January 1998 at the time of the murder. 37 RR 88, 89, 90-91.

But again, there is no record of Wait Sr. suggesting before trial that Charlie had confessed, back in February 1998, that he had "shot the dog." Instead, there is a good faith basis for believing that this fictional account was developed much later to curry favor with law enforcement and/or the DA's Office after his attempts to secure a reward for assisting with Charlie's apprehension had failed.

E. The State Obtained Judy Haney's Cooperation by Offering an Undisclosed Promise of Leniency in Exchange for Her Testimony.

The undisclosed deals that Jackie and Homero obtained are described above. Recently uncovered evidence also establishes that even ancillary witnesses were promised favorable treatment in exchange for their testimony.

Recently, Judy Haney admitted what the State never disclosed: that agents of the State—specifically, Jason January—had expressly promised her a deal in exchange for her testimony. Ex. 37. After the Flores trial, she decided to move away, change her number and try to leave the whole drug world behind. *Id.* But once she was finally tracked down, she provided a declaration under penalty of perjury revealing that she had met with Jason January in the DA's Office before the Flores trial, and he had expressly agreed to arrange for a pending drug distribution case against her to be reduced to a lesser possession case in exchange for her testimony. *Id.*

A review of Ms. Haney's criminal history records supports her recent admission. Records show that, in November 1998, about ten months after Mrs.

Black's death and a few months before the Flores trial began, she had been arrested for possession of methamphetamines with intent to deliver, after a search of her apartment. The search yielded "several baggies" with methamphetamine and marijuana, as well as "two syringes" containing methamphetamine. The arrest warrant also indicates that, "[t]hroughout the residence, various forms of drug paraphernalia, which included packaging baggies, scales, syringes, spoons and other items commonly used to sell narcotics, were found." Ex. 61.

It is unknown how a search warrant was obtained. But Ms. Haney was initially indicted for possession with intent to deliver a controlled substance, a first-degree felony—and thus had this case hanging over her when she met with ADA January before the Flores trial. *Id*. The criminal records available in the clerk's record also show that, on July 30, 1999—a few months after she testified for the State in the Flores trial—Ms. Haney was placed on community supervision as her sole punishment. *Id.*

Ms. Haney's testimony at trial did not advance the cause of placing Charlie at the Blacks' house before the murder. Her testimony essentially corresponded with Terry Plunk's, describing the hasty drug deal that Jackie had set up for Ric, involving Charlie's money, at Haney's apartment near Love Field. But the deal she was provided—and the failure to disclosure it—is yet more evidence of the State's modus operandi in prosecuting Charlie Flores.

With respect to Judy Haney, Jackie Roberts, Homero Garcia, and Ric Childs, evidence of undisclosed deals has at last been unearthed. Several other witnesses for the State had criminal histories and were known to be engaging in criminal activities at the time of the trial. Yet ascertaining whether Doug Roberts, Wait Sr., and Terry Plunk,[89] for instance, had received explicit or implied promises of leniency or were given special help on the inside is no longer possible—all three are now dead, as is the lead investigator, Detective Callaway. The two men who led the prosecution of Charles Flores (January and Davis) are, however, still very much alive—although they are no longer prosecutors. *See* Section IX.

[89] A good-faith basis exists for believing that Plunk was made an undisclosed promise that, in exchange for testifying for the State, no charge would be pursued against him arising from his central role in providing the ¼ pound of methamphetamine that he claims he agreed to sell to Jackie for $3,600 (not knowing there would be anyone else involved). 34 RR 208. A search of the Dallas County clerk's records shows that he was never charged with anything. He then testified for the State. He testified that he did not know either Ric or Charlie and had understood that the drug sale was to be solely between him and Jackie, which was also her understanding. *Id*. Aside from describing his memory of the drug transaction, his testimony includes an odd sequence in which he went from describing being out shopping with Jackie (the day of the murder) when she supposedly brought up that she had a bag in her car that belonged "to Charlie": "She told me she had a bag that belonged to Charlie in her El Camino. I said, do you know what's in it? And she said, no. I told her she should leave it there." 34 RR 220. This testimony is odd for several reasons. First, Jackie did not testify to this effect; instead, when the topic came up, she denied knowing that there had been any bag in her car and denied knowing that this bag was brought into Ric's grandmother's house while she was on the premises—a sequence witnessed by multiple undercover officers. Second, there was no evidence of any kind to suggest that this bag belonged "to Charlie;" indeed, all evidence indicated that the bag in question belonged to Ric. Third, the testimony is odd in that Plunk, right after saying he told Jackie to leave the bag in her car, then described going through the bag himself in his garage—and finding a hand-drawn map in the bag. *Id.* Based on the pattern and practice of the prosecutors in this case, it seems that Plunk may have been coached to suggest that the bag belonged to Charlie as another means to try to push responsibility away from Ric and Jackie. But, ultimately, the State did not pursue this angle because of the overwhelming evidence that the bag belonged to Ric. *See* Section III.A.3 above.

F. The State Abused the Grand Jury and Adjudicatory Process, Not Just to Handicap the Defense, But to Create a Basis for Giving Ric Childs an Astonishingly Generous Plea Deal Without Requiring That He Testify.

As discussed in Section I above, ADA January used the Grand Jury to obtain indictments of Charlie's elderly parents, Lily and Carter Flores, indicting them for hindering apprehension of a fugitive (their son) although the Floreses had no criminal history of any kind. ADA January also repeatedly attempted to secure an indictment against, and otherwise harassed, Charlie's common-law wife Myra Wait. These actions had nothing to do with seeking to protect the community or obtain justice. Otherwise, it is hard to see why ADA January assiduously avoided seeking to prosecute Jackie Roberts, or any of the people who had helped her evade arrest and destroy evidence, or who had helped Ric endeavor to escape. ADA January abused his power as a prosecutor to try to handicap the defense—creating the conditions that led these unsophisticated, religious people to believe they could not testify on their son's behalf while also keeping them out of the courtroom so that Charlie had little visible support during his trial. But ADA January's abuse of the Grand Jury was not limited to terrorizing Charlie's loved ones.

As noted above, transcripts uncovered long after the Flores trial reveal that ADA January presented Ric's girlfriend Vanessa Stovall and Jackie's friend and neighbor Jason Clark to the Grand Jury on September 9, 1998—a few months before voir dire commenced in the Flores trial. The Grand Jury before which they testified

was the one that had been convened in ***Ric Childs'*** case. Ric had been indicted for capital murder months before. Therefore, there was no legitimate purpose for convening a session before the Grand Jury in that case at that point.

ADA January invited Vanessa to share a version of events that did not match the facts known about the crime scene from Day One. Vanessa told the grand jurors that Ric "had said that he was outside with the dog. The dog was chasing him" and indeed "chased him out into the backyard." *Id.* And "he had shot the dog" only after "he had heard gunfire coming from the house[.]" *Id.* Then, "he went inside and Charlie grabbed him and his gun and pushed him in the bathroom and said 'Find the money.'" *Id.* This dramatic hearsay testimony was facially false; the uncontested forensic evidence showed that the dog was shot and died inside the house. 35 RR 198. Moreover, Jackie Roberts ***had told ADA January*** soon after the murder ***that Ric had confessed that he had shot Mrs. Black,*** not the dog. Ex. 9.

ADA January presented Jason Clark to the Grand Jury that same day, also in the case that had been filed against Ric. By reading between the lines, it seems that Clark was interviewed only after he had shared some information with Jackie that had then been passed along to ADA January. This information was about how ***Ric*** may have gotten the idea of using a potato as a silencer when burglarizing the Blacks' house while watching a "cop show" on TV at Clark's house:

> Q. What specifically do you recall that, being on TV and talking about it and involving the potato?

A. I remember something about how just the way he murdered one of the, you know, I can't remember, murdered one of his people with a potato on the end of the gun.

Q. Okay. And it was—

A. It silences-- silences the sound.

Q. Okay.

A. Nobody heard it and one reason the guy got away or something.

Q. In the TV show it portrayed it, as being a good way to get away with it?

A. Well, it's the way the [sic] got away with it, yeah.

Q. Now, later on did you discover that, in fact, something like that, may have occurred in the killing of Ms. Black?

A. Yes, yes, yes.

Q. Is that, when you mentioned, "Hey," you know, that there might have been some connection there?

A. Yeah. That's exactly right.

Q. And that's pretty much why you're here is that you had talked to, was it Jackie?

A. Uh-huh.

Q. Jackie Roberts. And you had told her that --

A. She said something about a potato or a vegetable or something, and I was just recalling that.

Ex. 12 at 30-31. This testimony and other comments Clark made suggested that Ric was not only responsible for Betty Black's death, but that he had ***planned*** the crime well before January 29, 1998.

Neither the DA's Office nor Farmers Branch PD has ever disclosed any notes of any interview with Jason Clark. The failure to interview Clark until, seemingly, over seven months after the murder, is surprising not only because he was tied to a car (a blue Nissan) observed outside the Blacks' house the morning of the murder along with Ric's Volkswagen. He also lived across the street from Jackie, who had suggested that he was "in business" with Ric Childs "stealing stereos" at the time, and Ric, when arrested, had been found in possession of checks with Jason Clark's name on them along with an open box of the exact ammunition used to kill Betty Black. AppX57. At the very least, what came out of this peculiar Grand Jury session should have prompted further inquiry—and immediate disclosure. But no such pursuit of the truth followed.

At the end of the Grand Jury session, Clark revealed that he had actually dropped by the Emeline house around "9:30/10:00 o'clock" the very morning of the murder. Ex. 12 at 36. According to Clark, he had come over from across the street to pick up a tool; he claimed that he asked Doug where Jackie was, and Doug had said "I don't know. Rick left to go get some donuts and didn't come back and Jackie got in a frenzy and left." *Id.* The Grand Jury transcript also reveals several material

details about Ric that were not aired during the Flores trial, hinting at as-yet-undisclosed facts about how and why Ric suddenly penetrated Jackie and Doug Roberts' circle (at the same time Ric had also suddenly resurfaced in Charlie Flores's life after about five years). *Id.* at 32.

Clark told the Grand Jury that he knew Ric, barely, and Charlie not at all. Ric had just shown up at Clark's house with one of Doug Roberts' girlfriends, offering them all free drugs. *Id.* at 33. But in retrospect, Clark found Ric's sudden appearance in their circle striking—"it's just strange that he [Ric] started showing up at my house right across the street from Jackie's house, you know, just everyday [sic] and I don't even know the guy from Adam and Eve, you know." *Id.* at 32. To Clark, it was "so strange," "***like he [Ric] planned it, you know***." *Id.* at 33.

By spontaneously offering this observation, Jason Clark may well have unsettled ADA January. Clark's free-ranging testimony, unlike Vanessa Stovall's, *enhanced* Ric's culpability. ADA January certainly did not seek to investigate or disclose what Clark had shared: that Ric had suddenly broken into Doug and Jackie Roberts' circle, dispensing free drugs, at a time when several people also recall Ric obsessively talking about hidden "drug money" that he would like to steal. ADA January did not explore these topics—during the Grand Jury session or, it seems, through any other vehicle. Instead, after the Flores trial, ADA January played a

central role in rewarding Ric, who did little more than prove himself to be remorseless and eager to shirk responsibility, with a remarkable plea deal.

G. The State Withheld Discovery Until the 11th Hour—and Then Disclosed Documents Cherry-Picked, and Even Crafted, to Support the State's Theory of Culpability.

The State pushed the case against Charlie Flores forward to voir dire less than a year after Betty Black's death. The record also indicates that, on January 8, 1999, when potential jurors were already filing out questionnaires, the State, via ADA January, finally produced a small volume of discovery. 2 RR 88-89. January marked the discovery as an exhibit (SXR1) and represented to the trial court that it was "an exact copy" of the discovery he had just given the defense. 2 RR 89. Because of the obviously inadequate nature of the production, the following exchange occurred on the record:

> MR. LOLLAR: Right. We need to get other discovery.
>
> MR. JANUARY: Okay.
>
> THE COURT: You've set a day for discovery, did you not?
>
> MR. JANUARY: Right. Anything exculpatory I gave it to them.
>
> MR. LOLLAR: Police report, autopsies.
>
> MR. JANUARY: You just got the autopsy.
>
> MR. LOLLAR: That's contained in that little bitty stack of paper?

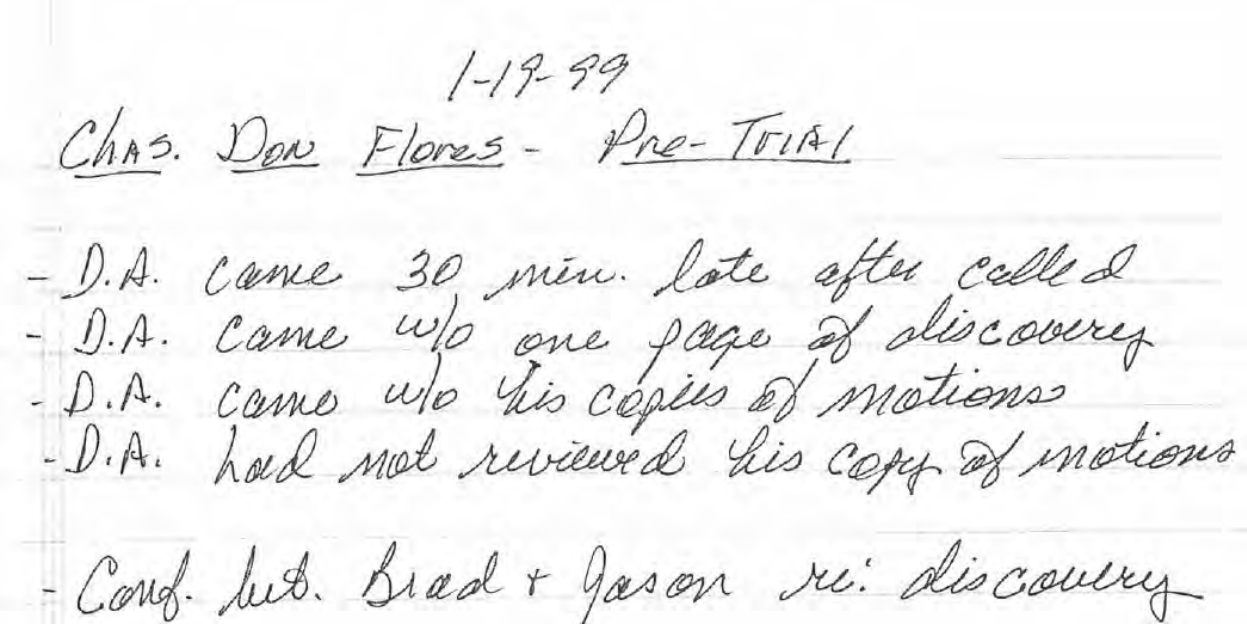
> MR. JANUARY: Yes. I gave it to you this morning so you could look at it.
>
> MR. LOLLAR: How about the big stack --
>
> MR. JANUARY: **I'm looking through it**.
>
> MR. LOLLAR: You anticipate you will be able to give me a copy of it?
>
> MR. JANUARY: **I haven't decided.** I'm going to look through and see if there's anything exculpatory. If there is, I'll give it to you and then no later than cross-examination I'll give it to you.
>
> MR. LOLLAR: You don't anticipate giving it to me before cross-examination, a big stack of FBI reports.
>
> MR. JANUARY: I might do it before. **I'm not going to commit.** I'll give it to you on a timely basis so you can examine it. **I'm not going to commit to.**
>
> MR. LOLLAR: Affidavits, police reports.
>
> MR. JANUARY: I just got the materials, as you know. So I'll look through it. **If there's things that I feel in the best interest of the State of Texas to give to you earlier, I will.** If not, then we'll get it.

2 RR 90-91 (emphasis added).

This exchange makes clear that the vast majority of discovery had not yet been produced—even though voir dire was already about to start. Despite ADA January's suggestion that he had just gotten the materials and was just starting to look through them, and thus did not yet have a grasp of the evidence, he had no problem pushing

a death-penalty case forward to trial. Additionally, the exchange shows that ADA January did not seem conversant with his *Brady* obligations, which do not permit deciding whether to timely produce discovery favorable to the defense only if doing so would be "in the best interest of the State." *Id*.

Thereafter, on January 19, 1999, as voir dire continued, second-chair defense counsel made the following note capturing on-going foot-dragging and unprofessionalism by ADA January:



1-19-99

Chas. Don Flores - Pre-Trial

- D.A. came 30 min. late after called
- D.A. came w/o one page of discovery
- D.A. came w/o his copies of motions
- D.A. had not reviewed his copy of motions

- Conf. w/ Brad + Jason re: discovery

Ex. 44.

The record from a pre-trial hearing held that same day shows that ADA January agreed to turn over various things that had not yet been produced. He made multiple promises to be forthcoming—eventually—with respect to the following:

- criminal records for State's witnesses "if it's impeachable;"

- "any promise or benefit to any other witness, we'll let that be known to the Defense;"

- "if I learn of any inducement or pressure on a witness to testify, I'll certainly let the Court and the Defense know;"

- "any exculpatory or mitigatory [sic]" evidence that existed; and

- "any agreement entered into between the State and any prosecution witnesses that could conceivably influence their testimony."

3 RR 5-6, 14, 24.

With respect to confessions, ADA January represented that, as of that date (January 19, 1999): "We don't know of any at this point." 3 RR 4. In retrospect, that statement was patently false because, months before, the State had obtained the Affidavit signed by Homero Garcia and dated May 18, 1998, purporting that Charlie had confessed to Homero that he had "shot the dog." *See* Ex. 45. Thus, ADA January had already been sitting on this document for over eight months when he represented to the trial court that the State did not know of any confessions available "at this point."

The trial court expressly ordered the State with "[a]ny witness that the State interviews," to inquire "whether any individual has coerced, forced, or threatened the witness in any way in order to procure the witness's testimony" as the defense requested. 3 RR 6-7. That was never done. The rampant coercion, threats, and hidden promises were largely concealed from the defense—except for what was done openly to Charlie's family members so as to sabotage the defense.

As for deals—including those made with co-defendant Ric Childs and Ric's accomplice Jackie Roberts—ADA January insisted "there hadn't been any deal with either" by that date (January 19, 1999). 3 RR 25. ADA January then insisted, inaccurately, that there "wasn't enough evidence to indict [Jackie] as a coconspirator so there's not really a deal[.]" *Id.* He also claimed, closer to trial, that he "couldn't prosecute her for" being involved in the delivery of methamphetamine "if I wanted to because I don't have the drugs." 41 RR 88-89. Aside from misrepresenting the evidence of Jackie's culpability, ADA January did not disclose that he had been meeting privately with Jackie each week for months as a condition not to revoke her probation and as an implicit promise not to seek to indict her for the "Conspiracy to Capital Murder" charge for which she had been arrested in February 1998.

The trial court ordered disclosure: "If any deals are made, make them known to the Defense." *Id*. However, no deals were ever disclosed.

As voir dire continued, the State still failed to produce basic discovery. Therefore, on February 10, 1999—with five jurors already seated and the presentation of evidence set to begin in a month—the defense filed a Motion to Compel Discovery in which counsel told the court:

> Despite repeated requests by the Defense, and despite previous Court order, the State of Texas has refused to comply with reasonable discovery. The State has tendered to the Defense some limited discovery, but among the items that the Defense knows exists and yet have not been tendered to Defense are the following:

1. **Copies of crime scene photographs and other photographs the State intends to offer into evidence.**

2. **A videotape of the crime scene.**

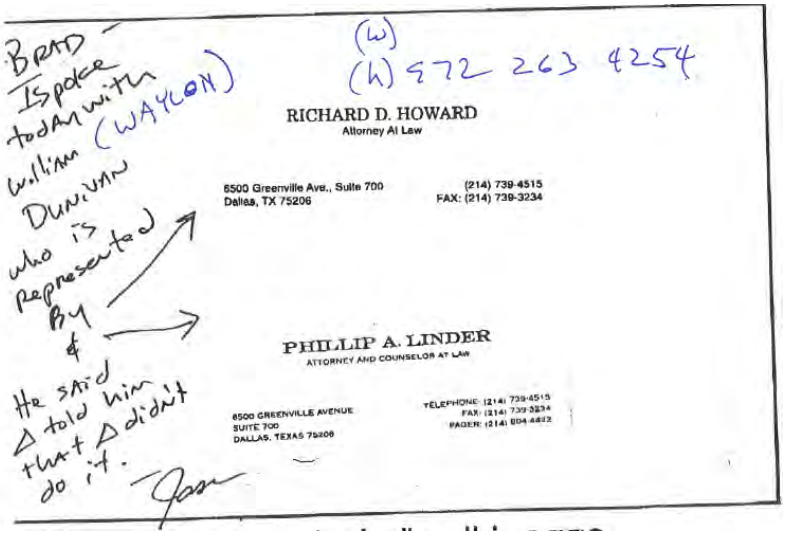
3. **Witness Statements taken by the FBI and various law enforcement agencies.**

4. **Tape recordings and transcripts of co-defendant's statements.**

5. **Co-defendant's and co-conspirator's written statements.**

6. **The lead Police Investigator's investigation file.**

The only indication in the record of additional disclosures is sparse. On March 12, 1999—during the brief window between the end of voir dire and the beginning of the presentation of evidence—ADA January sent a "Fax Transmittal Form" to Brad Lollar upon which January had cavalierly written: "exculp. ev." In a scribbled note, January purported that he had spoken that day with "William (Waylon) Dunivan" and "[h]e said Δ told him that Δ didn't do it."



Ex. 62. The name of this potential witness was misspelled.

Waylon Dunaway has recently revealed the nature of his interactions with law enforcement and the DA's Office, which had actually spanned many months—and conform to a pattern. That pattern involved efforts to manufacture, rather than uncover, evidence of Charlie's guilt by offering leniency to people with charges hanging over them if they provide inculpatory testimony.

As Waylon explains, months after his house was raided on May 1, 1998, right after Charlie had left the premises, charges were finally filed against him related to meth that was magically found under a bed after Waylon had let law enforcement search his house. Ex. 34 ¶¶9-10. Around the month of January 1999—when voir dire was already underway in Charlie's case—Waylon was charged. He sold a car and used the funds to retain an attorney. *Id.* at ¶11. Then, after a couple of months of checking in at court, in March 1999, just before the presentation of evidence was to begin in the Flores trial, Waylon's retained counsel told him that they were "going to talk to some guys who 'might be able to help.'" *Id*. Waylon and his counsel went to an office in the courthouse. Two men were waiting for them. One was one of the six officers who had been involved in raiding Waylon's house; the other was a prosecutor (described as a "clean-cut guy with grayish hair"). *Id.* On information and belief, this prosecutor was Jason January.

The prosecutor was very aggressive—and quite explicit that he could make Waylon's case "go away" if he provided helpful information against Charlie. They

pulled out a big gun and demanded to know if Waylon had seen either Ric or Charlie with that gun. *Id.* Waylon said he had never seen that gun before. Although the prosecutor kept pressing the point that they could make Waylon's case go away if he provided the information they wanted, Waylon had nothing to say because he had never seen that gun before. *Id.*[90]

After the fax alerting the defense about Waylon Dunaway (misspelled as "Dunivan") right before Opening Statements were to be given, the next indication that the defense received written discovery does not occur until moments before the jury returned with its sentencing-phase verdict—*i.e.*, after the trial was over. ADA January marked two exhibits and said: "The State would like to offer State's Exhibit R100 and R101, which are copies of some of the discovery given to Defense prior to trial." 41 RR 99. When asked if the defense objected, Lollar made clear that he would need to review the proffers first to be able to say whether January's representations were accurate. January's response was: "Yeah, if the Defense has any objection to that, they don't have some of that, let us know. I'm representing to the Court that's what I gave them." *Id.*

[90] Because Waylon did not give the prosecutor what he was looking for, Waylon eventually received a sentence for the possession case: six years deferred adjudication. This was his first offense. Ex. 34 ¶ 13. Therefore, he received a notably harsher sentence than Homero Garcia who, while already on probation for a felony, was caught in possession of a .380 caliber semi-automatic, a magazine of ammunition, and a container with Xtacy pills—and then later evaded arrest. Ex. 58. Yet, Homero received no new punishment at all. The difference? Homero, unlike Waylon, succumbed to the pressure to provide false inculpatory against Charlie in exchange for leniency.

Before the defense had the chance to review these materials, however, the jury was brought back in, its punishment verdict was announced, and Charlie Flores was sentenced to death. 41 RR 100-102.

State's R100 is reproduced in the trial record at Volume 46, pp 138-317 and Volume 47, pp 2-103; it consists of 179 pages. R101 is reproduced in the trial record at Volume 47, pp 104-296 and Volume 48, pp 2-160; it consists of 350 pages. This amounts to a total of approximately 530 pages. What, if any, of the material in R100 and R101 had been produced *before* trial is impossible to ascertain at this point. But as explained above, many other documents obtained over two decades later, against on-going resistance, show that, even if R100 and R102 had been disclosed before trial,[91] they represent a grossly cherrypicked set of materials and, in some instances, documents that had been consciously constructed to deceive.

H. There Is Overwhelming Evidence of Prosecutorial Misconduct at Trial.

The evidence now shows that ADA January engaged in a concerted scheme to push a death-penalty case against Charlie Flores to trial where the State had:

- Concealed that Ric was out on bond when he invaded the Blacks' home and that he had a "history" with several police departments and a father working in local law enforcement;

[91] Multiple reasons support doubting the credibility of the representation ADA January made to the trial court about what had previously been produced. One reason is awareness now of all of the undisclosed favorable evidence and promises of leniency that he had not disclosed.

- Concealed that law enforcement seemed to be monitoring Ric's movements before Betty Black's murder and passively observed him engaging in several criminal acts before the murder;

- Buried facts showing that Jackie had likely conspired with Ric to break into the Blacks' house before she even met Charlie, hoping to obtain drug money she believed was hidden there behind the medicine cabinets in the bathrooms;

- Buried evidence that Ric had confessed to Jackie that he had shot Mrs. Black, which Jackie had shared with Detective Callaway and members of the DA's Office, including ADA January, in February 1998;

- Cultivated an intimate relationship with Jackie, including asking SWIFS to do a paternity test on the fetus she believed she was carrying and refraining from indicting her so that she looked less like the accomplice that she was when she served as the State's star witness at trial;

- Obscured that law enforcement learned of Charlie's identity from Roy Childs Jr.—the co-defendant's brother, who had no personal knowledge of the murder—early in the investigation and had then sought evidence to push liability away from Ric and his co-conspirators and toward Charlie;

- Encouraged/enabled witnesses to change and coordinate their testimony during the trial;

- Coerced and manipulated a host of witnesses to obtain testimony helpful to the State, regardless of its falsity and then hiding promises of leniency made in exchange;

- Abused the Grand Jury to intimidate defense witnesses, to sponsor false testimony to minimize Ric Childs' role, and to conceal evidence at odds with the State's preferred narrative;

- Orchestrated a remarkably generous plea deal for co-defendant Ric Childs, hiding that he had committed the murder while out on bond and rewarding him for not taking responsibility and for *not* testifying; and

- Played unprincipled games with discovery while conducting trial prep "on the fly"; and

- Argued before the jury a litany of falsehoods, including that Charlie was some "big dog" drug dealer who orchestrated the drug deal and then the break-in when it was actually Ric, while out on bond, who did these things.

But some of the ***most egregious*** prosecutorial misconduct was so elaborate and so material that it is developed at length in Sections VII and VIII below.

VI. THE STATE PUSHED A FALSE "BIGGER GUN" NARRATIVE DESIGNED TO REDUCE RIC CHILDS' CULPABILITY AND TO SUPPORT THE FALSE INFERENCE THAT CHARLIE FLORES HAD SHOT BETTY BLACK.

The timeline for January 29, 1998, was not the only critical bit of evidence that the State manipulated to place Charlie Flores with Ric Childs through the morning of January 29, 1998, up to the time when two men were observed going into the Blacks' garage.[92] The State also manipulated evidence to support an inference that Charlie had been the person who had actually *shot* Mrs. Black. The story the State pushed at trial was this: two men had entered the Blacks' house with guns and potatoes that they intended to use as silencers; one of these men was Ric Childs; the other man, the State's preferred bad guy, was Charlie Flores; one of the

[92] Even though those manipulations resulted in self-contradictory testimony, as explained below, Mrs. Barganier's eleventh-hour "identification" meant that the jury could ignore the unbelievable testimony that had been provided by Jackie and Vanessa and still accept the State's theory that Charles Flores had been seen in Farmers Branch going into the Blacks' garage before her murder.

guns carried by these men was bigger than the other gun; the bigger gun had been used to shoot the dog; the bigger gun was Ric's; therefore, per the State's narrative, the smaller gun, which was never recovered, must have belonged to Charlie Flores who used it to shoot Mrs. Black.

This Ric-used-the-bigger-gun-to-shoot-the-dog story was a calculated lie.

A. The Basic Contours of the Lie Were Built from a Flawed Investigation.

The physical evidence recovered at the crime scene had yielded only a handful of clues.

First, it was clear that Betty Black had been killed by a bullet shot from a .380 automatic pistol of some kind. *See* SX50 (.380 bullet found at crime scene); 35 RR 236. The murder weapon itself was never recovered.

Second, the Blacks' dog, which had also been shot that morning, had a bullet wound, but no bullet or casing associated with that wound was recovered. 35 RR 226-227, 238, 240-245, 255.

Third, a whole potato had been found at the house and fragments of splattered potatoes had been found inside the house, suggesting to the investigators that the perpetrators had tried to use the potatoes as "silencers." *See* SX47, SX48. The hypothesis that the potato fragments were present because of a plan to use them as "silencers" was largely speculation, however. Investigator Stephens of the Farmers Branch PD and Raymond Cooper, a firearm and tool mark examiner, contradicted

each other regarding the ways in which a potato *might* work as a silencer, and both admitted that they had no experience with potatoes being used in this capacity and thus were just speculating. *See* 35 RR 269; 38 RR 82-105. Seemingly, the concept that a potato can be used in this way needs to be classified in the category of lame-brained ideas—a "myth dating back to mob murders of the 1920s and has persisted through movies and word of mouth."[93]

No one had witnessed the shootings—other than the two men involved. But one of these two men, Ric Childs, had been quickly identified as a likely perpetrator. For instance, the Blacks' next-door neighbor, Jill Barganier had picked him out of two different photographic lineups soon after the crime. This same witness had initially been able to say only that the second man was a similar-looking white male with long hair. Her vague descriptions to law enforcement the morning of the crime were not put before the jury, however. Likewise, it was not put before the jury that Barganier did a composite sketch of the passenger, which looked nothing like Charlie Flores. Nor did the jury hear that, despite her repeated insistence that the second man looked similar to Ric Childs, right after a hypnosis session performed by a police officer at the police station, investigators started showing Barganier

[93] *See* http://hoaxes.org/weblog/comments/potato_used_as_silencer. What the jury never heard is that Ric Childs likely got this lame-brained idea from watching a "cop show" on television with Jackie's friend Jason Clark, as Clark told both a Grand Jury and ADA January before trial. *See* Section V above.

pictures of Hispanic males with short hair, including a photo array with Charlie's mug shot prominently featured—a man who looked nothing like Ric or like Mrs. Barganier's composite sketch:

See Section VII below.

In short, law enforcement knew from the initial investigation that two strangers had entered the Blacks' house (through the garage) the morning Betty Black was killed. They knew, from multiple sources, that one of these men was Ric Childs. And they knew that at least two shots had been fired—at least one from a .380 caliber pistol. Yet within a few days, the State decided to push a hypothesis that the dog had been shot by a person armed with a *bigger*, higher caliber handgun. The bigger-gun-was-used-to-shoot-the-dog lie, although lacking evidentiary support, became a means to argue that Charlie Flores had not only been present at the scene but that he, not Ric, had shot Mrs. Black.

The origin of the bigger-gun-shot-the-dog hypothesis seems to have arisen soon after law enforcement found a .44 magnum revolver stashed at Ric's grandmother's house in a closet:

The .44 magnum had been found in Ric's grandmother's house (11807 High Meadow) about eight hours after Ric's arrest on January 31, 1998 (two days after the murder). 36 RR 197. The revolver was fully loaded at the time. SX54.

Yet, upon arresting Ric, other officers had found an open box of C.C.I. Blazer ammunition for a .380 caliber pistol in Ric's possession—the precise ammunition that had been used to killed Mrs. Black. 35 RR 226. Investigators had also been told by several witnesses that Ric routinely carried a small handgun, specifically, a .380. *See, e.g.*, AppX57; 34 RR 265-66. The mere presence of the .44 magnum in a closet, however, became a means to push responsibility for Betty Black's murder away from Ric.

Compelling fiction always involves a kernel of truth. In terms of ballistics, the shard of truth in the State's "bigger gun" lie is that pistols (such as a .380 caliber) release shell casings of the bullet when fired; whereas revolvers (such as a .44 magnum) do not. 35 RR 236-237.

The State seized on law enforcement's failure to recover a second casing as "proof" that a different, "bigger" gun had been used to kill the Blacks' dog. But law enforcement did not even recover a second bullet. During cross-examination, Investigator Stephens, who claimed that the Blacks' house had been thoroughly examined with metal detectors to try to find a second bullet, acknowledged that the carpet underneath the slain bodies had been removed before they had finished the crime scene investigation. When subsequently inspected, the carpet seemed to have a tear in it that may have been caused by a bullet passing through; Stephens admitted that metal detectors might not have been able to detect a bullet that had pierced the carpet once it lodged in the concrete floor below "due to the reinforced steel in the concrete." 35 RR 254. A casing could likewise have gone missing during the flawed investigation.

In other words, no component of the bullet that had pierced and killed the dog was ever recovered. 35 RR 255. And the underlying carpet that may have yielded additional clues had been removed and new carpet quickly installed before the investigation was complete. As Investigator Stephens admitted, the second bullet

could have "went through the carpet, through the padding, hit the concrete slab and flattened out, and either slid underneath the wall or was removed by the people doing the remodeling of the house after the carpet and pad had been pulled up." 35 RR 245. Considering that investigators did not even think to look for holes in the carpet until days later, when the carpet had already been ripped up and thrown in a dumpster, the failure to find a second bullet and/or casing does not support the conjecture about a "bigger gun." It only underscores the haphazard nature of the investigation.[94]

Yet the specific "bigger gun" that had been confiscated from a closet after Ric's arrest became a key prop at Charlie's trial to push a manufactured, unsubstantiated hypothesis.

When the trial began, aside from the gun itself, all the State had to support the Ric-used-the-bigger-gun-to-shoot-the-dog story was Ric's remarkably self-serving February 6, 1998 custodial statement, which had been crafted by law enforcement (and was inadmissible). The statement claimed that Charlie was not only present at the Blacks' house but that he had been the one to shoot Mrs. Black and had, essentially, controlled all of Ric's actions. *See* SXR101. But law enforcement had

[94] For some reason, a cleaning crew was allowed to remove the carpet where Mrs. Black's and the dog's bodies were found before the investigation was completed. A new carpet was hastily installed.

other evidence, not disclosed until years later,[95] showing that, before he was arrested, Ric had confessed to Jackie that *he* had in fact shot Mrs. Black. Ex. 9.

Additionally, Ric had not even suggested that Charlie had been involved in the break-in at the Blacks' until he had been in custody for nearly a week, and he did so only after investigators repeatedly urged him to implicate Charlie. *Compare* SXR101 (Transcript of Childs' Jan. 31, 1998 Interview) *with* SXR101 (Transcript of Childs' Feb. 5, 1998 Interview).

In the partially recorded custodial interview from February 5, 1998, Ric, with prompting from investigators, had jokingly described shooting the dog with the .44 magnum; but then later in that same interview, he had admitted that the 44. magnum—a bigger gun than the .380—had *not* been used at all:

> Baker: Did you already have a gun?
>
> Childs: I had my .44, but I didn't use – but my .44 was never used.

Id.

There does not seem to have been any plan to call Ric as a witness at trial to testify that he had used the .44 magnum to shoot the dog and/or that Charlie had used a .380 to shoot Mrs. Black. That would have been the easiest way for the State to

[95] The State not only failed to disclose the evidence that Ric had confessed to the shooting, law enforcement had actively suppressed this evidence by leaving it out of the typed-up report about the interview with Jackie when she made this disclosure. *Compare* Ex. 16 *with* Ex. 9.

prove its case—even if it required the State to suborn perjury. But Ric was damaged goods. The State could not risk the chance that the jury would be allowed to hear the partially recorded custodial interview in which Ric had joked lightheartedly with law enforcement about the crime in a way that suggested he had no conscience and was oddly chummy with his interlocutors. Therefore, the State had to look for another means to create some inference to support its false narrative.

B. The State Decided to Push the False Narrative that Ric Had Used a Bigger Gun to Shoot the Dog, Absent Any Legitimate Evidence to Support That Narrative.

When the Flores trial began, the State had no evidence to support the Ric-used-the-bigger-gun-to-shoot-the-dog lie. Yet in delivering the State's Opening Statement on March 22, 1999, ADA January repeatedly promised the jury that the evidence would back up the hypothesis that Charlie Flores had shot Mrs. Black and the less culpable role had been played by the absent co-defendant Ric Childs, armed with a bigger gun:

- "The evidence is going to show that that shot was by a .380 weapon, a handgun, that was an automatic, as it left a shell casing there and left the bullet that went through and through Ms. Black that was collected at the crime scene." 34 RR 27.

- "The next weapon, was **a larger caliber weapon**, and it was a revolver because no shell casing was left. That shot Santana, the Doberman dog that was theirs, shot Santana in the back, in the dog's back, there also in the same room, the living room of that household." 34 RR 28-29 (emphasis added).

- "Two days later Richard Childs is arrested here at 11807 High Meadow. He's arrested, the police search his house and find a **.44 revolver consistent with the shot that killed the dog**, but not provable because there's not a bullet left at the scene." 34 RR 38 (emphasis added).

- "We know the .380, the evidence is going to show, killed Ms. Black. And that **a larger caliber, consistent with a .44 revolver, killed the dog**." 34 RR 38 (emphasis added).[96]

ADA January made these representations about what the evidence was going to show, absent actually having *any* supporting evidence at the time. Worse still, when he made these representations to the jury, he knew that the **"**Ric-used-the-bigger-gun-to-shoot-the-dog" angle was ***false*** because Jackie had told him that Ric had admitting to shooting Mrs. Black over a year before. *See* Ex. 9.

ADA January tried to develop support for this false narrative on the fly through Jackie herself, a drug addict and dealer who was implicated in her mother-in-law's death. As explained above, Jackie, the common-law wife of the Blacks' incarcerated son Gary Black, had been having an affair with Ric Childs, and had orchestrated a drug deal for him in the early morning hours before Mrs. Black's murder. The trouble was, despite extensive coaching, she had trouble keeping the story about the two guns straight. The first time ADA January asked her "The gun you saw on Rick Childs, how would you describe it?"

[96] Notably, ADA January accidentally admitted in his Opening Statement that the story that the dog had been shot with a .44 Magnum revolver was "not provable;" yet in the next breath, he insisted: "We know" that "a larger caliber, consistent with a .44 revolver, killed the dog." 34 RR 38.

She responded: “It’s a very small gun, silver.” 34 RR 133.

Then, when ADA January tried to get Jackie to describe a gun, that she claimed she had seen Charlie Flores carrying, she admitted: “I’m really not that familiar with guns.”

ADA January, however, kept pressing: “Was it a shotgun, rifle, or handgun?”

Jackie relented: “A handgun.”

But ADA January wanted more: “Could you tell anything about it?”

Jackie tried to be helpful: “It had two barrels.” 34 RR 138.

But of course, a .380 pistol, the smaller gun that ADA January wanted desperately to place in Charlie’s hands, does not have “two barrels.” *See*, *e.g.*:

Because Jackie Roberts had failed so miserably to give him the answers he was after, ADA January circled back:

> Q. Charles Flores had the long, blue gun?
>
> A. Yes, he did.
>
> Q. What was the second gun [Charles Flores] had?

A. A handgun.

Q. Okay. What about Rick Childs, what kind did he have?

A. A bigger handgun.

34 RR 144. At last Jackie seemed to have given ADA January what he wanted. But then he had to ask that "one question too many":

> Q. Between the two handguns, then, who had the largest handgun that came out of that house?[97]
>
> A. The Defendant [*i.e.*, Charles Flores].

Id.

Even with this second attempt, Jackie was not able to keep it straight that the State wanted her to place the "largest handgun" in Ric Childs' hands, not in Charlie's. Therefore, ADA January cut his losses:

> Q. Do you know anything about weapons, like what's a .38, what's a .9, what's a .357, all that stuff?
>
> A. No, sir, I don't.

Id.

ADA January then had to contend with other witnesses inadvertently devastating his Ric-had-the-bigger-gun story. *See, e.g.*, this cross-examination of Doug Roberts, Jackie's ex-husband:

[97] The "house" to which January was referring was not the Blacks' house because Jackie denied knowledge of what had happened in the Blacks' house.

Q. Did you ever know Rick Childs to possess any kind of weapons?

A. Always.

Q. Did he have handguns or rifles?

A. Both.

34 RR 232. On cross-examination, Doug was more specific, acknowledging that he always saw Ric with a .380:

Q. And on each and every one of those occasions, did [Ric] always carry a gun?

A. Yes, sir.

Q. What kind of a gun?

A. He had a .380 semiautomatic pistol.

Q. What kind of .380?

A. Brand name?

Q. Yeah.

A. I'm not sure.

Q. Do you know the brand name?

A. I don't ask people to see their guns.

Q. So every time you saw him during that three-week period of time he had a .380?

A. Yes, sir.

34 RR 265-266.

Likewise, when the State put on another one of Ric's girlfriends, Vanessa Stovall, she too failed to help the State's Ric-had-the-bigger gun story. 35 RR 66. After admitting during her direct examination that she had seen Ric with a handgun and had never seen Charlie Flores with a gun, Vanessa admitted during cross-examination that the only gun she had ever seen Ric with was more of a "flat" handgun. 35 RR 83.

Luckily, ADA January had "talented prosecutor and good friend " ADA Greg Davis as his wingman. Ex. 63. ADA Davis tried to rebuild support for the "bigger gun" story, methodically reintroducing the concept while examining one of the investigators. First, he turned to the shell casing and bullet that had been recovered from the crime scene and asked Investigator Stephens the following:

> Q. As you looked at these items, sir, did they appear to be of a .380 caliber?
>
> A. Yes, sir.
>
> Q. And a .380, is that a -- what type of gun is a .380 officer?
>
> A. It's usually an automatic.
>
> Q. Now, would an automatic, would it operate differently than a revolver?
>
> A. Yes, sir.
>
> Q. Let's say that I had a revolver and I was actually firing a revolver of some sort. When I fired a shot off, would a casing be ejected from a revolver or —

A. No, sir.

Q. -- would it actually stay in the cylinder?

A. It would stay in the cylinder.

Q. If I was shooting a .380, though, would you expect a casing to be ejected from a .380?

A. Yes, sir.

35 RR 236-237.

Next, ADA Davis asked Investigator Stephens to consider hypotheticals involving a .44 caliber weapon:

Q. All right. Let me ask you too, going back to the dining room area [of the Blacks' house], if an individual had fired a .44 caliber weapon inside that area, a .44 revolver, would you expect again for a casing to be ejected from that gun during its firing?

A. No, sir.

Q. Would then expect the casings to remain in the cylinder then?

A. Yes, sir.

Q. And again, the bullets that you recovered there, they were submitted out to S.W.I.F.S. for testing, right?

A. Yes, sir.

35 RR 248-49.

But then ADA January put Dr. Townsend-Parchman, the medical examiner, on the stand. She resisted the prosecution's insistence that the dog had been shot by "a larger caliber weapon."

> Q. Before we look at the photographs, did you form an opinion after observing Elizabeth Black and this dog as to whether or not the shot from Elizabeth Black could potentially have come from a weapon with higher or lesser velocity than the shot from the dog? Were you able to make any conclusions based on what you saw?
>
> A. No, not a firm conclusion.

36 RR 147.

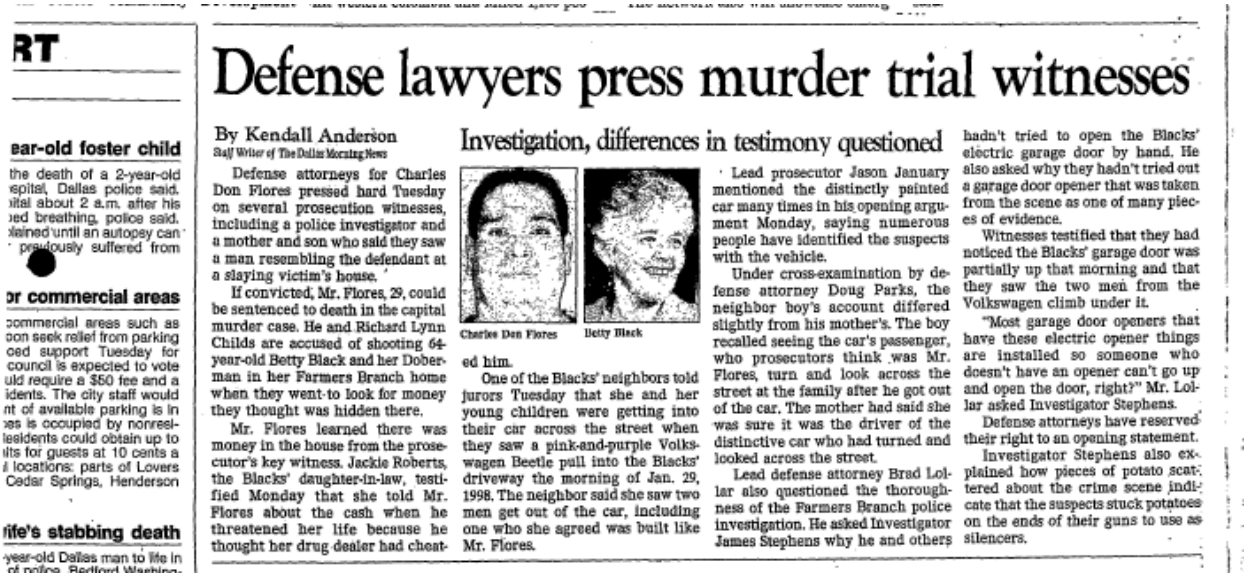
Despite pressure from ADA January, Dr. Townsend-Parchman maintained that she could *not* conclude with any certainty that the dog had been shot with a gun of a higher velocity, particularly because dogs are smaller than humans. 36 RR 147. She also noted that the gunshot wound the dog had sustained was atypical. 36 RR 148. Perhaps most importantly, Dr. Townsend-Parchman noted "let's face it, I don't routinely do dogs." 36 RR 146. Aside from noting a lack of training or experience performing autopsies on dogs, Dr. Townsend-Parchman emphasized that, while she could analogize to humans such as herself, "I hope it's obvious I'm not a Doberman." *Id.* Yet ADA January kept pressing:

> Q. Has it been your experience that a larger caliber of bullets and weapons, would typically produce a larger bullet hole in a typical case?

> A. In a typical case, but remember, the gunshot wound of probable entrance in the dog is **not** a typical entrance defect.

36 RR 149 (emphasis added).

At this point, the State's bigger-gun-was-used-to-shoot-the-dog story was in tatters. Even a local journalist, reporting about the trial the next morning, noted that the testimony was revealing a flawed investigation and inconsistent statements:



RT

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or commercial areas

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ife's stabbing death

-year-old Dallas man to life in

Defense lawyers press murder trial witnesses

Investigation, differences in testimony questioned

By Kendall Anderson
Staff Writer of The Dallas Morning News

Defense attorneys for Charles Don Flores pressed hard Tuesday on several prosecution witnesses, including a police investigator and a mother and son who said they saw a man resembling the defendant at a slaying victim's house.

If convicted, Mr. Flores, 29, could be sentenced to death in the capital murder case. He and Richard Lynn Childs are accused of shooting 64-year-old Betty Black and her Doberman in her Farmers Branch home when they went to look for money they thought was hidden there.

Mr. Flores learned there was money in the house from the prosecutor's key witness, Jackie Roberts, the Blacks' daughter-in-law, testified Monday that she told Mr. Flores about the cash when he threatened her life because he thought her drug dealer had cheated him.

Charles Don Flores Betty Black

One of the Blacks' neighbors told jurors Tuesday that she and her young children were getting into their car across the street when they saw a pink-and-purple Volkswagen Beetle pull into the Blacks' driveway the morning of Jan. 29, 1998. The neighbor said she saw two men get out of the car, including one who she agreed was built like Mr. Flores.

Lead prosecutor Jason January mentioned the distinctly painted car many times in his opening argument Monday, saying numerous people have identified the suspects with the vehicle.

Under cross-examination by defense attorney Doug Parks, the neighbor boy's account differed slightly from his mother's. The boy recalled seeing the car's passenger, who prosecutors think was Mr. Flores, turn and look across the street at the family after he got out of the car. The mother had said she was sure it was the driver of the distinctive car who had turned and looked across the street.

Lead defense attorney Brad Lollar also questioned the thoroughness of the Farmers Branch police investigation. He asked Investigator James Stephens why he and others hadn't tried to open the Blacks' electric garage door by hand. He also asked why they hadn't tried out a garage door opener that was taken from the scene as one of many pieces of evidence.

Witnesses testified that they had noticed the Blacks' garage door was partially up that morning and that they saw the two men from the Volkswagen climb under it.

"Most garage door openers that have these electric opener things are installed so someone who doesn't have an opener can't go up and open the door, right?" Mr. Lollar asked Investigator Stephens.

Defense attorneys have reserved their right to an opening statement.

Investigator Stephens also explained how pieces of potato scattered about the crime scene indicate that the suspects stuck potatoes on the ends of their guns to use as silencers.

Ex. 38 (March 24, 1999 *Dallas Morning News* found in the FBI case file noting, among other things, questions about the investigators' failure to test the electronic garage door and the opener found at the scene).

C. The State Manufactured Evidence on the Fly through a Pliable "Expert."

Because the attempt to build support for the State's Ric-had-the-bigger-gun story through lay witnesses was failing, mid-trial, ADA January decided to bolster

the State's story by adducing more compelling "evidence" from someone who did not self-identify as a drug addict or dealer: troubled and pliable SWIFS's[98] trace evidence analyst **Charles Linch**.

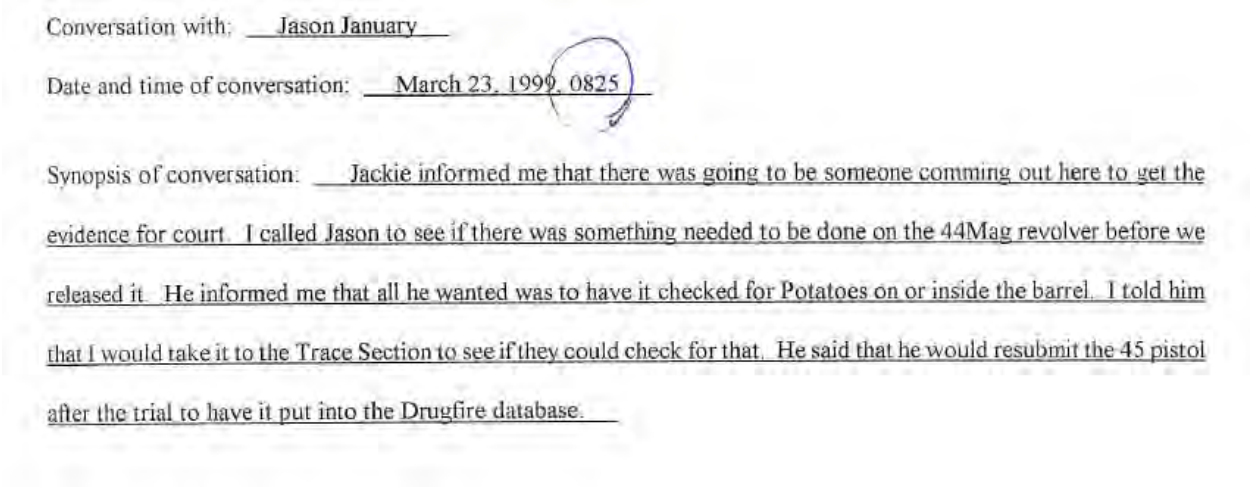
Notably, a firearms and toolmark expert at SWIFS, Raymond Cooper, was *not* asked to examine the revolver. Cooper testified at trial (for the defense) that "the first time [he'd] seen that gun"—meaning the .44 magnum—was when he was sitting on the witness stand. Cooper was not contacted about the .44 magnum although, at the State's request, Cooper had examined: other weapons, the recovered bullet, the recovered bullet casing, and the cartridges found in Ric's backpack as part of the Betty Black murder investigation. 38 RR 103-105.

At trial, Linch testified that his first contact with the .44 magnum came only after "Mr. January called me, and he asked me if I had finished with the weapon, and I asked what weapon." 36 RR 215. Recently disclosed evidence, provided by SWIFS, establishes that ADA January was much more explicit about what he wanted Linch to find in this particular weapon that had been sitting around in the DA's Office after the chain of custody was broken. ADA January had called SWIFS, the crime lab where Linch worked, on March 23, 1998—after the State's second wretched day of trial testimony. Ex. 19. Thus, this contact was made after ADA

[98] Again "SWIFS" is an acronym for the "Southwestern Institute of Forensic Sciences," the Dallas County crime lab, which was not then an accredited lab. *See* Claim II.

January had already promised the jury that the State would prove that Charles Flores had shot Mrs. Black and that Ric Childs, armed with the "bigger gun," had shot the dog.

A SWIFS call record shows that ADA January had a conversation with a SWIFS employee on March 23, 1998, "to see if there was something needed to be done on the 44Mag revolver before" the DA's Office came to retrieve it so that it could be offered into evidence. *Id.* ADA January then expressly told SWIFS how to help him out: "he informed [SWIFS] that all he wanted was to have it [the .44 magnum] ***checked for Potatoes on or inside the barrel***." *Id.* (emphasis added). ADA January was assured that the weapon would be taken to the "Trace Section" to be checked per January's explicit insinuations:



Conversation with: Jason January

Date and time of conversation: March 23, 1999, 0825

Synopsis of conversation: Jackie informed me that there was going to be someone comming out here to get the evidence for court. I called Jason to see if there was something needed to be done on the 44Mag revolver before we released it. He informed me that all he wanted was to have it checked for Potatoes on or inside the barrel. I told him that I would take it to the Trace Section to see if they could check for that. He said that he would resubmit the 45 pistol after the trial to have it put into the Drugfire database.

Ex. 19. Again, the date of his call—March 23rd—was the third day of trial. 36 RR.

Later that same day, after getting the (previously undisclosed) directive from ADA January that the prosecution wanted the "Trace Section" to find potatoes "on

or inside the barrel," Linch prepared a report describing his purported analysis of the .44 magnum, identified as "item 75."[99] When ADA January had called SWIFS, he knew that the work he was requesting mid-trial was going to be taken on by Charles Linch.

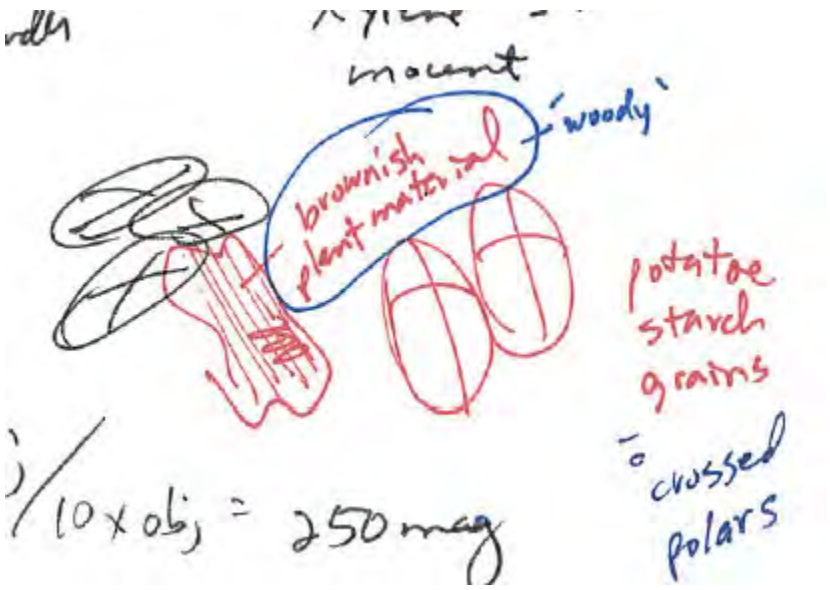
ADAs January and Davis both knew Charles Linch as the man synonymous with SWIFS' "Trace Section" at that time. Prosecutors in the Dallas County DA's Office had repeatedly turned to Linch to provide "critical testimony" in death penalty cases. Ex. 64; *see also* Claim II. The State knew well that Linch's title of Trace Evidence Analyst at SWIFS lent him the aura of authority and credibility. And these particular prosecutors had worked closely with Linch in the past. For instance, ADA Davis had recently sponsored Linch as an expert in the Darlie Routier death-penalty murder case.[100]

Linch's report, generated the same day he did his "testing," states: "A sterile surgical blade and powder free latex gloves were used to remove gray/black granular material from the grooves of the item 75 revolver barrel interior. This material was examined by polarized light microscopy and found to consist of starch grains, white and blue cotton fibers, and amorphous apparent carbonaceous particles." *Id.*

[99] Neither "item 75" nor Linch's report was shown to the jury or admitted into evidence. *See* Claim II.

[100] Linch's testimony in the Routier case was subsequently challenged along with other aspects of the conviction. A request for DNA testing, filed in 2007, was granted but is still pending in that case in which the defendant, who was sentenced to death, continues to assert her innocence.

Recently discovered evidence shows that Linch's process was captured in no more than a few scribbled notes in which he misspells the key word "potato" as "potatoe":



Ex. 65. Linch's methodology seems to have involved no more than making some hasty sketches and photocopying a few pages from a treatise called *The Particle Atlas*, which includes a short entry about "potato starch." *Id.*

In the middle of trial, Linch came up with this evidence, which ADA January needed to keep the promises he had made during opening statements. But the State was able to call him as a witness because his was among the ***199*** names on the State's witness list. Ex. 66. But the defense could have had no idea what Linch was going

to opine about until soon before he testified because Linch's report was only slapped together the day before he was called to the stand. 36 RR 215.[101]

ADA Davis artfully laid the groundwork for Linch's testimony by first focusing the jury on the .44 magnum revolver—a noticeably bigger gun than a .380 pistol that had been identified as the murder weapon (which was never recovered). SX53. Davis did so by calling Amy Bartlett, the officer who had found the .44 magnum in a closet at 11807 High Meadow. Davis asked this officer a series of leading questions to emphasize the size of the ammunition associated with this type of firearm relative to a .380—even though the witness made it clear that she was "not very good with guns":

> Q. Looking now at State's Exhibit Number 54, am I now holding the .44 — one of the .44 caliber shells that you found inside State's Exhibit Number 53 [the .44 magnum]?
>
> A. Yes.
>
> Q. Okay. It's a fairly large round of ammunition, isn't it?
>
> A. Yes.
>
> Q. Are you familiar with .380 auto ammunition?
>
> A. Vaguely. I'm not very good with guns.

[101] These facts give the lie to the assertion later made by Flores's trial counsel, Brad Lollar and Doug Parks, that Linch's testimony was "not unanticipated." Ex. 25. How the defense could have anticipated evidence that was only created during trial makes no sense, especially since Linch's own testimony made clear that he had not done the analysis until the day before he testified.

> Q. Okay. Let's take a look at some .380 auto ammunition. Would it certainly be fair to say that .44 caliber ammunition is a good deal bigger, is it not, than the .380 ammunition?
>
> A. Yes, it is.
>
> Q. It's longer, as well as it's bigger around, isn't it?
>
> A. Yes.
>
> Q. Again, as you looked at State's Exhibit Number 53 [the .44 magnum] that day, this gun was fully loaded, wasn't it?
>
> A. Yes, now I recall that it was.

36 RR 204-205. ADA Davis also wanted to prepare the jury to hear more about that .44 magnum, asking calmly about testing that he *knew* had only been done hastily the day before by Charles Linch, about which the witness, Amy Bartlett, knew nothing:

> Q. Okay. Now, when you recovered State's Exhibit Number 53 and the shells that were inside there, did you yourself do any testing on that weapon?
>
> A. No, sir.
>
> Q. Okay. Was that item along with the ammunition, was that later submitted to the Southwestern Institute of Forensic Sciences for some testing?
>
> A. After I put it in the evidence locker, I'm not quite sure where it went after that point.

36 RR 204-05.

ADA Davis had to have known then what SWIFS records now show: that there was no chain of custody documentation explaining how the .44 magnum had migrated from the Farmers Branch evidence locker to the Dallas County DA's Office. But, seemingly, the gun was at the DA's Office for some time until, March 19, 1999—a day during the short interval between the end of voir dire (on March 10th) and the beginning of the presentation of evidence (on March 22nd). Because on March 19th, an investigator with the DA's Office delivered the .44 magnum to the Dallas County crime lab. Ex. 65.

Additionally, SWIFS records produced two decades later show that potato fragments recovered at the crime scene that had been delivered to SWIFS on February 2, 1998, were returned by SWIFS on December 4, 1998, to agents of the State and thus were readily accessible to the DA's Office, where the .44 magnum was lying around for over a year. *Id*.

When Linch took the stand the day after throwing together his report, he testified misleadingly. He did not state that he had been expressly asked to look for traces of potatoes, instead he said: "I was asked to look for any foreign residues that may be on or in the revolver." 36 RR 210. Since the record of ADA January's call to SWIFS was not produced to defense counsel at the time (or until quite recently), defense counsel had no means to impeach Linch about having been given, in advance, notice of the precise "foreign residue" the State was looking for.

ADA Davis then asked Linch if, "[l]ooking at the outside portion of the barrel, did you find any unusual material on the outside of the barrel" of the .44 magnum? 36 RR 210-211.

Linch responded: "No, sir. It was very clean and appeared to have been polished. There was a slight amount of what appeared to be new lubricant in the chamber area." 36 RR 211. Defense counsel did not know that the .44 magnum had been in the possession of the DA's Office for over a year until it had been brought over to the crime lab on the eve of trial. Thus, defense counsel had no way to anticipate that this testimony too was misleading.

ADA Davis used the insinuation that the gun had "new lubricant" at least on the outside as a means to build suspense about what Linch had, nevertheless, managed to unearth inside the barrel. Linch described peering into "the lands and grooves" inside where he spied "some granular gray/black material that I scraped out with a scalpel onto a glass microscope slide." 36 RR 211.

Next, Linch testified about what he purportedly found after looking at this substance under a microscope:

> When the material was scraped on the glass microscope slide, it appeared gray/black and granular. Then I looked at it using a standard compound microscope or – and observed with that microscope some white cotton fibers and blue cotton fiber, and some other amorphous particles.
>
> Then I looked at it under the polarized microscope. And using polarized light microscopy, I saw several

> particles that are identified as starch grains. They have a very specific appearance under polarized light microscopy.

36 RR 212.

ADA Davis then leaned in toward the Eureka-moment the State had been seeking: a finding that this starch indicated the presence of POTATOES! Linch then proceeded to opine at length as if the microscopic inspection of potato starch was firmly in his wheelhouse:

> Q. Now, when you say starch grains, are we talking about some sort of plant material?
>
> A. Plants store their sugars, carbohydrates, and starch grains just as animal store their energy sources as fats. So it would be from a raw plant product.
>
> Q. Okay. And included in that raw plant category, would potatoes be included in that category, sir?
>
> A. Sure. Potatoes are rich in starch grains.
>
> Q. Okay. And did you form some conclusion as to whether or not the starch grains that you saw coming from inside that barrel were consistent with being potato starch grains?
>
> A. There are different types of starch grains depending on their polarized light and microscopic appearance. The potato starch grains are actually shaped like potatoes with a cross through them as observed under polarized light microscopy.
>
> These starch grains did have the potato shape, and there were other smaller grains that could be from other sources, including potato. But in the atlas I referred to, they were most consistent with potato starch grains.

> Q. Okay. If we were to look at other starch grains coming from other sources, for instance, they may have a different shape, a different size, and they may not have that cross marking; is that correct?
>
> A. These particles come in different sizes depending on how long the cell has been accumulating the carbohydrate into the particle. The smaller ones are the more common appearance. You see that on powdered surgical gloves. You see it from other starch sources. But the large ones are more characteristic of that that you find from a raw potato.
>
> Q. And again, the starch grains that you saw inside the barrel were of the larger variety; is that correct?
>
> A. They were both. They were the large ones and the small ones.
>
> Q. Okay. Would the outside portion of the potato, would that – such as the peel – would that – or the covering – would that have a different shape to it perhaps?
>
> A. Yes, sir. The peel, appears different microscopically. There are vacuoles of air within the vessels, and any type of woody plant, back, or potato peel has a generalized characteristic that you recognize under the microscope.

36 RR 213-214.

After Linch's testimony, the State had a circumstantial basis for arguing that the .44 magnum had been used at the Blacks' house based on this insinuation: why would potato starch, of all things, be inside the barrel of an otherwise clean gun

unless someone had used this same gun during the home invasion where potato splatters had been found? [102]

When Jackie was later recalled to the stand, she took the opportunity to "correct" some of her previous testimony. To be able to make these "corrections," ADA January had provided her with a rush copy of the transcript of her direct examination. 38 RR 111-113. One of the key points that the State wanted her to "correct" was her testimony about whom she had seen with a bigger gun. During her second round of testimony, Jackie delivered her rehearsed lines as follows: "when I stated the fact that the Defendant had the largest gun, he had the largest gun, but not the largest handgun. Rick Childs had the largest handgun. The Defendant had the smaller one." 38 RR 113.

In addition to the falsehood about Ric wielding the "bigger handgun" during the hours before Mrs. Black's murder, Jackie denied that she had told Ric that she believed money she had earned from dealing drugs with her husband was hidden behind the medicine cabinet in the bathroom walls. She did, however, admit to lying about her income to obtain government assistance and to hiding from the police for

[102] Defense counsel had made no effort to utilize the rules of evidence to test, in advance, what the basis for Linch's opinion was or whether he was qualified to opine about potato starch. *See* TEX. R EVID. 705(b) (permitting voir dire of an expert about the underlying facts or data outside of the jury's hearing). Nor did defense counsel ask for a physics lesson that would explain how firing a gun with a potato stuck on the end would result in microscopic potato fragments ending up inside the gun's barrel and staying there, intact, for fourteen months. Instead, the very brief cross-examination did no more than note that Linch's work on this front had only been done the day before. 36 RR 215.

several days after Mrs. Black's murder. 38 RR 119, 137, 140, 149. Even so, the State saw her as one of its more credible witnesses, worthy of propping up its Ric-had-the-bigger-handgun fable.

But Linch's CSI-esque testimony was essential. It suggested to the jury something that *seemed* like science, from a witness who, unlike Jackie Roberts, *seemed* objective and disinterested. That is, Linch's testimony gave legitimacy to the State's argument that the "bigger gun," found where Ric Childs had been hiding at the time of his arrest, had been used at the crime scene and, most likely, had been fired by Ric Childs and thus Ric Childs had killed the dog, not Mrs. Black.

This story was a core theme in the State's closing arguments. First up was Greg Davis:

> [Jackie] says that this person down here had a handgun and Richard Childs had a handgun, and of the two, the bigger handgun that day belonged to Richard Childs.
>
> I'll submit to you it's a reasonable deduction from the evidence that actually what those two people went in and got was a .44 caliber magnum, and a .380 auto. Richard Lynn Childs had that .44 magnum in his possession, and this man right down here, Charles Don Flores, had that .380 semi-automatic pistol in his possession.

39 RR 51.

Jason January then followed up, hammering over and over again the fiction that, because the bigger gun, found in a closet at Ric's grandmother's house, had

potato in it, this proved that Charlie Flores was not only present but was the person who had shot Mrs. Black using a smaller gun (that had never been found):

- "Now, the Defense lawyer said that it's probably Rick Childs that threw that [smaller] gun away. Let's look at that. If he threw that gun away, how come he didn't throw the .44 away that's sitting right in his own[103] house with the potato inside of it? I mean, I know Rick Childs is a doper, but it's a reasonable deduction that he's not that stupid. Why throw away the murder weapon -- why not throw away the -- both guns in this case? It doesn't even make any sense." 39 RR 95-96.[104]

- "The Defendant — the Defense lawyer said that Rick Childs is more likely the shooter because both have .380s, that Rick Childs threw away the .380. How come he didn't throw away the .44?" 39 RR 100.

- "Now, if for some reason you think that Richard Childs was the shooter of -- even though he would have a .44 in his own house, that for whatever reason, if you believe that, the Defendant is still guilty." 39 RR 101.

- "Jackie did say that Richard Childs had the larger gun, which we know was in his possession afterwards, this 44." 39 RR 102.

- "Again, I feel the evidence with a reasonable deduction shows that [Flores is] the shooter." 39 RR 103.

- "I suggest to you the true theory in this case is that [Flores] is the shooter of Elizabeth Black, a 64-year-old grandmother." 39 RR 106.

[103] ADA January repeatedly referred to 11807 High Meadow as Ric's "own house." That was inaccurate. It was his grandmother's house, just one of several places where he would stop by as he traveled around the metroplex selling and doing drugs.

[104] Most likely, Ric did not throw away the .44 Magnum because, as he himself admitted and as January well knew, "it had not been used" at the Blacks' house. SXR101.

This zealous commitment to a narrative that State's counsel ***knew to be false*** reflects an obsession with winning completely divorced from fundamental concepts of justice.

D. After Trial, State Actors Celebrated, and Then Ran from, Their Reliance on Linch to Further the "Bigger Gun" Lie.

Yet another recently obtained document, in which ADA January praised his team in a candid internal memo, exposes, not the full scope of the misconduct, but his keen awareness that the false "bigger gun" story had been material to the Flores conviction. Ex. 63. The memo also suggests remarkable arrogance.

ADA January took several gratuitous swipes at the trial judge and then celebrated the efforts of those who "helped place this dangerous criminal on death row." *Id.* In the memo, ADA January admitted that the case "was extremely difficult in many respects." *Id.* For one thing, he explained, the State's witnesses "were mainly drug users and/or dealers who have a contempt and mistrust of authority. Convincing, locating, recontacting, and producing the witnesses as presentable in court was quite a task." *Id.*

Indeed. Convicting a person who was not guilty of the charged offense is "quite a task"—especially if you have to rely on "mainly drug users and/or dealers who have a contempt and mistrust of authority." *Id.* ADA January's own words demonstrate that Linch's testimony was critical to the State.

Around the same time that ADA January admitted internally that the prosecution had been "exceedingly difficult," ADA Jason January sent a letter dated April 20, 1999, to the Director of SWIFS on the DA's letterhead. In this letter, January praised the help that the State had received from SWIFS personnel. January described Linch's work in particular on the Flores case as "critical to the State's theory":

> CHARLES LINCH - provided last minute testing and testimony in this case which proved to be critical to the State's theory of the case. He once again performed in a timely and professional manner.

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Ex. 64.

ADA January's own words to his colleagues and to SWIFS affirm the materiality of the false "Ric-used-the-bigger-gun-to-shoot-the-dog" story. Manufacturing "proof" to support that false story was, however, only part of a pattern of misconduct before and during the Flores trial.

VII. THE STATE'S JERRY-RIGGED CASE AGAINST CHARLIE FLORES WAS SAVED AT THE ELEVENTH HOUR BY JILL BARGANIER.

When the State scrambled on March 23, 1999, to have Linch shore up its weak, circumstantial case with some junk science, prosecutors January and Davis

did not yet know if the trial court would allow Mrs. Barganier to testify about her sudden declaration that she could identify Charlie. The next morning, the State had arranged to bring in Linch to testify about the "testing" he had done the previous day so that they could fulfill promises made in Opening Statements. But the State received an even better windfall on March 24th, when the trial court agreed that Mrs. Barganier could testify about her identification.

Critically, neither Jackie Roberts nor Vanessa Stovall claimed that they had seen Ric and Charlie get out of Ric's Volkswagen outside of the Blacks' house. The only person who had been able to identify *either* of the two men was the Blacks' next-door neighbor, Jill Barganier. The day after Mrs. Black's murder, Mrs. Barganier identified the car's driver by picking Ric Childs' picture out of a photographic lineup. But when Charlie's trial started thirteen months later, neither Mrs. Barganier nor anyone else had been able to identify the Volkswagen's passenger seen outside of the Blacks' house, despite many intervening events. As described below, those intervening events included highly suggestive machinations by law enforcement based on their desire to see Charlie Flores implicated. Most of the details of that intermeddling were concealed from the defense at the time of trial, and much of the evidence that would show the full extent of the intermeddling has never been produced, and has very likely been destroyed. But by reconstructing what

Mrs. Barganier claimed to know and when, the improper manipulations and the inherently unreliable nature of her ultimate courtroom identification become evident.

A. The Morning of the Crime, Mrs. Barganier Got No More Than a Fleeting Glimpse of Two Men While She Was Preoccupied with Her Morning Routine.

On January 29, 1998, the Barganiers were living at 2959 Bergen Lane, next door to the Blacks in Farmers Branch. 4 EHRR 32-33. At 6:45 a.m., Jill Barganier heard a noise, looked out a front window on the right side of her house through the mini-blinds, and saw an unfamiliar car in the driveway of the Blacks' house, located on the left side of her house. The blinds were down, but cracked open. Mrs. Barganier saw two men get out of the strange car. 36 RR 280-81. She made this observation while she was in the process of getting her kids ready for school and just before waking up her husband. *Id.* She noticed the driver drinking out of a beer bottle, and that caught her attention because it was so early in the morning. *Id.*; 4 EHRR 40-44, 131.

The lights were on inside Mrs. Barganier's house, but not outside. 38 RR 13-19. Sunrise was recorded that day in Dallas, Texas as 7:25 a.m. per *The Dallas Morning News*. 38 RR 19; DX1; 5 EHRR.

A photograph of Bergen Lane, where the Barganiers' and Blacks' houses were located, shows that there were no streetlights on the block. SX3, SX4.

Shortly after 10:00 a.m., according to Lt. D.C. Porter of the Farmers Branch PD, Mrs. Barganier "arrived at the scene" and described what she remembered seeing earlier that morning. Mrs. Barganier described the car as "a yellow Volkswagen bug." She described the Volkswagen's driver as "big, with long brown hair"; "a white male, about 30 years old and with a large build" with "a quart beer bottle in his hand when he got out of the car, and that he stopped and put the bottle back into the VW before he walked up to the house." She described the passenger only as follows: "**also a white male with darker hair than the driver**. She described his hair as almost black and **thought it was 'longer.'**" 4 EHRR 44-48; AppX10 (emphasis added).

At some point later on January 29, 1998, after her first interactions with law enforcement, Mrs. Barganier was interviewed by Detective Callaway, who made some notes. His notes, seemingly of Mrs. Barganier's description of the driver, are vague and diverge somewhat from the description reputedly given to a different officer earlier that day: "WM" "carrying beer bottle pitched"; "Slob;" "Fat 30ish" "long hair." The document also includes these notes, seemingly about the passenger: "WM;" "fat;" "med hair." AppX12. Mrs. Barganier, who was under 5' tall and weighed less than 100 pounds, described both men as "fat." *Id.* (But the man she soon picked out of two different lineups, Ric Childs, was not, by most people's standards fat; he was a tall, thin drug addict.)

That same day, Mrs. Barganier went to the Farmers Branch police station and was shown a photographic lineup of some sort. We know this because a Farmers Branch photographic lineup form, signed by Detective Callaway, is in the file. AppX57 at 557. But no record of the ***contents*** of that photographic lineup have ever been produced. It is a truism that law enforcement could not have created a photographic lineup unless they already had some idea of a suspect or suspects. But law enforcement did not make (or at least keep) a record of what Mrs. Barganier was shown on this day. And whatever she was shown, Mrs. Barganier was not, at that point, able to make an identification.

Other neighbors also went to the police station and were shown unidentified photographic lineups; but none of them were able to make an identification either. Officer Jerry Baker, the second-in-command on the case, signed some of the forms, and Detective Callaway signed others. AppX57 at 714-16; *id.* at 2596. There are no extant records of what photographs any of these witnesses were shown on this date. *See* AppX57.

That same afternoon, several neighbors, including Michelle Babler and her two minor sons, Nathan and Nicolas Taylor, provided written witness "Affidavits" on Farmers Branch PD forms. In their handwritten affidavits, these neighbors described how they had seen a car pull into the Blacks' driveway and two white males about the same age get out. AppX16. Mrs. Babler's Affidavit noted that the

passenger had been wearing tan clothing; her eight-year-old son thought both men might have been wearing black. *Id.*

Police records also refer to an "Affidavit" reportedly provided by Jill Barganier. AppX17. Although the handwritten Affidavits from the neighbors are found in the police file, the one that Mrs. Barganier provided has vanished. That is, Mrs. Barganier's Affidavit is not in the police file that was finally produced to Charlie Flores in 2016, although these same records refer to such an Affidavit, demonstrating that it once existed. AppX9; 4 EHRR 272 (testimony of Officer Baker admitting that Mrs. Barganier had likely provided a handwritten affidavit).

B. The Day after the Murder, Mrs. Barganier IDed the Volkswagen's Driver: Ric Childs.

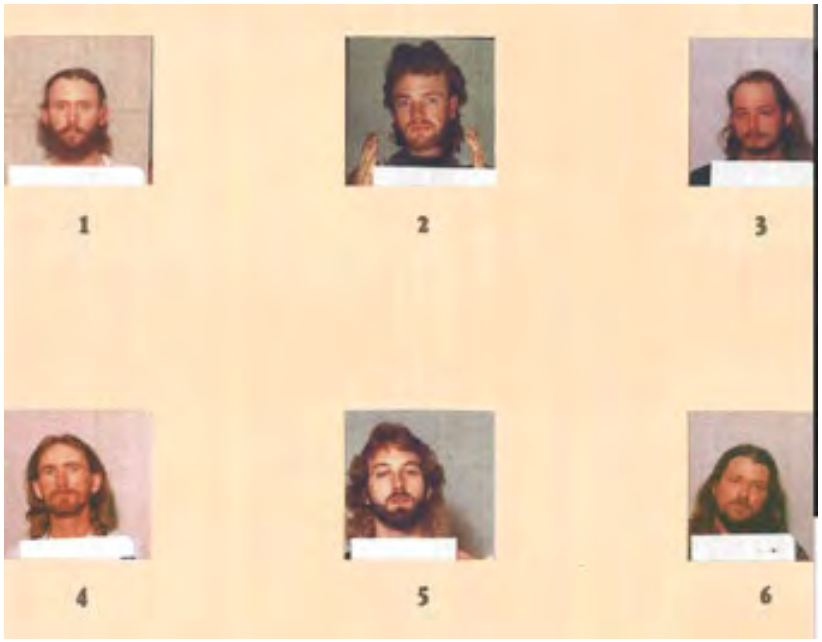
On January 30, 1998, *The Dallas Morning News* ran a front-page story about Mrs. Black's murder. The article included a description of the multi-colored Volkswagen Bug that the police were searching for. 38 RR 21; AppX57 at 2705-2706.

That morning, Mrs. Barganier went back to the Farmers Branch police station to create a composite sketch of the driver, which was then printed out:

AppX19. By this time, Farmers Branch investigators had already identified Ric Childs as a suspect and had obtained one of his mug shots. AppX20; AppX57 at 197; AppX57 at 199.

After Barganier provided the composite sketch, Farmers Branch police showed her a photographic lineup that included Ric's picture. AppX22; AppX57 at 226-27. There are no records of any instructions she may have been provided at the time. But the administration was not double-blind, as the lead investigator, Detective Callaway, signed the form demonstrating that he was the one who had presented her with the photographic lineup, and he already knew that Ric was a suspect. 36 RR

289; AppX22; AppX57 at 226-27. Mrs. Barganier was reportedly able to pick out Ric's picture (no. 2) out of the six-image lineup. AppX22; AppX57 at 226-27.



Ric is the only person holding up his hands, as if to say "pick me."

That day, Detective Callaway also showed Mrs. Barganier's neighbor, Michelle Babler, a photographic lineup of some sort, but she was again unable to make an identification. AppX57 at 1894.

C. The Next Day, Mrs. Barganier Was Back at the Police Station, Where She Was Shown Yet More Photos.

According to a memo by lead Detective Callaway, once Ric was in custody on January 31, 1998, "the similarity between his appearance and [Mrs. Barganier's] composite sketch was noted." AppX57. But according to Farmers Branch PD's own records, she had already picked Ric out of a photo lineup on January 30th, the day before Ric was taken into custody.

In any event, Mrs. Barganier came back into the Farmers Branch police station on January 31, 1998, and she was shown yet another photographic lineup that included a different, more recent picture of Ric who was, by then, under arrest. She again picked Ric, depicted in picture no. 4, out of the lineup.

Detective Callaway signed the form. AppX57; AppX24. Detective Callaway was the individual who had decided to include two different pictures of Ric in two different photo arrays, with Ric being the only common denominator between the two arrays. 36 RR 32. Detective Callaway also knew police had gotten a lead the night of the murder that the Volkswagen belonged to Ric. Therefore, Ric had been a suspect starting that first day.

That same day, Detective Callaway again showed Mrs. Barganier's neighbor, Michelle Babler, a photographic lineup of some sort, but she was again unable to make an identification. AppX57 at 230-31; *id.* at 749.

That same day, Mrs. Barganier was shown yet another photographic lineup of some kind. She signed another Farmers Branch Police Department Photographic Lineup Form and changed the date to January 31, 1998, but the form was otherwise left incomplete. *Id.* at 527.

D. Investigators Enlisted Mrs. Barganier to Try Again to Make Another Identification.

After being shown a large number of photos, most of which have never been identified, Mrs. Barganier continued to interact with Farmers Branch law enforcement. By February 3, 1998, after Ric and Jackie had been apprehended and interviewed, Detective Callaway and another unidentified officer with the Farmers Branch PD went to Mrs. Barganier's home. 4 EHRR 81-82. The officers wanted her to report to the police station again the next morning to try to do a second composite sketch, this time of the passenger—whom law enforcement, by this point, had already decided, absent any physical evidence, was Charlie Flores. Mrs. Barganier would testify that she was, at that time, "just a wreck," "very nervous," scared for "the safety of [her] children." 36 RR 290, 291. She "couldn't stop shaking." 36 RR 290. Indeed, she "felt responsible" for Mrs. Black's death because she "knew these men were there, and [she] dismissed it." *Id*. She was highly motivated to help.

She claimed that she asked the police to put her under hypnosis to help her "do a good composite." 36 RR 289-91; 4 EHRR 81-82. It is not clear how Mrs. Barganier knew that hypnosis was something that police officers sometimes did in criminal investigations. No records were made (or at least kept) memorializing the conversation between Mrs. Barganier, Detective Callaway, and the other officer at her home the night before the hypnosis session or any subsequent conversations about setting up the hypnosis session. AppX57.

Years later, when the reliability of the hypnosis session was being scrutinized, Mrs. Barganier testified that she only went to the police station seeking to be hypnotized to help her "relax," not to help the police obtain more information or to help her remember more. 4 EHRR 145-46. Her testimony in this regard does not, however, comport with statements she made during the hypnosis session itself, or with the testimony of Officer Serna who conducted the hypnosis session, or with common sense. 4 EHRR 145-46; 4 EHRR 230 (Officer Serna testifying "we wanted to elicit more information from her."); *see also* 6 EHRR 149-50 (hypnosis expert Dr. Lynn remarking that the suggestion that she went to the police station solely "to relax" was not credible because "[i]f she wanted relaxation, the last place she should go would be the police station."). Also, when the hypnosis session was conducted Officer Serna acknowledged in writing that the purpose was: to obtain "[a]ny

additional information pertaining to the suspect's identity and any other information pertinent to the case." AppX27.

At some point that night, Detective Callaway had contacted patrol officer Serna about hypnotizing Mrs. Barganier the next morning. 4 EHRR 185. Officer Serna had just joined the Farmers Branch PD. 4 EHRR 187. He had already been involved in the Black murder investigation collecting evidence at the crime scene, and had logged several hours at the Blacks' home on the day of Mrs. Blacks' murder. AppX52.[105] Officer Serna had never hypnotized anyone before, but he had received a certificate after taking a law enforcement course in 1996, two years earlier. AppX43.

E. Mrs. Barganier Was, Quite Literally, Hypnotized by the Police.

Some time before 10:00 a.m. on February 4, 1998, Mrs. Barganier reported to the Farmers Branch police station for the hypnosis session. AppX27; AppX57; 36 RR 27; 36 RR 31. She met Detective Callaway there. 4 EHRR 85. The hypnosis session was videotaped. AppX26. There is, however, no documentation reflecting when Mrs. Barganier arrived, when she entered the office where the hypnosis session was performed, or when the tape was turned on. 4 EHRR 278-280. The video camera was set up by Callaway's second-in-command, Officer Baker, who then sat in on the

[105] Additionally, after the hypnosis session, still on February 4, 1998, Officer Serna and others went to Grand Prairie to recover the burnt Volkswagen. AppX57.

hypnosis session. He is mostly off camera except for one moment when he stepped in front of the camera to adjust equipment. AppX26. The camera only captured a small part of Officer Serna's body, not including his face. *Id*.

AppX26. The sound quality of the copy of the tape that has survived is poor.[106]

The videotape shows that Officer Serna conducted a very brief pre-hypnotic interview with Mrs. Barganier. During that interview, she mentioned that she had looked out a window, saw a Volkswagen Bug, saw two men get out, noticed the driver's long hair, noticed one man drinking out of a beer bottle, described the passenger as having hair "basically like the driver's," and mentioned them closing

[106] While Charlie Flores's direct appeal was pending, the CCA sent a request to the Dallas County clerk's office seeking the original videotape of the hypnosis session. The CCA's request was denied because the videotape had been checked out by ADA January, purportedly because he was preparing for Ric Childs' trial. The tape was subsequently lost. Similarly, the affidavit that Jill Barganier provided to Farmers Branch PD the day of the crime has been "lost."

the door and walking off, after which she closed her blinds. AppX26; *see also* 6 EHRR 69-71. At one point, she confused the driver and the passenger, referring to both men as the "passenger," including the person she saw drinking out of a beer bottle, an action she had previously attributed to the driver. 4 EHRR 95, 219; AppX26. Officer Serna asked no follow-up questions. AppX26.

During the hypnosis session itself, Officer Serna invited Mrs. Barganier to imagine many things, such as: glue on her fingers, her "very own special theater … decorated in any way [she] like[d]," a "special leather chair," an elevator ride, a "yellow button" to push on an imaginary remote control, "magical letters" floating over the two men's heads, and a time-travel door she could walk through. He instructed her that, when he reached the number zero, she "could just press the [imaginary] play button, this play button will take us to Thursday, January 29. It's a very important day of significance." He also instructed her to imagine "you're going to be seeing a documentary, you're going to be seeing a film of the events that occurred on that day, on that morning." And while she was imagining this documentary, he invited her to "pan" in on each man's face and then "[t]ry and imagine, if you will, the shape of his face, if it's round or oval or square." AppX26; 4 EHRR 217-18.

As Mrs. Barganier described what she remembered in the present tense, she kept returning to the beer bottle. Officer Serna eventually asked her to use her

imaginary remote control to "fast forward" past that scene. AppX26; 4 EHRR 220. Mrs. Barganier again said of the passenger's hair that it "looked a lot like his friend's"—the driver's—which she described as "dirty, long and wavy." *Id.* Throughout the hypnosis session, Officer Serna repeatedly said "you're doing good" and "you're doing fine." AppX26. Additionally, Officer Serna made numerous suggestive statements, during and immediately afterwards:

- "Is his hair short, is it **shaved**, is it **neatly cut**?" [asked about the driver whose hair she had already described as "dirty, long, and wavy"]

- "Does he have it **neatly cut** or is it **trimmed**?" [asked about the passenger whose hair she had already described as "A lot like his friend's" and "Dark, long."]

- "You will also remember everything that you've said in this session and you might find yourself being able to recall other things as time moves on."

- "You'll remember everything that was said in this interview. And as I said, you'll be able to recall more of these events as time goes on."

- "Ok, oftentimes, like I told you before I brought you out, that hypnosis, uh, you might find yourself recalling things, things that might not have to do with the accident itself. You might be at home doing an everyday chore and something might come to you about that incident or anything else. It's almost a phenomenon the way that it happens, so it's not uncommon to just remember something after the fact, after the session."

AppX26.

The hypnosis session yielded many details that Mrs. Barganier had not mentioned in previous interviews, including a modified description of the Volkswagen. She had initially told police that it was "yellow," but while under

hypnosis she claimed to see a "pink top" and "waves" that looked "a bit purple"—which matched the description recently published in the newspaper. She also described the driver in more detail as having "dark blonde …. [l]ong, wavy" hair, "Blue eyes. Pretty eyes," "Kinda young"—details consistent with Ric Childs' recent mug shot that she had picked out of an array. As for the passenger, she described only his hair ("a lot like his friend's. . . . I see it to his shoulders") and that "[h]e has brown eyes." At the conclusion, Mrs. Barganier repeatedly asked "Did I do ok? . . . . Did I help in any way?" AppX26.

The videotape of the hypnosis session lasts approximately one hour. *Id.* There is no record of Mrs. Barganier's interactions with law enforcement personnel before the tape was turned on or after the tape was turned off. 4 EHRR 278-280.

Right after the hypnosis session, Officer Serna created a form upon which he made a short summary of his impression of what had happened in the hypnosis session. He described his memory that Mrs. Barganier had reported "two dirty men had exited the vehicle[.]" "She described Man B [the passenger] as having dark brown or blonde shoulder length hair. She said that he had turned and looked at her and she saw that he had brown eyes," although she does ***not*** say in the videotape that the passenger turned and looked at her. AppX26. Officer Serna's form also included the "purpose" for the hypnosis referral: to obtain "[a]ny additional information

pertaining to the suspect's identity and any other information pertinent to the case." AppX27.

After the hypnosis session, Detective Callaway took over again. 4 EHRR 277. Mrs. Barganier was asked to do additional tasks to assist in the investigation. At 12:54:56 PM, a composite sketch that Mrs. Barganier had created of the passenger was printed out at the Farmers Branch police station:

AppX28. This sketch somewhat resembles the first composite sketch she had done of the Volkswagen's driver before picking Ric Childs' picture out of two different photographic lineups. *Compare* AppX19 *with* AppX28.

Immediately thereafter, despite Mrs. Barganier's previous descriptions to police and contrary to her composite sketch, law enforcement personnel started showing her a photographic lineup with Hispanic males with short, dark hair—prominently featuring a recent picture of Charlie Flores (No. 2):

AppX30.

Even with the highly suggestive central placement of Charlie's photo—with his image being the only one that featured bright clothing and a distinctive background and that did not have a white bar blocking part of the picture—Mrs. Barganier was unable to pick anyone out.

Neither Mrs. Barganier nor any other neighbor had described either of the men seen exiting the Volkswagen Beetle at the Blacks' home as Hispanic or as having short, shaved black hair. But on the same day that Mrs. Barganier created the second composite sketch, supposedly of the passenger, Detective Callaway had a photographic lineup ready to go that included a picture of Charlie Flores with short, shaved hair. 36 RR 105-06; AppX30. It is unclear if this was the first time Mrs. Barganier had been presented with a photographic lineup that included a picture of Charlie Flores, because most of the previous Farmers Branch Police Department Photographic Lineup Forms that she signed were not paired with photo arrays. 4 EHRR 177-78. But it is undisputed that she did ***not*** make any identification at that time when shown Charlie Flores's most recent mugshot, taken a few months before Betty Black's death:

F. As Time Passed, Mrs. Barganier Was Exposed to Yet More Images of Charles Flores, and Certainly Knew That He Was the Person Against Whom She Would Be Testifying When His Case Went to Trial.

Over the next several months, photographs of Charlie Flores, all depicting him as a large Hispanic male with short, shaved, black hair, appeared in the news. *See, e.g.*, AppX57 at 1626-28, 1726-29. The exact same picture of Charlie that was used in the photo lineup that had been presented to Mrs. Barganier was reproduced in several *Dallas Morning News* articles before Mrs. Barganier would eventually claim at the eleventh hour in court that she could identify him. *See, e.g.*:

Student, doctor thwart murder suspect's escape

One grabbed gun, while the other handcuffed man after he overpowered deputy

By Kendall Anderson
Staff Writer of The Dallas Morning News

Charles Don Flores might be a big, tough capital murder suspect who managed to elude the law for months, but he messed with the wrong med student and anesthesiologist Friday.

Charles Don Flores

Mr. Flores, arrested in May and charged with killing a Farmers Branch woman, tried to escape custody by complaining of a leg injury. He then overpowered the deputy who took him to Parkland Hospital.

To the rescue came fourth-year medical student Ferhan Asghar and Dr. Andy Konen. Mr. Asghar relieved the suspect of the deputy's gun, and Dr. Konen and two other hospital workers wrestled him into handcuffs.

Mr. Asghar, a 24-year-old University of Houston medical student, may have saved Deputy Bryan Sher-

man's life, officials said.

"We believe the suspect had planned this and was intent on fleeing and was attempting to shoot the deputy," said Bill Spencer, a Sheriff's Department spokesman.

"So the indications are that Mr. Asghar was instrumental in helping to bring the situation to a conclusion. We are grateful and appreciative to him and all those who came to the officer's assistance."

Mr. Asghar and Dr. Konen could

Please see MURDER on Page 33A.

Ex. 38. His picture was also featured in a "Fox 4 segment on FBI Most Wanted" at least twice. AppX9.

Mrs. Barganier admitted at the time of trial that she had seen Charlie's picture in the news on at least one occasion before she saw him in the courtroom during his trial. 36 RR 108.

There are no extant records of the interactions Mrs. Barganier had with law enforcement and/or members of the DA's Office after the long day during which she had (1) been hypnotized, (2) created a second composite sketch, and (3) been shown photographic lineups, this time undoubtedly featuring Charlie Flores' picture. Most likely, the prosecutors interviewed her at some point, as she was subpoenaed to appear at his trial. (The DA's Office has never produced any notes of fact witness interviews made by anyone on the prosecutorial team.)

On March 23, 1999, thirteen months after Mrs. Barganier had fleetingly seen two men get out of a Volkswagen Beetle before dawn on January 29, 1998, she came to the courthouse with her husband Robert Barganier. 35 RR 2; 4 EHRR 110. She was called to the stand after her neighbors Michelle Babler and Nathan Taylor had testified.[107] At that point, she observed Charlie Flores in the courtroom seated at the defense table. 4 EHRR 118-19.

At some point that day, before Mrs. Barganier was called to the stand but after she had seen Charlie Flores in the courtroom, she told the prosecutors that she could *now* identify him. 36 RR 85-86, 92. Thereafter, ADA January approached the bench and informed the trial court and defense counsel of this development in an

[107] Neither of these witnesses identified a specific person. Nor did Mr. Barganier. 35 RR 38-39, 109; 35 RR 162-92. Ms. Babler's testimony before the jury differed considerably from the description found in her Affidavit signed on January 29, 1998, the day of the murder. But she was not cross-examined about those notable differences. *Compare* AppX16 at 5 *with* 35 R 96-135.

unrecorded bench conference. The defense counsel then apprised the trial court that they intended "to object to her testimony on the grounds that her in-Court identification is tainted by the hypnotic episode that she had undergone." 36 RR 15-16.[108] Towards the end of the second day of trial, this was the first notice that the defense had that Mrs. Barganier was purportedly able to identify Flores. 4 EHRR 122.

During a break from trial, Judge Nelms raised concerns about the timing of Mrs. Barganier's purported identification. 36 RR 84-85. ADA January represented to the court that he had had minimal interactions with her: "Other than just interviewing her and talking to her about the case, the fact that she was able to positively identify, she told me she was positively able to identify Childs who was, you know, a couple of arm lengths away from Flores. I knew she had the opportunity. I had no idea whether she would be able to or not." 36 RR 85.[109]

Later that day, after Mrs. Barganier started to testify, defense counsel asked for the jury to be excused, then formally objected to the prospect of her testifying

[108] This development was explained after-the-fact when Judge Nelms put this background on the record during the Zani hearing the next morning. 36 RR 15-16.

[109] Notably, ADA January made the assertion that Charlie was "a couple of arm lengths away from" Ric at the time of Mrs. Barganier's observation. He likely framed his questions to Mrs. Barganier in the same manner—*i.e.*, presupposing the answer he was seeking regarding the passenger's identity when he was "interviewing her and talking to her about the case." 36 RR 85. But, yet again, it is important to note that no record of any of these interviews with or statements made by Mrs. Barganier have ever been produced other than the investigator's notes described above (produced long after trial) and the hypnosis video.

about the identification. The prosecution then argued that the hypnosis had made no difference, but agreed to move on to another witness until they could have a "Zani hearing" in the morning outside the presence of the jury. Mrs. Barganier's husband, Robert Bargainer, was then called to the stand while she waited outside. 35 RR 153-62.

Robert Barganier provided some odd testimony: he suggested that he had recognized the Volkswagen. Specifically, he said that he had seen it before parked over on Emeline Street, where Gary Black had lived with Jackie Roberts, and so was not suspicious of the car. 35 RR 176-78, 190-92. (It was not explained why he knew where Gary Black had lived.)

G. The Hastily Convened Zani Hearing the Next Morning Was a Farce.

A "Zani hearing" was necessary because that is what Texas law required: that the trial court assess whether the "procedural safeguards" outlined in the 1988 CCA *Zani* case had been complied with, such that a witness should be permitted to testify in the wake of a forensic hypnosis session. During the past several decades, the CCA has not revisited the premises upon which *Zani* is based. Therefore, Texas law in 1999, and Texas law today, are premised on the concept that, if certain procedural safeguards are followed in conducting a forensic hypnosis session, then the "four-pronged dangers" of hypnosis can be guarded against. *Zani*, 758 S.W.2d at 243.

Those dangers are: "hypersuggestibility," "loss of critical judgment," "confabulation," and "memory cementing." *Id.*

The procedural safeguards that *Zani* suggested could be used to guard against hypnosis's four-pronged dangers are:

- the level of training in the clinical uses and forensic applications of hypnosis by the person performing the hypnosis;

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

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

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

- the creation of recordings of all contacts between the hypnotist and the subject;

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

- the appropriateness of the induction and memory retrieval techniques used;

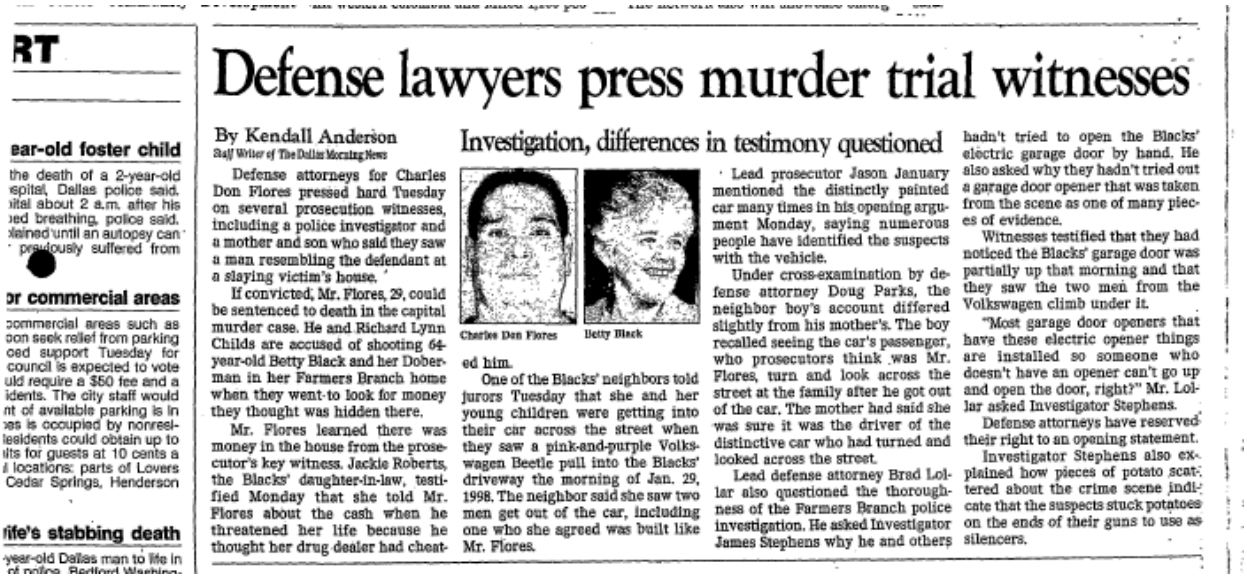
- the appropriateness of using hypnosis for the kind of memory loss involved;

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

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

Id. at 243-44.

The morning of the Zani hearing, March 24, 1999, *The Dallas Morning News* published an article about the trial—again featuring Charlie Flores's photo. The article emphasized inconsistencies in the testimony of the State's witnesses that were being brought out on questioning.



RT

ear-old foster child

the death of a 2-year-old spital, Dallas police said. ital about 2 a.m. after his ed breathing, police said. ained until an autopsy can viously suffered from

or commercial areas

commercial areas such as on seek relief from parking ed support Tuesday for council is expected to vote uld require a $50 fee and a idents. The city staff would nt of available parking is in as is occupied by nonresi- lesidents could obtain up to its for guests at 10 cents a l locations: parts of Lovers Cedar Springs, Henderson

ife's stabbing death

year-old Dallas man to life in

Defense lawyers press murder trial witnesses

Investigation, differences in testimony questioned

By Kendall Anderson
Staff Writer of The Dallas Morning News

Defense attorneys for Charles Don Flores pressed hard Tuesday on several prosecution witnesses, including a police investigator and a mother and son who said they saw a man resembling the defendant at a slaying victim's house.

If convicted, Mr. Flores, 29, could be sentenced to death in the capital murder case. He and Richard Lynn Childs are accused of shooting 64-year-old Betty Black and her Doberman in her Farmers Branch home when they went to look for money they thought was hidden there.

Mr. Flores learned there was money in the house from the prosecutor's key witness. Jackie Roberts, the Blacks' daughter-in-law, testified Monday that she told Mr. Flores about the cash when he threatened her life because he thought her drug dealer had cheated him.

Charles Don Flores

Betty Black

One of the Blacks' neighbors told jurors Tuesday that she and her young children were getting into their car across the street when they saw a pink-and-purple Volkswagen Beetle pull into the Blacks' driveway the morning of Jan. 29, 1998. The neighbor said she saw two men get out of the car, including one who she agreed was built like Mr. Flores.

Lead prosecutor Jason January mentioned the distinctly painted car many times in his opening argument Monday, saying numerous people have identified the suspects with the vehicle.

Under cross-examination by defense attorney Doug Parks, the neighbor boy's account differed slightly from his mother's. The boy recalled seeing the car's passenger, who prosecutors think was Mr. Flores, turn and look across the street at the family after he got out of the car. The mother had said she was sure it was the driver of the distinctive car who had turned and looked across the street.

Lead defense attorney Brad Lollar also questioned the thoroughness of the Farmers Branch police investigation. He asked Investigator James Stephens why he and others hadn't tried to open the Blacks' electric garage door by hand. He also asked why they hadn't tried out a garage door opener that was taken from the scene as one of many pieces of evidence.

Witnesses testified that they had noticed the Blacks' garage door was partially up that morning and that they saw the two men from the Volkswagen climb under it.

"Most garage door openers that have these electric opener things are installed so someone who doesn't have an opener can't go up and open the door, right?" Mr. Lollar asked Investigator Stephens.

Defense attorneys have reserved their right to an opening statement.

Investigator Stephens also explained how pieces of potato scattered about the crime scene indicate that the suspects stuck potatoes on the ends of their guns to use as silencers.

AppX57

The State presented the following witnesses at the Zani hearing: Officer Jerry Baker (the second-on-command on the Black murder case), Officer Alfredo Serna (the police officer hypnotist), Dr. George Mount (the State's hypnosis expert), and Mrs. Barganier. 36 RR 18-111. The defense called no witnesses—and had no expert of its own, as they had been ambushed with Mrs. Barganier's sudden "identification" the day before, in the middle of trial.

1. Zani hearing testimony of Officer Baker was false.

Officer Baker testified that the hypnosis session had been set up because Mrs. Barganier "thought [hypnosis] would help her relax and recall things that she might have overlooked." 36 RR 31. He also testified that he did not know what Charlie Flores looked like and did not know his name before the hypnosis session. 36 RR 20-21.

Officer Baker's testimony was false because the police file shows that he was a key player in the interview of Ric's girlfriend Vanessa Stovall, which had taken place on January 31, 1998—several days before the hypnosis session—in which she purportedly gave a description of Ric's friend Charlie as "a large Hispanic male with short hair and wearing glasses." AppX8.

Additionally, before or on the day of the hypnosis session, Detective Callaway had conferred with a detective with the Arlington PD about the burned Volkswagen; and it was Callaway who told the Arlington detective that Charlie Flores should be considered a suspect in the aggravated assault against James Jordan, that Farmers Branch was treating Flores as a suspect in the Betty Black murder case, and that Farmers Branch PD already had an older mugshot of Flores that had been obtained from a Tarrant County database. SXR100.

Further, starting at least by 6:30 a.m. that same day, February 4, 1998, Baker's SID colleagues had obtained a recorded statement from Jackie Roberts, during which

she had been asked about Ric's friend Charlie—whose trailer was already under surveillance by then.

Moreover, the Farmers Branch team investigating Mrs. Black's murder had a photo array with Charlie Flores's most recent mugshot from Irving PD ready to show Mrs. Barganier as soon as she finished with the hypnosis session. *See* AppX30.

The defense, however, had not been given the documents necessary to connect the dots and thus demonstrate that Officer Baker was lying under oath during the Zani hearing about his knowledge that Charlie Flores was already viewed as a suspect.

2. Zani hearing testimony of Officer Serna demonstrated that he was unqualified.

Officer Serna testified that he was employed as a Farmers Branch police officer and that he was a "certified hypnotist." 36 RR 33-34. That meant that he had completed one course offered by a law enforcement training group; he had taken that one course in August of 1996—nearly a year and a half before his encounter with Mrs. Barganier. 36 RR 35, 42. He testified that he was aware of the "four possible dangers of hypnosis." 36 RR 35.

Serna claimed that, in hypnotizing Jill Barganier, he had used the "safeguards" to guard against these dangers. He described the safeguards as using "the movie theater technique" because it is "designed" to limit the opportunities for

confabulation. 36 RR 36, 49. He claimed that the movie theater technique was "the best technique" to avoid hyper-suggestibility—although it is a technique that invites the hypnosis subject to pretend that their memories exist on a videotape and can thus be paused, fast-forwarded, and rewound using an "imaginary remote control." 36 RR 40.[110] He agreed with the prosecutor that he had not suggested "one single thing to her at all"—although he did in fact suggest several things. For instance, he repeatedly suggested that one of the two men she had described as having "long, wavy hair" might have "short, shaved hair;" most importantly, he suggested: "You will also remember everything that you've said in this session and you might find yourself being able to recall other things as time moves on." 36 RR 41.

No one challenged Officer Serna about his lack of knowledge of the Zani "procedural safeguards" that were supposed to be considered in assessing the reliability of a forensic hypnosis session—which include assuring that the hypnotist was sufficiently experienced, that the hypnotist was independent of law enforcement, that a complete written record of all facts that the hypnosis subject remembered *before* the hypnosis session was created before the hypnotism, etc. *See Zani*, 758 S.W.2d at 243-44.

[110] The trial court did not hear about the empirical research that has shown that Serna's "movie theater technique" can actually "produce a greater frequency of inaccurate memories." 6 EHRR 60.

Officer Serna repeatedly testified in the Zani hearing that his "safeguard" was deciding to use the "movie theater technique." Yet this "technique" implies that a "documentary film" of Ms. Barganier's experiences and memories existed inside her head that she could visualize—which is both inaccurate and misleading. 6 EHRR 65. He claimed that he had made the decision to use this technique after talking to Mrs. Barganier and learning that she had some trauma because she "felt that the suspects had seen her or their eyes had crossed"—although, according to the videotape, Mrs. Barganier did not make such a claim during the pre-hypnotic interview or during the hypnosis session itself. 36 RR 39, 45.

Officer Serna admitted to the trial judge that, before being called late at night to come in for a hypnosis session the next morning, he had been involved as a crime scene technician at the crime scene; but he claimed that he had not spoken to any witnesses. 36 RR 37-38. He had, however, conferred with the second investigator, Jerry Baker, who was in the room with them during the hypnosis session.

Officer Serna testified that he had not heard the name "Charles Don Flores" and had no idea what he looked like before the hypnosis session. 36 RR 38. Yet for some reason, during the hypnosis session, he started asking leading questions about whether either man had "neatly cut" or "shaved" hair when Mrs. Barganier had repeatedly stated that both men had long, dirty hair. He then denied that he had asked any leading questions. 36 RR 47.

Officer Serna claimed that he had not "noticed" any confabulation during the hypnosis session because "the safeguards" prevented this—although confabulation is something that takes place inside a person's head and thus cannot be "seen" by anybody. 36 RR 39.

Officer Serna felt that Mrs. Barganier was a suitable subject for hypnosis, did not "appear" "overly fatigued or depressed," intoxicated, or addicted to drugs, but appeared instead to be in good mental health—yet there is no indication that he asked any questions to ascertain her state of mind or health in advance of the session. 36 RR 48. (Later, before the jury, Mrs. Barganier testify that, at the time of the hypnosis, she was "just a wreck," "very nervous," scared for "the safety of [her] children." 36 RR 290, 291. She also admitted to being "kind of a nervous type person" generally. 36 RR 90.)

Officer Serna did admit that he told her "that's good" as feedback during the session. 36 RR 48-49. And Officer Serna acknowledged that he had ***not*** told the lead investigator, Detective Callaway, that the hypnosis session should not be conducted at the police station, although doing so was another violation of the Zani procedural safeguards. 36 RR 53.

Officer Serna informed the trial judge that he believed that memory worked "like a video recorder"—something that the State's own expert (Dr. Mount) would disavow when he testified. 36 RR 57. But the trial judge accepted Officer Serna's

denial that he had not "planted any seeds that would flower or bloom 13 months later." 36 RR 59.

As it turns out, this hypnosis session with Mrs. Barganier was the one and only time that Officer Serna ever endeavored to hypnotize a witness. 4 EHRR 185, 240. But during the Zani hearing, no one asked about his experience.

3. Zani hearing testimony of George Mount, Ph.D. showed a weak grasp of the key facts.

Dr. Mount, a local clinical psychologist, was the State's hypnosis expert. He testified that he had been contacted by the prosecution the evening before. 36 RR 74; SX86. He agreed with the prosecutor that he had "vast experience with forensic hypnosis" and his resume was admitted into evidence. 36 RR 60-61. Dr. Mount's experience involved working with law enforcement hypnotists.

Dr. Mount testified that he had reviewed the videotape of the hypnosis session (SX84) and Officer Serna's certificate from the police course (SX85) and found no problems with Officer Serna's credentials. 36 RR 62, 65. Either Dr. Mount did not know, or did not ask, about Officer Serna's actual experience—which was non-existent.

Dr. Mount opined that he was familiar with the *Zani* case, the "four possible dangers of hypnosis," and the ten procedural safeguards. 36 RR 63. He offered his opinions as to how the procedural safeguards had been adhered to during the

February 4, 1998, hypnosis session—but in ways that were indefensible in light of the key facts:

- Dr. Mount found that Officer Serna was sufficiently trained to perform a forensic hypnosis. Yet Serna's hypnosis of Ms. Barganier was his first; and the only training he had received was one course through a police organization. 6 EHRR 60.

- Dr. Mount blessed the "movie theater technique" that Officer Serna had used, although this technique actually increases, not decreases, the dangers associated with hypnosis. 6 EHRR 64. Studies about the problems with this precise technique existed at the time of the hypnosis session, but Dr. Mount was either unaware or failed to apprise the court of the controversy. 6 EHRR 65-66.

- Dr. Mount testified that he did not "see" any confabulation or any problems with Officer Serna's procedures—even though "confabulation" is not something that can be "seen."

- Dr. Mount testified that leading questions should not be asked, but claimed he had not heard any leading questions. 36 RR 63-65, 69-70. However, the audio of the hypnosis session shows that Officer Serna made multiple leading and suggestive statements during the hypnosis session, particularly about the men's hair, and also suggesting that Mrs. Barganier would somehow be able to "remember more" as time passed:

    - "You will also remember everything that you've said in this session and *you might find yourself being able to recall other things as time moves on.*"

    - "You'll remember everything that was said in this interview. *And as I said, you'll be able to recall more of these events as time goes on.*"

    - "Ok, oftentimes, like I told you before I brought you out, that hypnosis, uh, you might find yourself recalling things, things that might not have to do with the accident itself. You might be at home doing an everyday chore and something might come to you about that incident or anything else. It's almost a phenomenon the way that it happens, so *it's not uncommon to just remember something after the fact, after the session*."

6 EHRR 83 (emphasis added).

- Dr. Mount concluded that Officer Serna was sufficiently "independent" of law enforcement; yet Serna was not only a police officer, but also on the team investigating the Black murder case. In Dr. Mount's view, the *Zani* safeguard regarding the need for the hypnotist to be "independent of law enforcement" meant only that the investigator should not hypnotize his own witnesses or be the investigator in charge of the case. 36 RR 67-68, 75-76. Dr. Mount did not see an issue with one of the lead investigators on the case (Baker) being in the room during the hypnosis session—again, contrary to *Zani*. 36 RR 68. Moreover, the quality of the videotape is so poor that it is impossible to tell if Officer Baker, who knew the police's desired suspect, gave Mrs. Barganier any auditory clues or encouragement, or passed Serna any notes. 6 EHRR 63.

- There was no record of all information known to the hypnotist before the session, as *Zani* requires, because the only records the police made were the videotape and the short form Officer Serna created afterwards in which he mistakenly claimed that Mrs. Barganier had reported during the session that the passenger had "turned and looked at her." 6 EHRR 61. Yet Dr. Mount had no problem with these discrepancies.

- The videotape of the hypnosis session did not capture "all contacts between the hypnotist and the subject," as *Zani* recommends; nor did the videotape capture the full body of the hypnotist (Serna) or any of the observer (Baker), as *Zani* required. 6 EHRR 62. Yet Dr. Mount had no problem with the failure to adhere to those safeguards, either.

- Dr. Mount also testified that it was okay that the hypnosis session had been conducted at the police station because Mrs. Barganier "seemed very comfortable and at ease." 36 RR 69. But that view ignores the rather obvious scientific teaching that this setting could only have "increased the pressure on her to identify the culprit," as opposed to ensure reliable recollection. 6 EHRR 62-63.

In sum, Dr. Mount's 1999 testimony wrongly suggested that the *Zani* procedural safeguards had been complied with when, in fact, the opposite was true. 6 EHRR 66.

Dr. Mount did note that "if [Mrs. Barganier] was looking at pictures a lot or stuff like that, that might be a different issue" in terms of whether the passage of time might have affected the accuracy of her identification. 36 RR 73-74. Apparently, Dr. Mount had not been informed that Mrs. Barganier had been shown numerous, unidentified photographic lineups before and right after the hypnosis session. (And the defense at the time had no records with which to impeach him about this fact.)

Dr. Mount also revealed his contradictory view of the nature of memory. On one hand, he suggested that Mrs. Barganier's memory was "there" and "something happened" to "trigger" the memory thirteen months later. 36 RR 73. On the other hand, he agreed that memory does *not* work like a videotape recorder—and he did not seem to know that Officer Serna *did* believe that memory works that way. 36 RR 82.

In terms of assessing the accuracy of Mrs. Barganier's memory, Dr. Mount admitted that her memory had not seemed that sure during the hypnosis session. 36 RR 75. He was not asked to explain how a memory that was vague and unsure at the time of the hypnosis session could suddenly solidify thirteen months later. But he

did admit that it is important to corroborate an hypnotically enhanced memory, because one cannot tell the difference between true and pseudo memories—but that, he said, would be an issue for an eyewitness expert, and he was not such an expert. 36 RR 81-82.

4. Zani hearing testimony of Jill Barganier showed that her vague, unsure memory had been contaminated over time.

Before the Zani hearing, ADA January asked Mrs. Barganier a leading question as to whether she had enlarged her description of what she had seen "in any way" as a result of the hypnosis, and she answered "No." 35 RR 156. In truth, much of the information provided in the hypnosis session was new, relative to the pre-hypnotic interview and her previous statements to law enforcement. *See* above; *see also* 6 EHRR 80-82.

During the Zani hearing, quite contrary to her previous inability to identify anyone as the car's passenger, Mrs. Barganier further testified that, after seeing Charlie Flores in court the day before, she was now "100 percent" sure he was the passenger she had seen get out of the Volkswagen thirteen months before. 36 RR 93. She also provided descriptions of the driver and the passenger that were different from those she had provided to law enforcement: the day of the crime, during the pre-hypnotic interview, and during the hypnosis session itself. 36 RR 102-6. She further stated that she was unaware that she had been shown a photographic lineup

after the hypnosis session that included Charlie's picture in it (although she undoubtedly was). 36 RR 106. She stated: "I was shown a lot of photographic lineups. I couldn't tell you – if I didn't pick him out of there I assume I wasn't shown one with him in there." *Id*. Nearly twenty years later, the State conceded that she had been shown at least one picture of Flores on February 4, 1998, the same day as the hypnosis session. AppX30. She did admit that she had seen articles about the case in the newspaper, which included images of Flores when he was arrested. 36 RR 108.

After Mrs. Barganier's testimony, the trial judge expressed some skepticism about the identification being made only after Mrs. Barganier had seen Flores in the courtroom sitting at the defense table, knowing he was the accused: "And honestly you don't have to be a rocket scientist to pick out who is the Hispanic individual in the Courtroom." 36 RR 108-09. But Mrs. Barganier again insisted that she was "over 100 percent sure." 36 RR 109.

5. Zani hearing arguments and ruling reflected errors of fact and laws that resulted in Mrs. Barganier testifying about her unreliable identification.

After Mrs. Barganier's testimony, counsel made arguments. Relying on Dr. Mount's purported expertise and the fact testimony of Officer Serna and Officer Baker, ADA January argued that Mrs. Barganier should be allowed to testify because the State had satisfied its burden under *Zani* and all "the four possible dangers of

hypnosis" had been guarded against. 36 RR 116. More specifically, ADA January argued that (1) "the hypnosis had little or nothing to do with her in-Court identification at all" and (2) "if it had any effect, it certainly was proper under any of the Zani guidelines." ADA January also argued that there was evidence to corroborate "her identification." 36 RR 111-13.[111] But none of the purportedly corroborating evidence he refers to placed Charlie outside of the crime scene as the passenger exiting Ric's Volkswagen Beetle; Mrs. Barganier was the *only* witness to make such an identification—and only *after* seeing Charlie in the courtroom on trial for her neighbor's murder. Thus, there was in fact no corroboration of her identification.

The trial judge recognized that "The real issue here is whether her in-Court identification is trustworthy or not. And if it is not trustworthy by reason of the hypnosis, then obviously it would not be admissible." 36 RR 117-118. But the defense's motion to disallow her testimony was denied in reliance on ADA January's representation about the existence of corroborating evidence. 36 RR 118.

Thereafter, Ms. Barganier was called to the stand a second time in front of the jury. 36 RR 276. Mrs. Barganier was permitted to testify and identified Charlie as the person she had seen emerged from the passenger side of the Volkswagen at 6:45

[111] *See* Section VIII.A, below, debunking the notion that any evidence corroborated Mrs. Barganier's identification.

a.m. Although she had originally told the police that the Volkswagen was yellow, she told the jury that it "was like purple and pink and divided by like waves," matching the description in the police bulletin and a *Dallas Morning News* article. 36 RR 281; AppX10.

In her testimony before the jury, she initially emphasized her focus on the car and the beer bottle. She said that she had told her husband what she had observed: "I told him to look at this car because the paint job on it was so different.[112] And I said that there was someone over at Bill's and Betty's and why were they drinking beer so early in the morning." 36 RR 286. In describing the men, she confused the driver and the passenger, as she had done during the pre-hypnotic interview.

ADA January then scolded her: "I think you said passenger. Let's just focus for a minute." *Id.*

Mrs. Barganier apologized, then described the driver as follows: "He stood up, reached back and got a beer bottle out of his car and took another drink of his beer and put his beer bottle back." 36 RR 292. She then claimed, ***for the first time***, that the passenger turned and faced her. 36 RR 283. She testified that she felt this man had seen her (as she stood inside her house, looking through her mini-blinds toward a driveway the length of her entire house away). She told the jury how

[112] If this is an accurate report of what she told her husband, it is odd that he did not then share with her that he actually recognized the car from seeing it over at Jackie's house (which was his trial testimony).

"meeting eyes" with the car's passenger that day had made her "real nervous" and "scared" because she felt "[t]hey knew someone was there watching them." 36 RR 285. She then identified the passenger as Charles Flores, stating "I'm positive" and claiming she was in fact "[o]ver 100 percent" positive. "He's the man I saw that morning." 36 RR 294.

Finally, Mrs. Barganier emphasized that she was sure that she made this observation at **6:45 a.m.** because she kept a "real strict schedule" that involved getting three children ready for school, herself ready for work, and her husband awake and off to work. 36 RR 279-282; 4 EHRR 127. She further testified that she was focused on her children by 7:00 a.m. and left for work about 7:25 a.m., not noticing if the Volkswagen was still there. 36 RR 287.

H. Jill Barganier's Testimony, Although It Contradicted the Timeline of the State's Other Key Witnesses, Saved the State's Case.

Jill Barganier was quite adamant that she had looked out of her window at 6:45 a.m.:

> Q. On the time being 6:45, what makes you sure, if you are, about that particular time frame?
>
> A. I stay on a real strict schedule in the morning to get everyone out of the house on time.
>
> Q. So when you looked out at 6:45, was this vehicle, at the time that you saw it, was it pulling into the driveway?

> A. I didn't I heard it as it was coming up the street. I didn't see which direction it was coming from. By the time I looked out the window, it was in the driveway.

36 RR 281.

Jill Barganier was confident that she had made her observation at 6:45 a.m. But this timeline did not fit with testimony the jury had already heard.

Jackie Roberts had already testified that Ric and Charlie had dropped her off in the El Camino between 7:00-7:15 a.m. 34 RR 153. Additionally, Doug Roberts had already testified that he had seen Jackie come home and then seen Ric leave in his Volkswagen between 7:00-7:15 a.m. More specifically, the first time he testified, Doug claimed he was certain that Jackie returned home and Ric left around 7:15 a.m.—and he insisted that it could not have been as early as 6:15-6:30 a.m. 34 RR 277. That gave Doug and Jackie an alibi at the time of the break-in at the Blacks. And this testimony, if believed, meant that the Volkswagen could not have been at the Blacks' house before 7:15-7:30 AM.

But the State had also presented testimony that Ric and Charlie were together in North Dallas with Vanessa Stovall from about 6:30-7:30 a.m.—without Jackie. Vanessa Stovall had testified that Ric and Charlie had met her at Ric's grandmother's house in North Dallas and hung around doing drugs from at least 6:30-7:00 a.m. Therefore, the State's theory was that Ric and Charlie went from Farmers Branch to Vanessa in North Dallas *after* dropping Jackie off, and then back out to Farmers

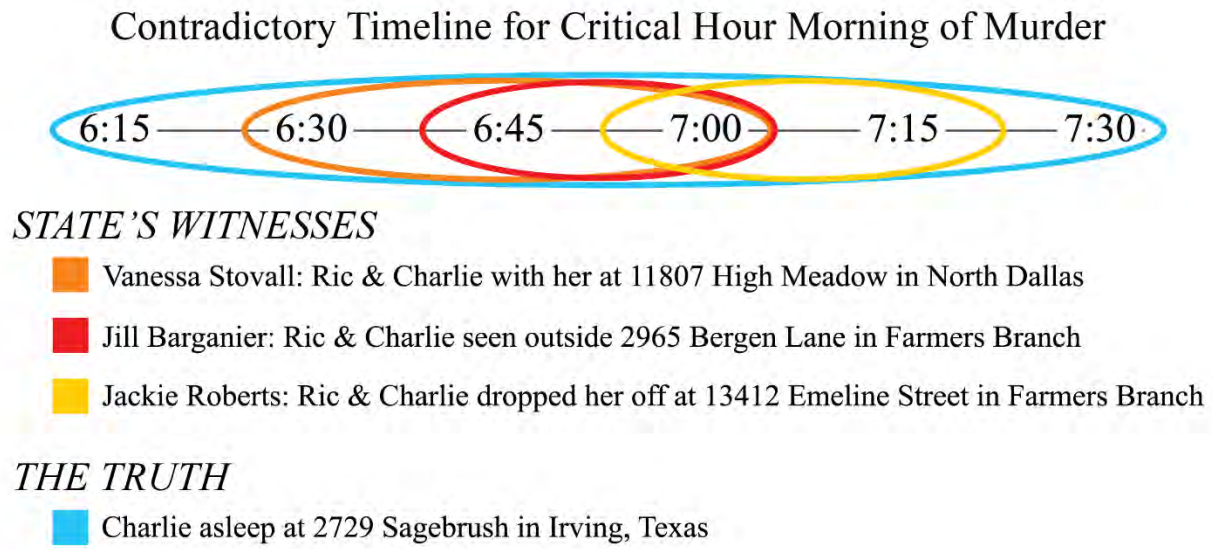
Branch—which, if Jackie and Doug had been correct about the time, then Vanessa had to have been wrong—or vice versa. The truth was: Charlie had not been with Ric when Ric had taken Jackie in Gary Black's El Camino back to Farmers Branch; Charlie had stayed behind at his trailer, then slept for a few hours, before Myra started getting her kids ready for school. Moreover, Ric had *not* gone to see Vanessa in North Dallas (with or without Charlie) because his Volkswagen was seen 1.6 miles away from Emeline in Farmers Branch at the Blacks' house by 6:45 a.m. or so (the same time Vanessa claimed he and Charlie were with her.)

This glaring inconsistency cast doubt on the credibility of Jackie, Doug, and Vanessa. That is likely why, when Doug returned to the stand a second time, he changed his testimony, insisting that Jackie had come home at 6:35 a.m. after all. 35 RR 14, 21. But that could not repair the damage; Doug's revised testimony was still inconsistent with Vanessa's.

Mrs. Barganier's testimony utterly muddled the State's timeline—***but*** she gave them so much more in exchange. She was adamant that she had made her observation through her mini-blinds at 6:45 a.m. and, by 7:00 a.m., she was busy getting her kids ready for school. 36 RR 280-81.

The State had worked hard to destroy Charlie's alibi by repeatedly seeking to indict Myra Wait so that she would not be credible (had the defense called her). The State had then tried to preemptively rebut that alibi (that the jury ultimately never

got to hear) by having Jackie and Vanessa put Ric and Charlie together in Ric's Volkswagen soon before the break-in. But the State—through Jackie, Vanessa, and Jill Barganier—ended up placing Charlie in three different places at the same time—and contrary to what a fourth witness, Myra Wait, could have said:



Thanks to Mrs. Barganier, the jury could ignore some of the State's ham-fisted attempt to manufacture evidence.

In an article the day after her game-changing testimony, *The Dallas Morning News* emphasized the significance of Mrs. Barganier's contribution to the State's case—noting how she had declared that she was "over 100 percent sure" of her identification. Ex. 38. The article noted that this next-door neighbor had seen "the man on trial getting out of a Volkswagen Beetle parked in the driveway before the killing" and that she had "locked eyes with Charles Don Flores as she looked out her window and he stepped out of the pink-and-purple car the morning Betty Black was

shot to death." *Id.* The article captured her anxiety, quoting her as testifying that "It made me real nervous. It scared me" and how she had been "just a wreck" and "felt responsible" after the murder had been discovered. *Id.* The article noted that ADA January had "argued that Mrs. Barganier had identified Mr. Flores as the Beetle passenger and had described him to police *before* she was hypnotized." *Id.* (emphasis added). This statement is patently false. It is unclear if ADA January made this false report to the journalist or the journalist misunderstood his statements on the record. But it is uncontested that Mrs. Barganier failed to make an identification until she showed up in the courtroom, thirteen months after her observation and the highly suggestive hypnosis session on February 4, 1998. But Mrs. Barganier's vague description during the hypnosis session is notable because it exposed that what she had observed (and could remember a few days after the observation) was utterly vague—and inconsistent with Charlie Flores's appearance. The hypnosis session was significant, not because it produced any meaningful memory at the time, but because ***it instilled in her false confidence that she could "remember more" as time passed.***

The article captured the State's false narrative that the hypnosis session had no effect on Mrs. Barganier, that it accomplished nothing more than helping Mrs. Barganier "relax … before she worked with investigators on a composite sketch of Mr. Flores." *Id.* What the article does not mention—because neither the jury nor the

defense was told—that the composite sketch she made after the hypnosis session ***looked nothing like Charlie Flores***; likewise, the trial record did not reflect that, when presented with a photographic array featuring a recent picture of Charlie Flores, ***she had failed to identify him***—because this key fact was not disclosed.

Mrs. Barganier was one of the few non-drug-dealing, drug-using individuals called by the State. She was a petite neighbor-lady with a seemingly normal morning routine. She was an innocent bystander who had been appalled by the man chugging beer so early in the day, and then horrified that the people she had glimpsed out a window had seemingly gone on to murder her next-door neighbor. Mrs. Barganier also had credibility because, the day after the crime, she had succeeded at identifying Ric Childs as the driver of the Volkswagen Beetle, a fact that no one at the Flores trial contested. Most critically, the jury did not hear any of the facts that explained why Mrs. Barganier's eyewitness identification of Charlie Flores was wholly unreliable.

The jury did not know about the suggestive procedures that had been used on Mrs. Barganier during the thirteen months before she was suddenly able to make a courtroom identification. They only heard a cryptic reference to a hypnosis session. The jury did not see the tape of the hypnosis session. The jury did not hear any testimony about how that hypnosis session had been conducted or about all the photos she had been shown. The jury only heard that she had asked to be placed

under hypnosis and heard, from ADA January, an insinuation that the hypnosis had made no difference. 36 RR 290, 291.

What the jury heard must have been chilling: how Mrs. Barganier, who had been so scared, was now "over 100 percent" sure that Charlie Flores was the person she had seen right before Mrs. Black was murdered because she "thought we made eye contact." 36 RR 89, 294, 285.

No one had been able to point out to the jury that this detail about "making eye contact" does not appear in the hypnosis session. And certainly, the jury had no way of knowing that, years later, in an unguarded moment, Ms. Bargainer had admitted under oath that she may have just imagined that story she had told the jury about "making eye contact" with the passenger:

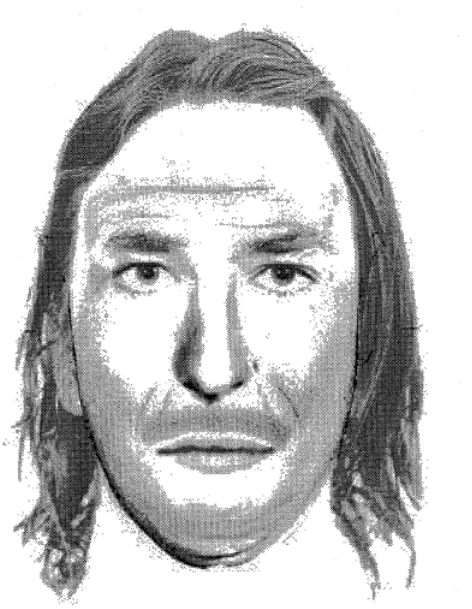
> Q. But you hadn't remembered, at least before the hypnosis session, any locked eyes, that anybody had seen you, correct?
>
> A. I'm not real clear if that was my imagination or not, but to me, he looked at me.

4 EHRR 132.

Likewise, the jury did not hear Mrs. Barganier's admission that, the morning of the crime, she "may have been confusing" the driver and the passenger—likely because she had only barely observed the two men, through slits in her mini-blinds

in a window of the house next door, when she was busy getting her family ready for the day before the sun had even come up. 4 EHRR 140; 4 EHRR 40-44.

But Jill Barganier's testimony allowed the jury to ignore the contradictory nature of Jackie's and Vanessa's statements about what had transpired from 6:30-7:15 AM. The jury could disregard these dopers' testimony as unreliable and just accept Mrs. Barganier's "more than 100 percent" certainty about what she had believed she had seen at 6:45 a.m. on Bergen Lane. The jury had no information about either the facts or the science that would explain how that certainty was impossible considering the conditions of her actual observation and the nature of human memory. The jury was not informed that her sense of certainty was likely the byproduct of an amateur police hypnotist's multiple suggestions that she would "be able to recall more of these events as time goes on" and the way the police showed her Charlie's picture right after that hypnosis session, even though he looked nothing like (1) the description she had given to police the day of the crime; (2) her description right before and during the hypnosis session; or (3) the composite sketch she made of the passenger:



AppX26; 6 EHRR 83.

When Mrs. Barganier left the stand at the end of March 24, 1999, the jury had finally been given what looked like credible evidence from a confident, disinterested witness, linking Charlie Flores to the crime scene. Mrs. Barganier was allowed to testify, Charlie's conviction, especially in light of his counsel's failure to present his alibi defense, and the way the State had sandbagged the production of evidence favorable to the defense, was virtually a foregone conclusion.

VIII. A MYTH TOOK ROOT THAT SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION EXISTED, EVEN WITHOUT MRS. BARGANIER'S 11TH-HOUR IDENTIFICATION, AND HAS NEVER BEEN EXPOSED—UNTIL NOW.

Before trial, the State had no direct evidence putting Charlie at the Blacks' house: no DNA, no fingerprints, no weapon, no fibers, no eyewitness identification. The only "evidence" of this nature ***materialized during trial*** with Mrs. Barganier's

miraculous in-court identification. Likewise, before trial, the State had no evidence to support the prosecutors' "Ric-had-the-bigger-gun" story proffered to support an inference that Ric had shot the dog, and thus Charlie must have shot Mrs. Black. The only evidence to support that fallacious proposal ***materialized during trial*** courtesy of Charles Linch's junk-science testimony. Yet, during trial, the State spun a myth that there was ample "corroborating evidence" to support the State's entirely circumstantial case.

The myth of sufficient evidence has proven to be remarkably resilient—because it has never been subjected to meaningful adversarial testing and because those primarily responsible for the false testimony (former ADAs January and Davis) have not heretofore been exposed. Indeed, those representing the State, in defending the conviction, have engaged in a game of bait-and-switch over the years. At different times, State's counsel has minimized the significance of the most seemingly credible and thus material trial testimony—Linch's quasi-scientific testimony regarding "potato starch" in a .44 magnum revolver, during the initial habeas proceeding, and then Mrs. Barganier's identification, during the first subsequent habeas proceeding.

Additionally, during the lone occasion when the record was reopened (in the first subsequent habeas proceeding), the State fought aggressively and to limit the degree to which the trial record would be scrutinized. On one hand, the State argued

that Charlie Flores should be prevented from developing evidence discrediting any of the so-called "corroborating evidence" that supposedly support Mrs. Barganier's identification testimony. Simultaneously, the State sought to shore-up its hopelessly flawed circumstantial case by recourse to affidavits from Charlie's former counsel, created two years after trial, in response to accusations of their ineffectiveness. These self-interested affidavits, which have never been subjected to adversarial testing, have been repeatedly waved around as evidence of Charlie's guilt and thus a basis to forego wading into the quagmire that this case represents.

As the discussion above demonstrates, exposing just how flawed and unprincipled the State's case was has required Herculean efforts. This section seeks to explain how the myth of sufficient evidence first emerged, how the myth was then treated uncritically as settled fact, and then how, in the face of efforts to expose the house of cards, the State resorted to gamesmanship incompatible with due process and the State's constitutional obligations under *Brady* and its progeny.

A. The Myth of Sufficient Evidence Was First Urged by ADA January During the Mid-Trial Zani Hearing.

The myth of sufficient evidence was urged during the "Zani hearing," which resulted in Mrs. Barganier being allowed to testify about her post-hypnosis identification. One of the "Zani factors" that is supposed to be weighed by the trial court in deciding whether to allow hypnotically induced testimony is "the existence of any evidence to corroborate the hypnotically-enhanced testimony." *Zani*, 758

S.W.2d at 244. During the Zani hearing, ADA January asked the trial court for permission to address the requirement of "corroborating evidence" by listing what he felt the evidence was, instead of developing it "through a witness." 36 RR 23. More specifically, he asked to be able "just to state what I feel the previous evidence has shown and what I feel the future evidence will show to corroborate it"—*i.e.*, Mrs. Barganier's identification.

The trial court admonished: "Be sure you state the evidence shown accurately." *Id.*

ADA January did not, however, "state the evidence shown accurately." Instead, in his closing argument in the Zani hearing, ADA January rattled off the following list:

> . . . I believe that the evidence either has shown or will show that her identification has been corroborated by the fact that number one, Jaime Dodge saw the Defendant and Rick Childs in that Volkswagen a few hours before saying that they were going to go to Farmers Branch.
>
> That Jackie Roberts saw the Defendant and Rick Childs in that Volkswagen within hours of the —within an hour of the murder. The Defendant wanted money, that she had discussed being at the victim's house.
>
> That Judy Haney saw the Defendant and Rick Childs a few hours prior to the killing.
>
> That Terry Plunk saw the Defendant and Rick Childs a few hours prior to the killing together.
>
> That Doug Roberts saw the Volkswagen and Rick Childs as the driver at 6:30 in the morning.
>
> That Jill Bargainer, in fact, does pick out Rick Childs as the driver of that vehicle prior to hypnosis.
>
> That Vanessa Stovall sees the Defendant and Rick

> Childs in that Volkswagen literally minutes prior to going over to the Bergen address that morning.
>
> That Michelle Babler sees two men, and the passenger is consistent with the build and physical description of this Defendant that she pointed out in court.
>
> That Nathan Taylor saw two men with gloves in that Volkswagen, again bolstering the credibility of Jill Bargainer.
>
> We have two witnesses that are going to testify that the Defendant admitted to being present at the scene.
>
> We also have a witness that is going to testify that he sees the Defendant, identifies the Defendant burning the Volkswagen two days after this offense out on I-30.
>
> And I take that back, there's three witnesses I'm going to have testify that the Defendant admits to them that he was there at the scene.
>
> And all of that evidence, even the evidence that has previously gone, corroborates Jill Bargainer's identification.

36 RR 111-113.

In truth, ***not one of these items*** "corroborated" the hypnotically induced testimony of Ms. Barganier. No other witness identified Charlie Flores as one of the two men who had been observed getting out of a Volkswagen Beetle in the Blacks' driveway on January 29, 1998, around 6:45 a.m. No one could make that representation because Charlie was not a "white male with long hair;" and the jury was not told how Mrs. Barganier's description had changed so dramatically from the day of the crime to the day when she made the in-court identification thirteen months later. *See* Section III above. Not only was there no evidence to corroborate Ms. Barganier's false post-hypnotic memory, most of the evidence cited by ADA

January does not even withstand scrutiny as circumstantial evidence of anything other than that Charlie Flores and Ric Childs had been involved in a drug deal, set up by Jackie, around 3:00 a.m., about four hours before two "white males with long hair" were observed outside of the Blacks' house.

Every aspect of the purportedly corroborating evidence listed during the Zani hearing can be debunked.

First, ADA January claimed that the testimony of several witnesses who had attested to seeing Charlie Flores with Ric Childs together several hours *before* Mrs. Black's murder was "corroborating" evidence. But Jaime Dodge, for instance, testified only that he saw Charlie and Ric together, saying they were going to Farmers Branch, soon before 3:00 a.m. (when they went to Jackie's, per her testimony). 36 RR 111. That was at least 4 hours *before* Betty Black's murder. 34 RR 86. Similarly, ADA January argued that Judy Haney and Terry Plunk saw Charlie and Ric together earlier that morning. 36 RR 112. But it was uncontested that Haney and Plunk saw Charlie, Ric, and Jackie together around 3:00-3:30 a.m., also about 4 hours before the murder. 34 RR 172, 207. None of these witnesses claimed to have seen Charlie and Ric together after about 3:30 a.m.—hours before Betty Black's murder.

Second, the State cited Jackie Roberts' testimony. Jackie—and only Jackie—claimed that Charlie was with Ric, in her El Camino, when she was dropped off

around 7:00 a.m. at home on Emeline Street. Jackie also claimed that Charlie wanted money because he perceived he had been shorted in her drug deal. 36 RR 112. Jackie, however, was not a credible witness. At the time, she was involved with Ric both sexually and financially. As explained at length above, Jackie was an accomplice in the attempted burglary of the Blacks' home and provided the information about drug money being stashed in the house and about where the house was located. 34 RR 245-46; 38 RR 28, 117. After she learned of her mother-in-law's murder, she returned a backpack to Ric and spent three hours with him. 36 RR 185. Jackie was also a meth addict and a daily meth user. 34 RR 110. Her allowance, which the Blacks were paying her from Gary Black's drug money, had been cut in half the day before Mrs. Black was murdered. 38 RR 138, 140. Not only did Jackie have the motive to commit a burglary of the Blacks', but once she was arrested as an accomplice in the capital murder of her mother-in-law, she had the motive to lie to save herself. 34 RR 165-166. Although she told investigators and prosecutors while in custody that she had told Ric about money hidden in the bathroom walls of the Blacks' house and had drawn Ric a map, at trial she lied to the jury about having shared where she believed the money was hidden and about having drawn that map for Ric. 38 RR 204 and AppX57.

Third, in the Zani hearing, ADA January cited Doug Roberts' testimony as "corroborating" evidence. 36 RR 112. But Doug testified that he had seen Ric—and

only Ric—drop Jackie off and then leave in his Volkswagen Beetle. On his first day testifying, Doug swore he had seen Ric leave at 7:15 a.m. (not at 6:30 a.m., as January stated in the hearing). 34 RR 235-39, 277. More importantly, although the passenger side of the Volkswagen Beetle was facing him, Doug did not see anyone in the car with Ric, and never claimed to place Charlie in the car, or to have said anything to investigators about Jackie being concerned about a Hispanic person named "Charlie," although he had multiple conversations with both Jackie and Farmers Branch investigators during the first few days after the murder. 34 RR 275-76.

Fourth, in the Zani hearing, ADA January said that Vanessa Stovall saw Ric and Charlie in another part of the metroplex "literally minutes" before they allegedly went to the Blacks' house on Bergen Lane in Farmers Branch. 36 RR 112. Yet Vanessa's testimony about when she allegedly did drugs with Ric and Charlie contradicts Mrs. Barganier's timeline and was directly contradicted by both Jackie and Doug, who said Ric had dropped Jackie off when they were already supposedly with Vanessa. 34 RR 154, 235-38, 277; 35 RR 70-71, 75. Vanessa's testimony cannot be "corroborating" if the testimony of Doug and Jackie is also "corroborating," as the testimony is contradictory.

Fifth, in the Zani hearing, ADA January also pointed to the testimony of Michelle Babler and her child Nathan Taylor as "corroborating" evidence. Michelle

Babler's physical description of the passenger was supposedly consistent with Charlie's "build." 36 RR 112. However, at trial, thirteen months after-the-fact, was the first time Babler had given a description of the passenger's build to anyone. 35 RR 38-39. She also changed her description of the passenger's clothes at trial. 35 RR 39, 109. Her son Nathan only claimed to have seen two men with gloves. 36 RR 112. Aside from clothing, the boy Nathan did not describe any other features of the two men he had seen and thus is not corroborating of Mrs. Barganier's ex-post identification. 35 RR 140.

Lastly, in the Zani hearing, ADA January said that witnesses would be testifying that Charlie had admitted to them that he had been present at the crime scene. 36 RR 112-13. Those witnesses were Homero Garcia and Jonathan Wait Sr., both of whom ended up testifying that Charlie had reputedly confessed to shooting the dog. Homero, a meth addict, was facing charges for unlawful possession of a firearm while on probation for felony drug crimes. He signed a statement, typed up by law enforcement, about this alleged admission months after-the-fact and only while Homero was in FBI custody coming off a four-day meth binge. 36 RR 229, 232-33. He also dodged a subpoena and was not attached in time to be recalled by the defense. 38 RR 68-69. Wait Sr. was a habitual FBI snitch who barely knew Charlie. He was also a self-professed drug user and alcoholic who took issue with the fact that Charlie had married his estranged daughter. 37 RR 79, 88-89, 91-92,

95-96. These were not, in other words, individuals fairly characterized as reliable and their testimony was facially incredible. *See* Section V above.

The following chart illustrates the problem with each of the purportedly "corroborating" items that ADA January claimed justified permitting Mrs. Barganier to testify about her post-hypnosis, in-court identification:

ADA January's Representation	**Why That Evidence Is Not Corroborating**
"Jaime Dodge saw the Defendant and Rick Childs in that Volkswagen a few hours before saying that they were going to go to Farmers Branch."	Observing Charlie leave Irving with Ric over four hours before Mrs. Barganier's observation in Farmers Branch does not corroborate Mrs. Barganier's identification.
"That Jackie Roberts saw the Defendant and Rick Childs in that Volkswagen within hours of the —within an hour of the murder. The Defendant wanted money, that she had discussed being at the victim's house."	Jackie was the only witness who claimed she was dropped off at home by Ric *and* Charlie around 7:00-7:15 a.m.—a fact at odds with the testimony of Vanessa Stovall and Jill Barganier. As explained at length in Section IV above, Jackie's uncorroborated accomplice testimony is not credible. Moreover, during the nearly five days before she was arrested, she told none of her close friends that she had been dropped off by Ric *and* Charlie (only by Ric).
"That Judy Haney saw the Defendant and Rick Childs a few hours prior to the killing."	Observing Charlie with Ric and Jackie in an apartment near Love Field nearly four hours before Mrs. Barganier's observation in Farmers Branch does not corroborate Mrs. Barganier's identification.

"That Terry Plunk saw the Defendant and Rick Childs a few hours prior to the killing together."	Observing Charlie with Ric and Jackie in an apartment near Love Field nearly four hours before Mrs. Barganier's observation in Farmers Branch does not corroborate Mrs. Barganier's identification.
"That Doug Roberts saw the Volkswagen and Rick Childs as the driver at 6:30 in the morning."	ADA January misrepresented Doug's testimony regarding the time; in fact, Doug claimed it was around 7:00, and that he saw Ric—and *not Charlie*—get into the Volkswagen. That Doug saw this soon before Mrs. Barganier saw two white males with long hair get out of that Volkswagen is *exculpatory* of Charlie and thus does not corroborate Mrs. Barganier's identification.
"That Jill Bargainer, in fact, does pick out Rick Childs as the driver of that vehicle prior to hypnosis."	That Mrs. Barganier succeeded at picking Ric out of a photographic lineup (twice) and failed to pick Charlie out (a critical fact suppressed at trial) is *exculpatory* of Charlie and thus does not corroborate Mrs. Barganier's identification.
"That Vanessa Stovall sees the Defendant and Rick Childs in that Volkswagen literally minutes prior to going over to the Bergen address that morning."	That Vanessa testified that Ric and Charlie were with her in North Dallas between 6:45-7:15 a.m. contradicts both Jackie's and Mrs. Bargainer's timeline and, as described above, was a story manufactured to try to corroborate Jackie's testimony and is facially incredible. In any event, it does not corroborate either Mrs. Barganier's identification or her original observation, as Mrs. Barganier's

	observation of the two men occurred in Farmers Branch at 6:45 a.m.
"That Michelle Babler sees two men, and the passenger is consistent with the build and physical description of this Defendant that she pointed out in court."	Ms. Babler made no identification before trial, despite repeated attempts. Her vague description of "two white males," including one wearing tan coveralls, changed considerably by trial. Since there is no debate about whether Mrs. Barganier saw "two men," Ms. Babler's testimony does not corroborate Mrs. Barganier's identification of Charlie Flores.
"That Nathan Taylor saw two men with gloves in that Volkswagen, again bolstering the credibility of Jill Bargainer."	Since there is no debate about whether Mrs. Barganier saw "two men," Nathan's testimony about having seen two generic "men with gloves" does not corroborate Mrs. Barganier's identification of Charlie Flores.
"We have two witnesses that are going to testify that the Defendant admitted to being present at the scene."	These two witnesses were Homero Garcia and professional snitch Jonathan Wait Sr. As outlined in Section V above, their testimony was utterly incredible. Moreover, the promises of leniency made to Homero, who later recanted, was not disclosed. Likewise, Wait Sr.'s failure to mention Charlie's alleged admission during the preceding year while he was actively working with the FBI to enable Charlie's apprehension, was not disclosed.
"We also have a witness that is going to testify that he sees the Defendant, identifies the Defendant burning the	This witness was James Jordan. Aside from the significant problems with his testimony outlined in Section VI above, Charlie's role in burning Ric's Volkswagen on I-30 the night of

Volkswagen two days after this offense out on I-30."	January 31, 1998 is only tangentially connected to, and as such cannot corroborate, Mrs. Barganier's post-hoc identification of Charlie as one of the men who got out of that Volkswagen on January 29.
"And I take that back, there's three witnesses I'm going to have testify that the Defendant admits to them that he was there at the scene."	There were not "three" such witnesses—only Homero Garcia and Jonathan Wait Sr.

The trial court did not have the benefit of the context provided in this subsequent habeas application. Nor did the defense at trial have the benefit of the vast amount of exculpatory, impeachment, and other favorable evidence that the State had suppressed that would have further exposed the absence of "corroborating" evidence.

B. The Myth of Sufficient Inculpatory Evidence Was Perpetuated on Appeal.

Charlie's case was, as a matter of right, appealed directly to the CCA. The CCA decided the case on November 7, 2001. *See Flores v. State*, No. 73,463 (Tex. Crim. App. Nov. 7, 2001) (unpub. "Slip Opin.") The opinion first addresses the issue of whether the evidence was legally and factually sufficient to support the verdict. *Id.* at 2. Most of the recitation of "facts" reputedly developed at trial is unsupported by the trial record or at least the record is far more ambiguous than the opinion notes. For instance:

- The opinion states that "[t]he size of the wound" to the Blacks' dog Santana "suggested a large-bore weapon, such as a .44 caliber." *Id.* at 2. That was an *argument* pursued by the State, as discussed in Section VI above. But in fact, the medical examiner had pointedly resisted offering an opinion to that effect. 36 RR 147-148. There was no evidence that a .44 may have been used at the scene other than the mid-trial "discovery" of "potato starch" inside the barrel of the .44 caliber revolver that the DA's Office had taken to Charles Linch upon directing him to find potato in the gun over a year after the weapon had been recovered and after the chain-of-custody had been destroyed. *See id*.

- The opinion states that "[a]lthough officers did not find another bullet or shell casing" aside from the one bullet and casing from a .380 that had been used to kill Mrs. Black, according to the opinion, officers "did find a hole in the carpet, and the size of the wound and patterns of blood and potato splatter tended to corroborate" the hypothesis that a second round struck the dog. Slip. Opin. at 3. The testimony about the "hole in the carpet"—that had been pulled out of a dumpster after it had been rained upon—did not support any hypothesis other than that a second bullet may have gone through the carpet and then gotten lodged in the concrete below and thus was never detected. *See* Section III above.

- The opinion states that "[n]eighbors reported that a purple, pink, and yellow Volkswagen had been parked in the Blacks' driveway around 7:35 on the morning of the murder." Slip Opin. at 3. In fact, Mrs. Barganier was adamant that she saw the Volkswagen and two men get out of it at 6:45 (before Jackie claims she was dropped off on near-by Emeline Street and at the same time Vanessa says she received a visit in North Dallas on High Meadow). *See* 36 RR 279-282; 4 EHRR 127.

- The opinion states that "[a] neighbor identified [Charlie], dressed in dark-clothing, as the passenger, but other witnesses could not identify the passenger." Slip. Opin. at 3. The only neighbor who identified Charlie at all was Mrs. Barganier, under circumstances, not put before the jury, that completely eviscerate the credibility of the identification. Additionally, she did not identify him as "dressed in dark-clothing." Michelle Babler, contrary to her statements at the time of the crime, said that the passenger was dressed in black; but the day of the murder, she had told investigators that the passenger was wearing tan clothing. SXR101.

- The opinion relies primarily on Jackie's testimony about the drug-deal-gone-bad and exclusively on her testimony about what supposedly happened in the hours thereafter. Slip Opin. at 3-5. The testimony recited includes Jackie's "corrected" testimony when re-called to the stand that Ric Childs "carried a larger gun." *Id.* at 5. There is no acknowledgement in the opinion that Jackie was *an accomplice* and thus her uncorroborated testimony could not support the verdict—likely because evidence that would have illustrated Jackie's involvement in the murder had been actively suppressed by the prosecution at trial. *See* Section I & III above. Moreover, as described in Section VII above, the entire Ric-had-the-larger-gun hypothesis was manufactured by the prosecution to support the fiction that Ric, armed with a larger gun, had only shot the dog. That hypothesis, which the State knew to be false from the outset, does not withstand scrutiny in light of newly discovered evidence.

- The opinion does not address the contradictory timeline created by Jackie's, Vanessa's, and Mrs. Barganier's testimony. Instead, the opinion treats it as coherent—by reading their contradictory testimony to show a consensus that the Volkswagen was seen outside of the Blacks' house about an hour later than what Mrs. Barganier claimed at trial. Slip Opin. at 5. The inconsistencies in the timeline provided by these witnesses are clear from the trial record—but the significance of these inconsistencies as evidence of the State's concentrated effort to mold dishonestly-obtained witnesses and evidence into a story that would shift culpability from Ric Childs and Jackie Roberts towards someone (Charlie) who had not actually been present at the scene, only becomes clear upon digging deep into long-suppressed police records. *See* Section III above.

- The opinion states that "[p]olarized-light microscopy of granular material found inside the magnum barrel identified starch grains consistent with those from a potato." Slip Opin. at 6. The opinion does not mention that this "microscopy" was performed by SWIFS trace-evidence analyst Charles Linch. Months before the CCA's opinion issued, Linch had become the subject of devastating reporting in *The Dallas Morning News* about ways that his mental health issues and desperate desire to please prosecutors had been exploited to obtain helpful (and scientifically unsound) testimony in death-penalty cases. *See* Ex. 67. But more importantly, the opinion did not have access to Linch's sworn 2020 statement disavowing his work in the Flores case or to other new scientific evidence showing that the "evidence" had been acquired through a standardless process. *See* Claim II.

- The opinion states that "[a] day after the offense, [Charlie] admitted to a friend, Homero Garcia, that he had shot the dog, but blamed Childs for killing the 'old lady.' [Charlie] made a similar statement to his father-in-law." Slip Opin. at 6. The opinion invokes this wholly unreliable evidence because the CCA (like the jury) did not have the benefit of suppressed impeachment evidence, including the undisclosed promises of leniency given to Homero in exchange for his testimony, which he subsequently recanted. There is no good-faith basis for crediting the testimony of professional snitch Jonathan Wait Sr., referred to in the opinion as Charlie's "father-in-law," but who barely knew Charlie and had spent months trying to come up with some means to help law enforcement so as to obtain a reward. The opinion was written without access to suppressed evidence showing that Wait Sr. had never said anything about Charlie's alleged "admission" until trial, although he had been communicating with the FBI from the moment that he learned that Charlie was a suspect. *See* Section V.D above.

The opinion also reflects heavy reliance on the junk science related to the ostensible finding of "potato starch" inside the barrel of the .44 magnum and acceptance of the State's Ric-had-the-bigger-gun fiction pushed at trial. The opinion, for instance, includes this discussion:

> The state introduced testimony that putting the end of a gun barrel into a potato may muffle the sound of firing the gun and act as a silencer. Fragments of potato were found at the crime scene. A gun recovered from the home of Childs' grandmother contained in its barrel starch grains consistent with a potato. At the time of his arrest appellant [*i.e.*, Charlie Flores] had ammunition of the same caliber and brand as the shell casing found at the murder scene.

Slip Opin. at 8-9. There are several significant problems with this characterization of the facts.

In truth, some witnesses at trial did speculate that the potato-splatter found at the crime scene could possibly be explained by the hypothesis that whoever broke into the Blacks' house believed that potatoes could work as silencers. These witnesses acknowledged that they had no actual experience on this front. *See* 35 RR 269; 38 RR 82-105. But what neither the jury nor the CCA knew was that ADA January had adduced testimony before the Grand Jury from Jason Clark, who revealed that ***Ric Childs*** had likely gotten the lame-brained idea of using a potato as a "silencer" from a TV show he watched at Clark's house well *before* Betty Black's murder. This evidence suggests that Ric was contemplating burglarizing the Blacks' house well before the morning of the murder. The theory that the State pushed at trial sought to avoid facts suggesting that Ric and Jackie had (for some time) been scheming to have Ric and an accomplice rob the Blacks' home for Gary's money, and instead hinged on Jackie's testimony that, on the day of the murder, Charlie was demanding money and spontaneously decided with Ric, unbeknownst to Jackie, to break into the Blacks' house.

More importantly, as explained above, neither the jury nor the CCA had access to the new scientific evidence—including Linch's 2020 recantation—showing that there is no basis for believing the testimony about finding potato starch in the "gun recovered from the home of Childs' grandmother." Slip Opin. at 9; *see* Claim II.

Equally important, the opinion on this topic gets another critical fact wrong. "At the time of his arrest," ***no ammunition was found on "appellant"*** as the opinion states; ***it was Ric Childs*** who, when arrested, was found with "ammunition of the same caliber and brand as the shell casing found at the murder scene." Slip Opin. at 9. *See* 36 RR 180-183; *see also* Ex. 47; AppX57 (establishing that Ric Childs was arrested with an opened box of C.C.I. Blazer bullets for a .380 pistol, found in the black backpack in his truck when he was pulled over on January 31, 1998, which was an exact match of the bullet and casing recovered from the crime scene). This particular misstatement of the evidence—relevant only to ***Ric's*** culpability—should, at the very least, have warranted a motion for rehearing. But the representation that Charlie received in his direct appeal was nearly as deficient as what he received in state habeas—which was a complete sham. Therefore, that serious misstatement of the factual record was never corrected.

Most of the opinion in the direct appeal, however, like most of the State's Closing Argument at trial, is devoted to recounting the conduct Charlie engaged in while trying to avoid being arrested. *See* Slip Opin. at 6-9. That evidence is not fairly characterized as evidence of "consciousness of guilt" in a context where all of the other circumstantial evidence upon which the State relied was no more than a house of cards. *See, e.g.*, *Fentis v. State*, 582 S.W.2d 779, 781 (Tex. Crim. App. 1976) (explaining that, for evidence of flight to be admissible as evidence of consciousness

of guilt, "the circumstances must indicate that the flight is 'so connected with the offense on trial as to render it relevant as a circumstance bearing upon his guilt'") (citation omitted). Charlie's conduct, after learning that he was being viewed as a suspect in Betty Black's murder, is, in light of the evidence presented in this subsequent habeas application, best understood as the woefully misguided behavior of a man terrified that he was being set up to take the fall (and be executed) for someone else's horrible crime. Charlie did many stupid, reckless things—but he never killed anyone, even when his attempts to avoid apprehension gave him the opportunity to do so. *See, e.g.*, 37 RR 194-201 (illustrating that, although Charlie had taken mace and a gun from an officer at Parkland Hospital during an escape attempt, he had not shot anyone; instead, a doctor had "just came over and took [the gun] out of [Charlie's] hands and went and put it up."). The State's extraneous-offense evidence would *not* have made Charlie's guilt more probable if the adjudicator had been aware of the lengths to which state actors had gone to frame him, which places his attempts to avoid apprehension in a completely different light.

In sum, the CCA's opinion on direct appeal recites as evidence supporting the conviction many items that are not supported by the record and others that more recently discovered evidence further undermines.[113] "The law of the case doctrine

[113] The opinion in the direct appeal does not mention the issue of the hypnosis session conducted on Mrs. Barganier until page 22 of a 25-page opinion. The cursory discussion, without benefit of the context eventually developed in the first subsequent state habeas proceeding,

relied on by the majority" should not wed this Court "forever to a clear misreading of the record, especially a misreading brought about by the State's falsification of the record in the case. Courts should correct their mistakes where important matters are concerned, and a man's life is an important matter." *Cone v. Bell*, 492 F.3d 743, 765 (6th Cir. 2007) (Merritt, Circuit Judge, dissenting) certiorari granted in *Cone v. Bell*, 556 U.S. 449 (2009) (vacating Sixth Circuit's judgment and remanding for consideration of Cone's *Brady* claim).

C. The Myth of Sufficient Evidence Was Bolstered by Outrageous Affidavits Submitted by the State in a Sham Initial Habeas Proceeding.

The direct appeal discussed above was decided on November 7, 2001. Meanwhile, a facially worthless initial state habeas application had been filed on Charlie's behalf by a lawyer, Roy Greenwood, who admitted to doing no investigation and who repeatedly tried to withdraw before the deadline because he had no time to work on the case. *See* Ex. 68. The State had filed an Answer on or around June 7, 2001, to which it attached affidavits from former defense counsel Brad Lollar and Doug Parks and from former ADAs Jason January and Greg Davis. *See* Ex. 25. The State's Certificate of Service shows that the Answer was served only on an attorney named Steve Rosen—who never did any work on Charlie's behalf. *See* Certificate of Service, Respondent's Original Answer, WR-98-02133-QN(A).

concludes that the facts as found by the trial court show that the hypnosis "substantially conformed" to the *Zani* requirements. Slip Opin. at 23.

Rosen did not even pick up the trial record until he was threatened with contempt of court. Rosen never served Charlie himself with the State's Answer or the exhibits attached to it; Charlie did not learn of their existence for years, until after he was appointed federal counsel. Ex. 4.

Years later, in federal habeas proceedings, Charlie's counsel argued that he had been provided ineffective assistance of state habeas counsel who had, *inter alia*, failed to investigate and present evidence of the ineffective assistance provided at trial.[114] But this claim was made *before* the Supreme Court of the United States decided *Martinez v. Ryan*, 466 U.S. 1 (2012) (finding cause could be found under some circumstances to excuse procedural default and thereby allow federal courts to review some claims that had been procedurally defaulted in state habeas proceedings due to the ineffectiveness of state postconviction counsel); *Trevino v. Thaler*, 469 U.S. 413 (2013) (applying the rule announced in *Martinez* to Texas capital cases). Charlie's claim that state habeas counsel had been ineffective with respect to pleading trial counsel's ineffectiveness was never heard on the merits. Moreover,

[114] Trial counsel's deficient performance, which was never investigated or presented as a cognizable claim, was legion. Some deficiency was evident from the face of the record. For instance, as the CCA noted in the direct appeal, the State was never required to articulate a race-neutral reason for striking one of only two Hispanic jurors in the pool of qualified jurors because, after a *Batson* challenge was initially raised, trial counsel never asked for a hearing to be convened. Thus, this claim affecting the fundamental fairness of the trial was abandoned through inattention and thus, when raised on appeal, was summarily dismissed because it had not been preserved. *See* Slip Opin. at 23-24.

the bare allegations of trial counsel's ineffectiveness that had been pled by Charlie's post-conviction were never subjected to adversarial testing.

As such, the untested affidavits from trial counsel and the lead prosecutors, all adduced by the State, have never been tested either, but they have nevertheless played an outsized role in subsequent courts' decisions to deny any and all habeas relief. For multiple reasons, these affidavits should never have been credited.

The 2001 trial counsel affidavits were proffered by the State to rebut allegations of ineffectiveness in failing to present Charlie's alibi defense and of prosecutorial misconduct in concealing information about the State's expert Charles Linch. That the State took the trouble to obtain these affidavits is interesting, considering that Charlie, at the time, had been abandoned by his counsel: before his total abandonment, state habeas counsel had failed to develop or support these claims (or any others) with any competent extra-record evidence.[115]

1. The affidavit of trial counsel Brad Lollar, prepared to support the State, is self-serving and incredible.

Nearly two years after trial, Brad Lollar seemingly agreed to provide an affidavit to support the State in defending against Lollar's former client's allegations of both ineffectiveness and prosecutorial misconduct. The affidavit states, *inter alia*,

[115] It is the habeas applicant, not the State, who bears the entire burden of proof in a writ proceeding. *See, e.g.*, *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000).

that Lollar did not call Myra Wait "to alibi the defendant because he told me that he was, in fact present at the home of the decedent and witnessed the co-defendant, Rick Childs, murder the decedent, and that at the time they were engaged in the burglary of the decedent." Ex. 25. Putting aside the oddity of a defense attorney referring to his own client as "the defendant," Charlie Flores vehemently denies that he ever said anything of the sort to counsel. Ex. 4; *see also* Claim IX. A far more reasonable interpretation is that Lollar was endeavoring to invent a justification for his truly unreasonable and unethical conduct at trial: ***conceding his client's presence at the crime scene in closing arguments in a law-of-parties case*** and then ***asking the jury to convict his client of murder "or whatever you want."*** 39 RR 86. According to Charlie's baffled parents, who were shut out of the courtroom due to ADA January's conduct throughout trial, their son's lawyers had said *nothing* to them about the law of parties that was ultimately used to obtain the conviction. *Id.* In any case, ither Lollar and Parks, reputedly experienced criminal defense attorneys, were completely ignorant of the law of parties[116] or they intentionally misinformed their client and his family in proposing "Plan B" (in lieu of putting on the alibi defense through Myra and Charlie himself); under no scenario could "Plan B" have ever resulted in anything other than a conviction and death sentence since counsel

[116] This degree of ignorance is difficult to fathom, considering the law of parties was discussed extensively during jury selection.

put on ***no mitigation case***—a fact boldly exploited by the prosecution.[117] *See* Section II above.

Most critically, Lollar's affidavit does not even acknowledge, let alone justify, his Closing Argument in which he urged the jury to convict his client, not of a lesser-included offense, but of "whatever [they] want," contrary to his client's insistence on his innocence. 39 RR 86. The affidavit is facially incredible.

2. The affidavit of former ADA January, prepared to support the State, is replete with falsehoods.

About a month after obtaining Lollar's affidavit, January, Davis, and Parks all signed affidavits. This occurred about a year after ADA January had orchestrated a stunning plea deal for Ric Childs in coordination with Parks' office-mate, Karo Johnson (*see* Section I above); and this was a few months after January had left the DA's Office in some disgrace. *See* Section IX.B. Mere submission of an affidavit is inconsequential, although the State has no burden in Article 11.071 proceedings to adduce evidence in response to allegations. What is noteworthy about January's affidavit is the fallacious content. *See* Ex. 25.

January's affidavit responded partially to two allegations: (1) that the State had intimidated defense witnesses to hinder the ability to put on any defense; and

[117] Moreover, the record indicates that the defense team conducted scant investigation of any kind. The lone investigator on the case submitted a bill to the court for grand total of 85.5 hours—most of which was for time meeting with the attorneys, driving to pick up records, and interviewing a few ancillary witnesses. Ex. 46.

(2) that the State had failed to disclose impeachment material regarding the mental stability of the State's trace-evidence expert, Charles Linch. January's response consisted of a compendium of exaggerations, outright falsehoods, and unsubstantiated, racist attacks.

In responding to the first allegation, instead of addressing specifics regarding his own conduct, January focused on Myra Wait:

First, he endeavored to cast aspersions on her. *Id*.

Second, he gave a misleading description of her interactions with law enforcement, claiming that the State only considered using her as a witness because she had "voluntarily" talked to investigators. *Id.* He does not mention that she was arrested on a pretext, ripped away from her three young children, held for days in the drunk tank in the Farmers Branch police station, interrogated repeatedly, and then only authored one statement, in which she asserted that Charlie had *denied* being involved with the events that had unfolded at the Blacks' house. *See* Ex. 39. The other statements that ostensibly have her signature on them were all written by the lead investigator under conditions that would have compelled a person to confess to orchestrating the JFK assassination.

Third, January's affidavit relies on hearsay statements from unnamed "relatives" of Myra Wait who supposedly said she "was much more fearful of retribution by the Flores family than any kind of charge the State would level upon

her." *Id.* at 2. January well knew that Myra's mother was then actively fighting to have authorities take Myra's children away from her and that Myra's estranged father was a drug addict and FBI informant who had invented stories about Charlie's movements in hopes of ingratiating himself to law enforcement. Therefore, the insinuation that her "relatives" were credible sources regarding her feelings is, at best, disingenuous. More importantly, there was *no evidence* that any member of the Flores family had threatened Myra in any way. Indeed, the only evidence before him established that the opposite was true. Myra moved in with Lily and Carter Flores and lived with them for the year leading up to and beyond trial; she worked for Carter Flores's roofing business; she came to the courthouse with the Floreses and sat with them while they were all shut out of the courtroom as a result of January's machinations; and in letters, in the State's possession, she described Charlie's parents as "wonderful" (although not enough to console her for having her children taken from her). Ex. 40.

Fourth, January offered no more than his own "opinion" that Myra's (non-existent) "fear of Charles Don Flores and his family was well-founded." Ex. 25. His only support for this was an allusion to Charlie's brothers' incarceration and an unattributed "belief" by "some" that they were "members of the Mexican Mafia." *Id.* There is and never has been any support for that racially tinged allegation—which was seemingly first made by Ric Childs as a means to threaten Jackie Roberts to

"keep her mouth shut." Ex. 8. The inclusion of this spurious, racist accusation in a sworn affidavit by a former agent of the State is, in a word, unconscionable.

Fifth, in his affidavit, January did not acknowledge: his multiple efforts to indict Myra or his coercive tactics to pressure her into providing testimony helpful to the State, including threatening to assist in having her kids taken from her—which ultimately occurred. *See* Ex. 13. These material omissions about the way he had engaged with this witness, not to mention the elderly Floreses—individuals who could and should have been witnesses helpful to the defense—are of a piece with the undisclosed deals he offered to all who agreed to cooperate with the State.

January's response to the allegation that the State had suppressed impeachment evidence related to Charles Linch consists of two similarly farfetched disavowals.

First, January claimed he "did not have any knowledge that Mr. Linch was hospitalized for [psychiatric] treatment." Ex. 25. January claimed that he did not learn about that incident (from 1994) until "a year after Mr. Flores's conviction"—thus in 2000.[118] That disavowal, even if true, does not join issue with the allegations

[118] The affidavit from former ADA Davis contains virtually identical language: "At the time of Mr. Flores' trial, I had no knowledge that Mr. Linch had ever suffered from depression or alcoholism or that he had ever been hospitalized for either condition. I first learned of these matters approximately a year after Mr. Flores' conviction." Ex. 25. Davis's protestations of ignorance are equally incredible; he had worked closely with Linch on other death-penalty cases, including the Darlie Routier case, tried in 1996-1997, closer in time to Linch's hospitalization.

in the writ application. Three different claims were made about the State's failure to disclose *any* information about Mr. Linch's "mental health background," "mental health condition," and competency to testify. *See* Initial Application, Grounds for Relief 8, 9, 10. As developed below in Claim II, even if January had no personal knowledge of one particularly sad event in Mr. Linch's history, Linch's emotional instability and issues with his employer were well known within the DA's Office. Mr. Linch's issues were playing out in a very public way during the Flores trial as he pursued a grievance against his employer, SWIFS, which was not then an independent, accredited crime lab, but essentially an extension of law enforcement. *See id.*

Second, January disingenuously attested in his affidavit that "Mr. Linch was not one of the State's key witnesses," insisting that, "[i]n [his] opinion, if Mr. Linch's testimony were redacted from the trial testimony, the evidence would still be sufficient to convict Charles Don Flores of capital murder in the death of Betty Black." Ex. 25. By contrast, as noted above, in a letter January sent to SWIFS right after the trial, he described Linch's testimony as "critical" to the State's theory of the case. Ex. 64. Additionally, in an internal memorandum around the same time, January acknowledged that the State's witnesses "were mainly drug users and/or dealers who have a contempt and mistrust of authority" who had made prosecuting the case "exceedingly difficult." Ex. 63. Therefore, his subsequent insistence that

testimony from Linch, one of the State's few non "drug users and/or dealers" witnesses, was immaterial is not credible.

3. The affidavit of trial counsel Doug Parks, prepared to support the State, is self-serving and incredible.

Soon after the State obtained January's affidavit, Doug Parks, second-chair defense counsel, signed one as well. Ex. 25. Much of that affidavit contains statements identical to that found in the affidavits signed by the prosecutors. But Parks' affidavit also addressed the failure to put on evidence of an alibi. His explanation is, however, notably different from Lollar's. Parks says nothing about Charlie admitting that he was at the scene, but instead says obliquely "We spoke to Myra outside the presence of Mr. Flores' parents and she told us that she could not truthfully provide an alibi for Mr. Flores." *Id.* His explanation, however, contradicts contemporaneous notes made by both Lollar and Parks, showing that Myra told counsel soon before trial that Charlie had been in bed in the trailer sleeping beside her around 6:30 a.m. when she got up, the morning when Betty Black was killed. Ex. 36; Ex. 44. Myra may not have known the facts well enough to understand whether what she did know amounted to an "alibi." But it is unthinkable that defense counsel failed to appreciate that evidence that Charlie was at home, asleep, in Irving at 6:30 a.m. meant that he could not also be in North Dallas doing drugs with

Vanessa and Ric by 6:45 and/or also be with Jackie and Ric in Farmers Branch at the same time.

Parks further attested to a supposed "strategic decision" that counsel had made that "our best defense to capital murder, or, in the alternative, to the death penalty" was to "admit that Mr. Flores had gone to the Black home with the intention of committing burglary, but had no intention to kill anyone." *Id.* Parks claims they believed that "the State could not prove Mr. Flores was guilty of capital murder since we did not believe that evidence showed he was a regular party or that he anticipated a killing." *Id.*

There is ***no conceivable basis*** whereby admitting Charlie's presence at the Blacks' home at the time of the murder could have be deemed a "reasonable trial strategy." A decision cannot be a reasonable trial "strategy" if it is based on a misapprehension of the relevant law. *Cf. Harrington v. Richter*, 562 U.S. 86, 108-10 (2011) (explaining that a decision can only be deemed a reasonable strategic decision if made after a thorough investigation of law and facts relevant to plausible options); *Baldwin v. Maggio*, 704 F.2d 1325, 1332 (5th Cir. 1983) ("Essential to the rendition of constitutionally adequate assistance in either phase is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived.").

Under the law of parties, upon which the State relied at trial, a decision to concede Charlie's presence at the crime scene was a concession *to* capital murder, not a defense against it. Moreover, trial counsel had utterly no plan to present a mitigation case. Therefore, Parks unexplained suggestion that this "strategy" could at least be a defense "to the death penalty" also makes no sense. Defense counsel put on *no* mitigation witnesses of any kind during the punishment phase. *See* 40 RR 140-142. Therefore, trial counsel's incoherent explanation for the inexplicable decision to concede guilt and their efforts to disparage the availability of an alibi are patently incredible. At best, they seem to be retroactive efforts to mask the lack of *any* coherent strategy, which is nevertheless evident by reading defense counsel's Closing Argument.

In his guilt-phase closing argument, after stating that the State's case was "based upon liars," Lollar argued that, even if Charlie had been was at the scene, he was not the shooter. But counsel's concession was plainly a concession to capital murder under the law of parties—as the State seized upon in its final closing argument. 39 RR 95 (ADA January emphasizing "The defendant's guilty whether he's a party or whether he's the shooter. We've been over that.") Therefore, there could never have been a valid "strategic" reason for this decision on the part of defense counsel so as to counter the allegations of their deficient performance at

trial.[119] Moreover, the defense Closing Argument took incompetence to the level of betrayal when Lollar entreated the jury: "**[f]ind him guilty of murder; find him guilty of whatever you want to**[.]" 39 RR 86.

4. The untested affidavits cannot be fairly or even rationally treated as "evidence" that reinforces the conviction.

a. None of the 2001 affidavits a reliable.

The affidavits signed by former ADAs January and Davis in 2001 were primarily drafted to rebut a skeletal claim of prosecutorial misconduct made in the initial habeas proceeding. The claim was that the State had failed to disclose to Charlie's counsel before trial in 1999 that Charles Linch had been involuntarily committed to a psychiatric unit in 1994 and that, despite having been declared a danger to himself or others, and despite having been prescribed powerful anti-depressive drugs, he had been temporarily released so that he could testify as an expert in another capital murder trial. Because Charlie's initial state habeas counsel did not submit any competent evidentiary proffers or obtain a hearing during which evidence of any kind could be admitted, this claim was summarily rejected without these witnesses testifying about what they knew about Charles Linch, in spite of the serious questions about the State's conduct in dealing with Linch—such as the fact

[119] Additionally, this unauthorized concession was a clear violation of the constitutional principle recently revisited in *McCoy v. Louisiana*, 584 U.S. ___ (2018). *See* Claim IX.

the prosecutors made a mid-trial decision to put Linch on the stand to testify about "potato starch" that Linch purportedly found inside a gun that was brought to Linch by members of the DA's Office the day before Linch testified. 36 RR 208-216. These affidavits are not competent evidence of anything—except a pattern and practice of dishonesty. But the problems evident even from the face of these affidavits were never exposed because the affiants have never been examined during a proceeding permitting a court to assess demeanor and credibility.

Similarly, because there was no evidentiary hearing in the initial writ proceeding, one can only surmise from the context why Charlie's trial lawyers had been willing to eschew the duty of loyalty they owed him and link arms with the State against him. It is well-established that, when ineffectiveness is alleged post-conviction, affidavits from trial counsel merit special skepticism because counsel often occupy a position adverse to their former client when such affidavits are executed. *See, e.g.*, State Bar of Texas, *Guidelines and Standards for Texas Capital* Counsel, Guideline 11.8.A Duty to Facilitate Work of Successor Counsel ("In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel); Lawrence J. Fox, Darcy Covert & Megan Mumford, *Protecting the Continuing Duties of Loyalty and Confidentiality*

in Ineffective Assistance of Counsel Claims, CRIMINAL JUSTICE ETHICS (2020);[120] *see also* TEX. R. CIV. PROC. 166a(c)(ii) (setting forth the standard for summary judgment proof based on "uncontroverted testimonial evidence of an interested witness," which encompasses trial counsel in proceedings accusing them of ineffectiveness).[121] The 2001 affidavits of trial counsel plainly are not "free from contradictions and inconsistencies" and were not credible. *Id.* Because there was no hearing, though, these self-serving affidavits were never subjected to adversarial testing, and counsel were never cross-examined about the unreliability of their statements.

b. Had these affiants been cross-examined, the habeas record might reflect that the affidavits bear an uncanny resemblance to each other.

In language that appears to have been penned by the same hand, three of the attorneys attested that: (1) they did not know that one of the State's experts at trial,

[120] *See also* American Bar Association Formal Opinion 10-456 July 14, 2010, *Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim* (explaining ethical obligations defense counsel owe to forego disclosing attorney-client privileged and other confidential information without court supervision).

[121] As adverse witnesses, trial counsel in post-conviction proceedings are interested parties. The Texas Rules of Civil Procedure state that affidavits from an interested party may establish a fact for summary judgment purposes only if the evidence is "clear, positive and direct, otherwise credible, and free from contradictions and inconsistencies, and could have been readily controverted." *See also Charles v. State*, 146 S.W.3d 204, 210 (Tex. Crim. App. 2004). The phrase "could have been controverted" from Rule 166a(c) means "the testimony at issue is of a nature which can be effectively countered by opposing evidence." *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989).

Charles Linch, had been involuntarily committed to a psychiatric unit not long before Mr. Flores's trial; and (2) besides, the testimony of Mr. Linch, a trace evidence analyst with SWIFS, had not been "crucial" to the State's case against Mr. Flores.[122] That is, prosecutors January and Davis had signed affidavits to support the State's opposition to the initial writ application that had much in common with trial counsel's affidavits. Compare, for instance, these virtually identical passages found in the affidavits signed by defense counsel Parks and prosecutors January and Davis:

Affiant	**Quote**
Doug Parks, defense counsel	"I am also aware that, in his application for writ of habeas corpus, Mr. Flores accuses the State of suppressing evidence regarding Charles Linch's mental history, specifically, treatment for depression and alcoholism. I did not have any knowledge that Mr. Linch suffered from either condition, nor did I know he had been hospitalized until long after Mr. Flores' trial. Mr. Linch's testimony was not one crucial to the State's case against Mr. Flores." ¶2
Jason January, prosecutor	"I am also aware that, in his application for writ of habeas corpus, Mr. Flores accuses the State of suppressing evidence regarding Charles Linch's medical history, specifically, treatment for depression and alcoholism. I did not have any knowledge that Mr. Linch was hospitalized for such treatment. The first indication I had of these alleged conditions was over a year after Mr. Flores' conviction. His testimony did not go directly to Mr. Flores' guilt." ¶5
Greg Davis, prosecutor	"I am aware that Mr. Flores has filed an application for writ of habeas corpus alleging that the State suppressed evidence

[122]Whether evidence was "crucial" is not the relevant standard. *See Brady v. Maryland*, 373 U.S. 83 (1963) (explaining that the standard is materiality defined as a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.). *See* Claims IV & V.

	regarding Charles Linch's mental history, specifically, treatment for depression and alcoholism." ¶5 "At the time of Mr. Flores' trial, I had no knowledge that Mr. Linch had ever suffered from depression or alcoholism or that he had ever been hospitalized for either condition. I first learned of these matters approximately a year after Mr. Flores' conviction." ¶6

Perplexingly, the State argued in 2001 that Charles Linch's testimony at Mr. Flores's trial was "not crucial;" yet the CCA's opinion on direct appeal *emphasized* that testimony as significant to the conviction.[123]

The affidavit of Brad Lollar, Charlie's lead trial counsel, took a slightly different, but equally incredible approach to the Linch testimony. He stated: "The testimony of Charles Linch **was not unanticipated** [*i.e.*, was anticipated] and was not crucial to the State's case"[124] but does not clarify whether Lollar knew about Linch's psychiatric history at the time of trial. Ex. 25 (emphasis added). How Lollar could, in good faith, assert that Linch's testimony was anticipated makes little sense. As Linch himself testified, he did not look at the .44 magnum until the day before

[123] Years later, in the first subsequent habeas proceeding, in the Proposed FFCL that the State drafted and that the habeas court adopted wholesale, Linch's highly suspect testimony was highlighted as an example of "corroborating evidence" that justified ignoring the problems with Mrs. Barganier's post-hypnotic, in-court identification. *See* Court's FFCL at p. 66 (312) (stressing his testimony while obscuring Linch's identity as the source of the eleventh-hour potato starch "evidence"). In other words, the State's attitude about the significance of Linch's trial testimony has shifted to suit its needs of the moment.

[124] Doug Parks' affidavit uses similar language: "Mr. Linch's testimony was not unanticipated, nor did we have any reason to believe it was inaccurate." Ex. 25.

he testified. *See* Section VI above. Lollar could not have anticipated any testimony of this nature, since he only learned of it when Linch was called to the stand.

Despite flagrant problems with the 2001 affidavits, these documents have since been invoked repeatedly to argue against awarding habeas relief in the form of a new trial—implying that these highly suspect, untested affidavits amount to "evidence" support the conviction's legitimacy.

D. Invoking the Myth of "Corroborating" Evidence Became the Strategy for Convincing Federal Courts to Forego Granting Relief.

In federal habeas proceedings over the years, relief of various kinds has always been summarily rejected. In arguing against any and all relief, counsel for the Respondent has repeatedly included in its briefing a long recitation of the "facts of the crime" purportedly "heard by the jury" as "summarized by the CCA" in the direct appeal. *See, e.g.*, Respondent's Opposition to Request for Hypnosis Expert and Investigator, Civil Action No. 3-07-CV-0413-M (N.D. Tex. June 15, 2007) at pp 3-7 (quoting verbatim the CCA's Slip Opin. at 2-8). That is, the Respondent has relied on the same recitation of "facts" that the CCA penned years ago in the direct appeal (challenged for the first time, point by point, above).

Respondent's counsel has also fought against any federal court granting relief by relying on the 2001 affidavits adduced by the State in the initial writ proceeding to counter the skeletal allegations of ineffectiveness and prosecutorial misconduct claims that were raised in the initial habeas application. *See id.* at 11-20. As

explained above, those affidavits were never admitted into evidence, have never been subjected to adversarial testing of any kind, and are utterly unreliable. Yet the 2001 affidavits have served the State well over the years as a means to urge courts not to consider the rampant unconstitutionality of the Flores trial that resulted in railroading someone for Betty Black's murder who was not guilty.

E. In the First Subsequent State Habeas Proceeding, the State Actively Hindered Attempts to Expose the Myth of Corroborating Evidence and Induced the Habeas Court to Misuse the Concept of "Judicial Notice" to Rely on the 2001 Trial Counsel Affidavits as a Basis for Again Denying Relief.

After years of poor representation, in 2016, relying on a state statute that had been enacted in 2013, a subsequent application for a writ of habeas corpus was filed on Charlie's behalf. The new statute provided a vehicle to bring claims, without being procedurally barred, challenging the reliability of science that the State had used to obtain a conviction. *See* TEX. CODE CRIM. PROC. art. 11.073. Charlie's new-science claim sought a new trial because the State had relied on discredited science about the practice of "investigative hypnosis" to put an unreliable, hypnotically induced identification before the jury in violence of his constitutional rights to due process and to be free from cruel-and-unusual punishment.

The State moved to dismiss the habeas application, but the CCA concluded that the hypnosis claim satisfied the state-law procedural requirements and remanded it for resolution on the merits.

The judge who was to preside over the state habeas proceeding had not presided over the 1999 trial; indeed, he did not even assume the bench until January 2017. Thus, he had no personal recollection of the 1999 trial upon which to rely. *See* TEX. CODE CRIM. PROC. art. 11.071 sec. 9(a) (permitting trial courts to use personal recollection to resolve disputed factual issues at a hearing). Yet to prevail on a claim brought under Article 11.073, an applicant is required to convince the habeas court, *inter alia*, "that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted." TEX. CODE CRIM. PROC. art. 11.073(b)(2). In other words, there is a materiality requirement: that the applicant show that, had the new scientific evidence been presented, the preponderance of the other competent evidence was insufficient to sustain the conviction. Therefore, in the state habeas proceeding, Charlie, as the applicant, bore the burden to show that, had the trial court heard the current scientific evidence, it would not have permitted Mrs. Barganier to testify about her hypnotically induced identification and, as a result, there would not have been a preponderance of evidence to sustain Charlie's conviction.

The evidence that the State has previously cited as supporting the conviction has historically duplicated the list that ADA January recited to the trial court at the Zani hearing as evidence reputedly "corroborating" Mrs. Barganier's post-hypnotic identification. To expose the inaccuracies of this representation, during the writ

proceeding on the hypnosis claim, Charlie's counsel had planned to call former ADAs January and Davis and former defense counsel Lollar and Parks, as well as a number of guilt-phase witnesses who had testified at trial.

The State, however, filed a motion expressly asking the Court to strike most of the names from the applicant's witness list, arguing that these witnesses did not have information relevant to the claim at issue in the proceeding. *See* "State's Motion to Exclude the Testimony of Witnesses Not Relevant to this Proceeding." The habeas court granted the motion and further limited the Flores team to calling four fact witnesses and two experts—and expressly precluded them from calling any of the lawyers who had submitted affidavits to support the State's previous efforts to oppose the quest for habeas relief. 3 EHRR 8-17.[125]

During a multi-day evidentiary hearing, scholarship was introduced into evidence on Charlie's behalf demonstrating a contemporary consensus that investigative hypnosis is an inherently suggestive procedure associated with manufacturing, not recovering, memory. Charlie also presented evidence showing what his jury had not heard: the content of and context surrounding the hypnosis session. The evidentiary hearing featured a critical analysis of both the hypnosis

[125] The habeas court's ruling excluding most of the habeas applicant's witnesses was erroneous and at odds with the statutory mandate that "[e]very provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it." TEX. CODE CRIM. PROC. art. 11.04.

session and its endorsement by the State's hypnosis expert, Dr. Mount, who testified at trial and in the habeas proceeding.

In the habeas proceeding, Dr. Mount initially testified that he stood by all of his 1999 testimony. But on cross-examination in the habeas proceeding, he disavowed several aspects of his trial testimony: that confabulation is something one can "see;" that inviting someone to imagine things during hypnosis is not problematic; and that Officer Serna had not asked leading questions. But Dr. Mount also testified that, while memory does not work like a videorecorder, he still believed that the movie theater technique (used by Officer Serna) is a legitimate memory-retrieval device and thus is still taught to law enforcement. Dr. Mount admitted, however, that his view of the technique was not based on empirical research and that he had not done any empirical research since the 1980s. 5 EHRR 146, 154-160.

Dr. Steven Lynn, a leading scientist in the fields of hypnosis and forensic psychology, also testified. He disagreed with Dr. Mount's assessment that "procedural safeguards" had been adhered to during the 1998 hypnosis session on several bases:

- Officer Serna was not sufficiently trained to perform forensic hypnosis. His hypnosis of Mrs. Barganier was his first; and the only training he had received was through a police organization.

- Officer Serna was insufficiently independent from law enforcement; he was a police officer on the team investigating the crime.

- The record-keeping associated with the hypnosis was insufficient as there was no record of all information the hypnotist knew before the session; the only records the police made were the videotape of the hypnosis and the short form Officer Serna created afterwards.

- The videotape did not capture all contacts between hypnotist and subject as *Zani* recommends; nor did the videotape capture the full body of the hypnotist or any of the observer (Officer Baker).

- Conducting the hypnosis in a police station was unacceptable. This setting could only have increased the pressure on Mrs. Barganier to identify a perpetrator.

- Having a second police officer in the room was unacceptable. Officer Baker's presence added subtle pressure to come forward with information helpful to the police. Moreover, the quality of the video is so poor that one cannot tell if there was any cueing from Officer Baker, who (as established during this habeas proceeding) had lied to the trial court regarding his knowledge of Charlie and what he looked like.

- The movie theater technique was inappropriate as it *increases* the dangers associated with hypnosis. The technique implied that Mrs. Barganier could visualize a documentary film of her experiences and memories. Studies identifying problems with this technique existed at the time of the hypnosis session, but Dr. Mount was either unaware or failed to apprise the court of that controversy.

6 EHRR 57, 60-66.

Dr. Lynn opined that Dr. Mount's 1999 testimony wrongly suggested that the *Zani* "safeguards" had been complied with. Dr. Lynn also explained how numerous statements made during the hypnosis session reflected risks now associated with inducing false memories. Dr. Lynn further noted Mrs. Barganier's eagerness to please the hypnotist and to be helpful, a circumstance that further increased the risk

of confabulation. Additionally, Dr. Lynn observed that, although the witnesses had told the court during the *Zani* hearing that nothing new had come from the hypnosis session, much of the information she provided under hypnosis was new at least relative to the pre-hypnotic interview that had been recorded. And contrary to Dr. Mount's trial testimony that he had heard no leading statements, Dr. Lynn identified multiple leading statements made during the hypnosis session, including repeated suggestions that Mrs. Barganier would "remember more later," all of which, consciously or not, had invited confabulation. Most importantly, Dr. Lynn explained the evolution of the scientific perspective on hypnosis, the data supporting that evolution, and the contemporary consensus that investigative hypnosis produces unreliable results. AppX5; AppX16; AppX60.

Ultimately, however, Mr. Flores did not prevail. The habeas court adopted the FFCL, which had been drafted by State's counsel, recommending that relief be denied. The court's FFCL includes a statement that Dr. Lynn's testimony should be minimized because of his "decision not to consider any corroborating evidence." FFCL at (256).[126] This justification for disregarding Dr. Lynn's critique of the hypnosis session was based on the incorrect assertion that "there is considerable evidence in this case that corroborates Barganier's identification." FFCL at (261).

[126] It is noteworthy that the State had to concede that Dr. Lynn is a recognized expert and researcher in the field of hypnosis. 6 EHRR 26-27. Moreover, the habeas court made no adverse credibility finding with respect to Dr. Lynn.

The court's FFCL was also premised on the view that it was appropriate to take "judicial notice" of the 2001 affidavits that had been attached to the State's Answer opposing the initial quest for habeas relief. During the evidentiary hearing, the habeas court had agreed "to take judicial notice of … the original writ." 4 EHRR 11. The court had not, however, indicated an intention to rely on the evidentiary proffers created for, and filed by, the State back during the initial writ proceeding or suggested that such untested proffers would be treated as "evidence" in adjudicating the hypnosis claim. Yet in the FFCL, the habeas court purported to take "judicial notice" of the patently incredible, untested affidavits signed by trial counsel back in 2001, discussed in subsection C, above. FFCL at ¶¶340-345.[127]

The 2001 affidavits, which were never admitted into evidence by any fact-finder, never subjected to adversarial testing, and were not part of the evidence used to convict should not have been deemed relevant to the materiality of Ms. Barganier's post-hypnotic "eyewitness identification." Therefore, objections were made on Mr. Flores's behalf to the habeas court's reliance on the 2001 affidavits as follows: (a) these are not the kinds of materials that can ever be a proper subject of judicial notice;[128] (b) the CCA had already rejected the State's attempt to rely on

[127] The State's/Court's FFCL does not mention that prosecutors Jason January and Greg Davis had also signed affidavits to support the State's opposition to the initial writ application that contained some of the exact same text found in trial counsel's affidavits.

[128] The 2001 affidavits are replete with contested facts that are not akin to mathematic formulas or whether a particular street address is found in Dallas County, the kind of facts that can

these same affidavits in granting an evidentiary hearing on the hypnosis claim;[129] (c) the State had sought and obtained an order that curtailed the ability to attack these very allegations and other reputedly "corroborating evidence" that the State had relied on to obtain the conviction;[130] (d) affidavits in general are disfavored as a means to resolve disputed facts;[131] (e) the 2001 affidavits specifically were not

be properly judicial noticed. *See, e.g., SEI Bus. Sys., Inc. v. Bank One Tex., N.A.*, 803 S.W.2d 838, 841 (Tex. App.—Dallas 1991, no writ); *see also Gaston v. State*, 63 S.W.3d 893, 900 (Tex. App.—Dallas 2001, no pet.) (same); *Garza v. State*, 996 S.W.2d 276, 280 (Tex. App.—Dallas 1999, pet. refused) ("Reliance on judicial notice rather than the normal requirements of proof must be justified by a high degree of indisputability."). *Accord United States v. Lopez-Solis*, 447 F.3d 1201, 1210 (9th Cir. 2006) (holding "[d]ocuments such as a police affidavit establishing probable cause or a pre-sentencing report, which 'require[the court] to make factual determinations that were not necessarily made in the prior criminal proceeding,' are not judicially noticeable").

[129] In both its Motion to Dismiss the first subsequent state habeas application, which the CCA denied, and then again in its Original Answer to that application, the State had asked the CCA to consider trial counsel's affidavits, which the State had obtained and attached to its Answer as a means to oppose IAC and prosecutorial misconduct claims in his original writ application filed back in 2001. Yet the CCA found that the hypnosis claim satisfied the requirements of Article 11.071, section 5(a) and remanded for further proceedings.

[130] *See* habeas court's order preventing the applicant from calling trial counsel, the former prosecutors, and any of the State's guilt-phase witnesses other than those who had participated in the *Zani* hearing. 3 EHRR 20-45 (noting that applicant would not be allowed to "to relitigate this case").

[131] *See Manzi v. State*, 88 S.W.3d 240, 255 (Tex. Crim. App. 2002) (Cochran, J., concurring) ("Trial judges who are confronted with contradictory affidavits, each reciting a plausible version of the events, ought to convene an evidentiary hearing to see and hear the witnesses and then make a factual decision based on an evaluation of their credibility.").

competent "evidence" relevant to any aspect of his claim challenging the science of hypnosis;[132] and (f) the 2001 affidavits are facially unreliable.[133]

Viewed objectively, the 2001 trial counsel affidavits are not credible because they do not account for counsel's facially unreasonable decisions: (1) to convince their client to forego testifying and putting on an alibi defense; (2) to concede his presence at the murder scene in a law-of-parties case and then *urge* the jury to convict him; and (3) to put on no affirmative punishment-phase case at all. The affidavits reflecting those unreasonable (and unethical) decisions, created after trial, cannot qualify as "corroborating evidence" of the conviction.

The only evidence that should have been relevant to the question of "corroboration" during the first subsequent habeas proceeding was the evidence in front of the fact-finder at the time of trial. That is, in deciding whether, by a preponderance of evidence, Charlie Flores would have been convicted, even without the untrustworthy, hypnotically induced identification testimony of Mrs. Barganier,

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[132] The 2001 affidavits had nothing to do with the 2016 claim about the reliability of Ms. Barganier's post-hypnotic, in-court identification in light of contemporary scientific understanding. The affidavits were prepared to defend against, *inter alia*, allegations that trial counsel had gone rogue and abandoned him during closing arguments when lead counsel decided to concede, in the wake of Ms. Barganier's testimony, that Charlie may have been present at the crime scene but did not shoot Ms. Black. Most certainly, these affidavits were not proper support for the State's position that, even without Mrs. Barganier's testimony, Charlie would have been convicted. These affidavits were never before the jury. Indeed, they did not come into existence until two years after the Flores trial.

[133] *See* discussion in Section VIII.C above.

the only relevant evidence was that which had been admitted during trial. The limited case law applying Article 11.073 suggests that the only evidence that should matter in assessing the "preponderance" element is the evidence that was before the jury at trial. *See, E.g.*, *Ex parte Chaney*, 563 S.W.3d 239, 262 (Tex. Crim. App. 2018) (explaining that without an expert's "bite mark" testimony, "the State's remaining evidence was circumstantial and weak."). Yet the habeas court's FFCL, adopting the State's proposal wholesale, rewarded the State's post-conviction gamesmanship, disregarded the Rules of Evidence, and misapplied the concept of judicial notice. As a result, a weak, circumstantial case was buttressed with incompetent "evidence" that had not been before the jury and has never been vetted by any fact-finder.

The habeas court should have rejected the State's renewed efforts to bootstrap the 2001 affidavits into evidence under the guise of "judicial notice," especially as the State had fought and succeeded at preventing Charlie from testing the veracity of the affiants (Lollar, Parks, January, Davis) in the first subsequent writ proceeding. Thus, the myth of sufficient inculpatory evidence was further cemented—absent any legitimate foundation.

IX. THE HISTORY OF THE DALLAS COUNTY DA'S OFFICE AND OF THE INDIVIDUALS WHO LED THE FLORES PROSECUTION IS RELEVANT TO ASSESSING THE CREDIBILITY OF THE PROSECUTORIAL MISCONDUCT ALLEGED HERE.

Accusing prosecutors of rampant misconduct should not be undertaken lightly. Unfortunately, the misconduct allegations raised here are supported by considerable evidence, which was exceedingly difficult to uncover because of on-going resistance to full and appropriate disclosure of the sham justice that characterizes this case. Moreover, the culture of the Dallas County DA's Office at the time of the Flores prosecution and the patterns and practices of the two lead prosecutors since then underscore the credibility of the allegations of extra-record misconduct leveled here.

A. The Culture of the Dallas County DA's Office in the 1990s Was a Petri Dish for Misconduct.

The case against Charlie Flores was worked up in 1998 by the Dallas County DA's Office, and *voir dire* began in January of 1999. Since that time, the Supreme Court of the United States has recognized "extensive evidence of purposeful discrimination by the Dallas County District Attorney's Office" to keep minorities off of juries—particularly in death-penalty cases. *See Miller-El v. Dretke*, 545 U.S. 231, 237 (2005).[134] The Supreme Court recognized that this systemic racial discrimination had been entrenched "for decades" and had been "a specific policy"

[134] In the Flores trial, the presiding judge, the prosecution team, the defense team, and all but one of the jurors were non-Hispanic whites. A *Batson* challenge to a pattern of striking minorities from the jury was raised—but never ruled upon. The opportunity to attack that injustice through an ineffective-assistance-of-counsel claim was then lost because of the ineffective assistance that Charlie Flores received in his initial state habeas proceeding, where counsel performed no extra-record investigation of any kind. *See* Procedural History.

governing "prosecutors in the Dallas County office[.]" *Id.* at 263-265. This culture was forged, in part, by elected DA Henry Wade, whose tenure in office spanned from 1951 to 1987. DA Wade once told an assistant prosecutor, "If you ever put another n****r on a jury, you're fired." DPIC, *OUTLIER COUNTIES: Dallas County, Texas Imposing Fewer Death Sentences After Years of Discrimination*.[135] An office manual created under DA Wade's leadership, first written in 1963 and still in use in the 1990s, instructed Dallas County prosecutors not to "take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." *Id.*

The problems in the Dallas County DA's Office in the 1990s cannot, however, be cabined solely to systemic racial discrimination in jury selection. The culture of the office at that time was pervaded by a "win at all costs" mentality. *See* Michael Hall & Jake Silverstein, *Trials and Errors*, TEXAS MONTHLY (June 2012)[136] (quoting a former Dallas County DA as admitting that a win-at-all-costs culture "was prevalent in the Dallas County district attorney's office" in the 1990s). One prosecutor reportedly said of the culture in the 1990s: "You would get big accolades for big sentences, and everyone wants to be promoted[.]" *See* Elizabeth Barber,

[135] *Available at* https://deathpenaltyinfo.org/news/outlier-counties-dallas-county-texas-imposing-fewer-death-sentences-after-years-of-discrimination (last accessed Jan. 19, 2021).

[136] *Available at* https://www.texasmonthly.com/articles/trials-and-errors/ (last accessed Jan. 19, 2021).

Dallas targets wrongful convictions, and revolution starts to spread, CHRISTIAN SCIENCE MONITOR (May 25, 2014).[137]

In the 1990s, the Dallas County DA's office had a closed-file policy and had not yet created a Conviction Integrity Unit ("CIU"). *See* Texas District and County Attorneys Association, *Setting the Record Straight on Prosecutorial Misconduct* at 24 (2012) (hereafter "TDCAA 2012 Report").[138] According to the TDCAA 2012 Report, "the Dallas County conviction integrity experience revealed that a closed-file policy played a part" in several wrongful convictions, which, ultimately, led to significant "discovery policy changes in that office"—implemented long after the Flores trial. *Id.* at 15.

One reason why Dallas County led the way in opening a CIU was the notoriety that the county had earned for having the most DNA exonerations of any county in the nation. *See* The Innocence Project, *Deconstructing Dallas: The County with More DNA Exonerations Than Any Other* (Aug. 7, 2007).[139] The Innocence Project's

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[137] *Available at* https://www.csmonitor.com/USA/Justice/2014/0525/Dallas-targets-wrongful-convictions-and-revolution-starts-to-spread (last accessed Jan. 19, 2021).

[138] *Available at* https://www.tdcaa.com/wp-content/uploads/*Brady*_Resources/Reports_&_Articles/Setting-the-Record-Straight.pdf (last accessed Jan. 19, 2021).

[139] *Available at* https://www.innocenceproject.org/deconstructing-dallas-the-county-with-more-dna-exonerations-than-any-other/ (last accessed Jan. 19, 2021). The Innocence Project's data has demonstrated that, nationally, nearly 75% of wrongful convictions have been due in part to misidentification by victims or eyewitnesses, leading The Innocence Project to deem it the single greatest cause of wrongful convictions. Out of the 44 Texas exonerations listed on the Innocence Project website, 35 (80%) were related to eyewitness errors.

"in-depth investigation" of the causes of Dallas County's thirteen DNA exonerations uncovered by that point identified noteworthy trends. The most common variables were "faulty eyewitnesses"—as in the Flores case—and "overzealous prosecutors"—also evident in the Flores case. *Id.* In trying to explain Dallas County's abysmal record, The Innocence Project's investigation relied in part on interviews with ex-prosecutors who noted "the office's push to convict in the 1980s and 1990s." *Id.*

But even before DNA testing was employed to expose several wrongful convictions obtained in Dallas County, the county had an unusually large share of high-profile wrongful convictions, "includ[ing] the cases of Joyce Ann Brown, Randall Dale Adams, and Lenell Geter, all of whom were eventually exonerated after the media took up their causes." Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1034, 1036 (2011-2012).

The exposure of wrongful convictions did not lead to an overnight sea change in Dallas County. Indeed, one director of Dallas's CIU noted ongoing resistance to acknowledging wrongful convictions: "It would, I believe, be fair and accurate to say that in Dallas County, the former administration considered the nine DNA exonerations as public relations embarrassments. . . . Likewise, it appears that within the Dallas County office, the unspoken policy was to acknowledge each wrongful

conviction as an existent aberration in a system that worked 99.99%[.]" *Id.* at 1039. Evidence of systemic problems was deflected: "There was no need to encourage any unnecessary attention toward them, much less study or attempt to learn from them." *Id.*

Until the advent of major reforms, Dallas County prosecutors did not "have any knowledge of *Brady* before" becoming prosecutors and were not getting training while employed. TDCAA 2012 Report at 26. Thus, in or around 2012, a program was implemented "requir[ing] its prospective prosecutors to study *Brady* and related caselaw[.]" *Id.*

The current elected Dallas County DA—former Dallas County district judge John Creuzot—ran for office on promises to rein in overly aggressive prosecution and prosecutorial misconduct in the office. Seemingly as part of making good on his campaign promises, he fired twelve people, including the heads of the juvenile, crimes against children, and appellate divisions at the outset. *See* Tasha Tsiaperas, *Dallas County's New District Attorney Fires 12 Prosecutors Before Taking Office Jan. 1*, DALLAS MORNING NEWS (Dec. 27, 2018).[140] The fact that DA Creuzot could run, in 2018, on promises of reform, was because the culture within the DA's Office *still* very much needed reforming. Undoing the abuses associated with a long-

[140] *Available at* https://www.dallasnews.com/news/courts/2018/12/27/dallas-county-s-new-district-attorney-fires-12-prosecutors-before-taking-office-jan-1/ (last accessed Jan. 19, 2021).

standing culture of unbridled aggression, self-preservation, and unapologetic racism, while continuing to provide prosecutorial services for a major metropolitan region, has not been easy.

This history is the relevant backdrop against which Flores's allegations of prosecutorial misconduct and false testimony should be assessed. Additionally, the history of the two lead trial prosecutors should be taken into account.

B. The History of the Lawyers Who Prosecuted the Flores Case Is Relevant to Assessing the Prosecutorial Misconduct Allegations.

1. Lead Prosecutor Jason January's history shows remarkable hubris regarding his power as a prosecutor.

According to his current professional website, Jason January was employed by the Dallas County DA's Office from 1985-2000.[141] Thus, his first job after graduating from law school was in the DA's Office then run by Henry Wade. That is the context in which he learned how to be a prosecutor. January became a "special prosecutor" entrusted to represent the State in significant felony cases, including death-penalty cases. During his tenure, he tried six death-penalty cases to a verdict and, in each case, induced a Dallas jury to embrace a death sentence. All but one of these individuals was a person of color; four men were Black, one man (Charles Flores) was Hispanic; and one man was White. Charles Don Flores is the only one

[141] *Available at* https://www.januarylaw.com/Attorney/Jason-S-January.shtml (last accessed on Jan. 18, 2021).

of the six individuals against whom January obtained a death sentence who has not already been executed.[142] January's conduct since that conviction suggests an inordinate interest in seeing Flores executed, not in the service of justice, but, seemingly, to protect his own reputation.

January abruptly left the Dallas County DA's Office in the fall of 2000 soon after orchestrating the remarkable plea deal for Ric Childs. On information and belief, January did not leave the DA's Office by choice but did so because of acts of moral turpitude. A contemporaneous article about his departure questions the notion that January would suddenly have quit his high-profile job. After all, he "often appeared in the media for prosecuting high-profile cases such as the notorious Mi-T-Fine Car Wash murders, which he worked in September just before quitting." *See* Charles Siderius, *Tuned Out*, DALLAS OBSERVER (Jan 18, 2001).[143] Yet in that article, January is quoted as insisting that, despite some tension with the new elected DA, his departure was his choice: "No question, I had some mild philosophical differences with the way that things were running down there [under the new elected DA, Bill Hill] but nothing that stopped me from working with him for a year and a

[142] *See* TDCJ, Death Row Information: executed offenders, *available at* https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html (last accessed Jan. 19, 2021).

[143] *Available at* https://www.dallasobserver.com/news/tuned-out-6392788 (last accessed Jan. 19, 2021).

half." *Id.* January further claimed: "I had crossed the line of 15 years and got my little 15-year pin. At that point, I thought it was time to move on." *Id.*

In the same article, January also admitted, unapologetically, that he had taken time off ***during a death-penalty trial*** to pursue an extracurricular opportunity. This was during the trial of Douglas Feldman, which began shortly after the Flores trial had wrapped up. During that trial, January traveled to New York City to perform with a singing group. Reportedly, he was criticized upon his return for having claimed he was taking off to attend to a family matter and was then observed appearing with his singing group on the TV show *Good Morning, America.* But in a post-termination interview, he insisted that "he only missed a 'couple hours' of testimony and that he had gotten approval to go before the trial stated." *Id.* He mockingly brushed aside the notion that this might "sound bad": "'Oh, he left during a capital murder trial, whooo.'" *Id.*

During his years working as an ADA, January actively moonlighted as a singer in "Acoustix," a Dallas-based barbershop quartet:

In the 1990s, this "dynamic foursome" reputedly maintained "a rigorous schedule of performances averaging about 75 concerts a year" all around the globe.[144] Maintaining this "rigorous schedule," flitting around the globe performing for and with celebrities, would be very time-consuming—and difficult to square with discharging primary responsibility for prosecuting *six* death-penalty trials in rapid succession.

Being able to discharge that momentous responsibility on the State's behalf in the win-at-all-costs culture that then pervaded the Dallas County DA's Office would have been especially challenging. It is easy to see how juggling these competing demands might have prompted January to cut corners when it came to his

[144] According to the group's website, the group "has been electrifying audiences around the world for over 25 years. ACOUSTIX has appeared on CNN, NBC's 'Today Show,/ TNN's 'The Statler Brothers Show,' and two PBS specials. At the turn of the 21st century, ACOUSTIX performed for a global audience of 175 million viewers on 'ABC 2000,' hosted by Peter Jennings." *Available at* https://en.wikipedia.org/wiki/Acoustix (last accessed Jan. 19, 2021).

constitutional and ethical responsibilities, inclining him to strike foul blows in the pursuit of convictions and death sentences. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (describing the prosecutor's interest "not that it shall win a case, but that justice shall be done" and noting that the prosecutor "may strike hard blows, he is not at liberty to strike foul ones.").

January has continued over the years to rely on his reputation as a former prosecutor to promote himself. The Acoustix website highlights that he is an attorney. Yet the only legal experience he calls out is that he "spent 15 years as a Prosecutor and Assistant District Attorney for Dallas County."[145] Likewise, the only "Honors and Awards" highlighted on January's current law firm's website also harken back over twenty years to when he worked as a Dallas County prosecutor; the only two honors listed are the designation "Prosecutor of the Year" by Dallas Police Chief Ben Click and by the Sheriff of Dallas County.[146]

The website for January's personal-injury law firm features the six death-penalty cases he tried between the years 1988-1999 among the nine cases listed today (in 2021) on January's website as his "Representative Cases":

- *Douglas Feldman*, Sentenced to death (Randomly killing two 18-wheel truck drivers)

[145] *Available at* https://www.acoustix.com/a-homepage-section/ (last accessed Jan. 19, 2021).

[146] *Available at* https://www.januarylaw.com/attorney/jason-january/ (last accessed Jan. 18, 2021).

- *Kenneth Mosley*, Sentenced to death (Killing a Garland police officer during a bank robbery)
- *Toronto Patterson*, Executed by lethal injection (Killing his two baby nieces and their mother for chrome car wheels)
- *Yokamon Hearn*, Sentenced to death (Car jack/slaying of a young stockbroker from a carwash)
- *Charles Don Flores*, Sentenced to death (Killing a grandmother and her dog during a home invasion burglary)
- *Gaylord Bradford*, Sentenced to death (Gunning down a security guard during a grocery store robbery)
- *Coat Hanger Rapist*, Eight plus aggravated sexual assaults in Dallas
- *NationsRent*, Civil negligence in connection with an (18 wheel truck wreck which injured a computer programmer)
- *Contract Freightliners, Inc.*, Civil negligence in connection (18 wheel truck wreck which killed two good Samaritans)

January's website also boasts: "Jason January never lost a first-degree felony case during his tenure at the District Attorney's Office. Every capital murder case he tried resulted in a conviction and death sentence."[147]

Current representations on his personal-injury law website and on the Acoustix website exist in tension with his insistence that he left the DA's Office back in 2000 by choice, simply because he felt it was time to "move on." To this day—over twenty years after his employment with the Dallas County DA's Office ceased—he continues to feature his experience in the DA's Office as a reason to hire him as a personal-injury lawyer or as a singer.

Ultimately, whether January left the DA's office voluntarily so that his singing career would not be hampered, or he was asked to resign for dishonest

[147] *Id.*

behavior, his "brand" still relies heavily on the perception that he was a Dallas County prosecutor who "never lost" in a death-penalty trial. Perhaps because he has branded himself in this fashion, January has remained entangled with the Betty Black case generally and Charlie Flores's sentence in particular over the years.

A few months after he left the DA's Office, January provided his former employer with an affidavit to fight against allegations of prosecutorial misconduct made in the initial writ application, as discussed above.[148] In addition to submitting a fallacious affidavit to assist his former employer in holding on to one of his victories, January has continued to act as a spokesperson for the State with respect to the Flores case. On information and belief, he has remained in contact with members of the victim's family, providing them with updates. Other evidence suggests a conflict of interest and arbitrary motives in the extremely disparate treatment he urged for the two co-defendants. For instance, in a letter dated August 7, 2012, sent to the Texas Board of Pardons and Parole, the step-father of co-defendant and triggerman Ric Childs claimed that Jason January had shared that he

[148] As explained above, January's affidavit has never been subjected to adversarial testing. No evidentiary hearing was held in Flores's initial state habeas proceeding. After the CCA granted a stay of Charlie's execution in 2016, and after his first subsequent habeas application was remanded to the trial court, Jason January was subpoenaed to testify at an evidentiary hearing. The trial court, however, entered an order, dramatically curtailing the witnesses that the parties were permitted to call. Therefore, Flores's habeas counsel was not allowed to question Jason January, Greg Davis, or many others involved in the underlying investigation and prosecution.

felt Ric's sentence of 35 years "was too excessive" and advised Ric to file "an appeal for a possible sentence reduction." Ex. 14.

By contrast, January has continued to voice his opinion that Charles Flores deserves the death penalty. In 2016, when Charlie Flores was facing a pending execution, January was quoted as saying "Flores had a lifelong history of criminal and violent activity, and if you've ever seen Charles Dickens—Scrooge and all that stuff, you kind of wear your own chain[.]" *See* Casey Tolan, *Meth, Hypnosis, and Murder: An Incredible True Story of Race and Punishment on Texas' Death* Row, SPLINTER (May 10, 2016).[149] In fact, Charlie had no such "lifelong history." He had previously served one two-year sentence for possessing drugs and fighting in violation of his probation and had no history of significant violence—until he resisted being taken into custody in conjunction with the Black case. January also told the reporter that he was not concerned "with the wide difference in sentencing that Flores and Childs received"—although Ric actually had a worse criminal history. January also expressed indifference as to who may have pulled the trigger: "[I]n Texas, you're as guilty as the triggerman. You can't escape responsibility in a criminal endeavor just because you didn't pull the trigger." *Id.* But January's comments obscure the fact that "escaping" responsibility seems to be what he

[149] *Available at* https://splinternews.com/meth-hypnosis-and-murder-an-incredible-true-story-of-1793856732 (last accessed Jan. 19, 2021).

enabled Ric to do. Yet we now know that January possessed information over a year before the Flores trial that Ric had told Jackie that he had shot Mrs. Black. More important to the current claims, January actively worked to manipulate and manufacture evidence—not only to place Charlie at the crime scene but to enable the State to argue that he, not Ric, had shot Mrs. Black. *See* Factual Background, Sections V & VI, above.

As recently as 2019, January again took it upon himself to defend the Flores case as though he were still authorized to speak on the State's behalf. He did so in the context of lobbying against a criminal justice reform bill, inspired in part by the Flores case, which would have brought Texas in line with the vast majority of jurisdictions that now ban the admission of hypnotically induced testimony in criminal cases.[150] January wrote a letter to the bill's sponsor, purporting to be an authority on "the facts of the Flores case." Ex. 70. In January's letter to the Honorable Juan "Chuy" Hinojosa, January railed about "the intentional misstatement of the facts of the case and trial that is now being stated by Mr. Flores and his attorneys and supporters[.]" *Id.* He claimed that the suggestion that the prosecution "rested solely" upon the testimony of a hypnotized witness was "completely false and intentionally extremely misleading." *Id.* January insisted that

[150] *See, e.g.*, Lynn, S.J., Malaktaris, A., Barnes, S., & Matthews, A. *Hypnosis and Memory in the Forensic Context*, in A. Jamieson, & A. Moenssens (Eds.), WILEY ENCYCLOPEDIA OF FORENSIC SCIENCE (New York: Wiley).

the prosecution had "ample evidence independent" of the hypnotized witness while also insisting that the hypnotized witness had "never changed any of her testimony" as a result of the hypnosis. *Id.* He did not address the ample evidence that this witness had changed her description of what she had seen considerably after a hypnosis session during which she was repeatedly told she could "remember more" as time passed and after the police showed her Charlie Flores' picture. *See* Section VII above.

January went so far as to include with his letter to Senator Hinojosa a copy of the Findings of Fact and Conclusions of Law (FFCL), written by the Dallas County DA's Office, that had been adopted by the trial court in Charles Flores' previous habeas proceeding on the forensic hypnosis issue, citing passages that he felt legitimized his objections to the forensic hypnosis bill. *Id.* January was so worked up about the idea of any attack on the Flores conviction that he, who had not worked as a prosecutor for decades, took time to defend the controversial practice of forensic hypnosis generally and even offered himself as an authoritative voice to be consulted going forward:

To throw out the "baby with the bathwater" by excluding all hypnotically-refreshed testimony might very well result in a miscarriage of justice in the future for a victim/victim's family.

As you can see by the facts of the Flores case, the hypnosis part of the evidence was merely additional to the mountain of evidence – including confessions- that the State already had to convict Mr. Flores.

If you have any questions or comments, please feel free to contact me any time.

Thank you for your time.

Very truly yours,

/s/ Jason January

Jason January

Id. It is also noteworthy that, in this letter, January yet again promoted the myth of some "mountain" of corroborating evidence that does not exist. He specifically alludes to the so-called "confessions" that were attested to only by Homero Garcia, for whom January had orchestrated a remarkable, undisclosed deal and who later recanted, and Jonathan Wait Sr., a professional snitch and drug addict who barely knew Charlie Flores and who seems to have invented for trial his facially incredible story about obtaining a "confession" that is not reflected in any pre-trial production.

The distinctly personal, highly emotional investment January has made over the years to intermeddle in the adjudication of Ric Childs' light sentence, in Charles Flores's post-conviction appeals, and even in plans for much-needed legislative action on the controversial use of "forensic hypnosis" in Texas criminal

investigations is relevant to assessing the current prosecutorial misconduct allegations and the credibility of his 2001 affidavit.

2. Prosecutor Greg Davis's history reflects a win-at-all-costs mentality.

Greg Davis was a prosecutor for decades, moving among various DAs' offices in Dallas, McLennan, and Collin counties. On information and belief, he is now in private practice as a defense lawyer. According to an article about his career, Davis went to work for Dallas County DA Henry Wade in 1977 and worked there for several years before going into private practice in Dallas. He returned to the Dallas County DA's Office in 1992, reportedly, "because he missed prosecuting."

Davis, along with Jason January, was among a handful of prosecutors in the 1990s who had primary responsibility for working up capital murder cases in Dallas County. *See* Tommy Witherspoon, *McLennan County prosecutor likely holds active*

death row record, WACO TRIBUNE-HERALD (May 24, 2014; Updated July 15, 2020).[151]

In an internal memo drafted shortly after the Flores trial, January described his second chair, Greg Davis, as a "talented prosecutor and good friend" who had taken the lead in jury selection and then played key roles in presenting both guilt- and punishment-phase evidence. Ex. 63. Davis was a skillful courtroom advocate who played a significant role in developing the State's false Ric-used-the-bigger-gun-to-shoot-the-dog narrative. *See* Section VI above. Davis was also responsible for presenting Charles Linch, with whom he had worked quite closely in other cases, in court during the Flores trial.

After the trial, Davis, like January, submitted an affidavit to support the State's opposition to Charlie Flores's initial habeas application. Ex. 25. In that affidavit, Davis made these attestations about the allegations related to Linch:

- "Mr. Linch was called as a trace evidence expert by the State in this case to testify that starch grains consistent with potato were present in the grooves of the barrel of a gun recovered at the time Richard Childs, the co-defendant, was arrested. His testimony was **but a minor part** of the State's case against Mr. Flores. There was abundant evidence to convict Charles Flores of capital murder without Mr. Linch's testimony. *Id.* (emphasis added).

- "I am aware that Mr. Flores has filed an application for writ of habeas corpus alleging that the State suppressed evidence regarding Charles Linch's mental

[151] *Available at* https://wacotrib.com/news/local/crime-and-courts/mclennan-county-prosecutor-likely-holds-active-death-row-record/article_548a4b86-4742-5f0a-aa35-bce4a41ad89a.html (last accessed Jan. 19, 2021).

> history, specifically, treatment for depression and alcoholism. At the time of Mr. Flores' trial, I had no knowledge that Mr. Linch had ever suffered from depression or alcoholism or that he had ever been hospitalized for either condition. I first learned of these matters approximately a year after Mr. Flores' conviction."

As with January's affidavit, Davis's attestations have never been subjected to adversarial testing. There are multiple reasons for doubting their credibility, however.

First, as explained at length in Section VI above, Linch's testimony was not a "minor" part of the State's case against Charlie Flores. Linch offered the only facially credible evidence to support the State's "Ric-had-the-bigger gun" story, which was pushed from Opening Statements onward. During Closing Arguments, Davis himself repeatedly urged the jury to embrace the "bigger gun" story, based on Linch's finding that potato starch was present in the .44 magnum, to find that Flores had been the one to shoot Betty Black with a smaller .380. 39 RR 51, 63; *see also* 39 RR 94-95, 100, 101, 102, 103. The amount of airtime that Linch himself spent on the stand is not dispositive of the significance of his role.

Second, Davis's assertion that he had no knowledge of Linch's mental health issues until a year after the Flores trial rings hollow. A few years before the Flores trial, Davis had worked closely with Linch, who provided crucial trace-evidence testimony for the State in the death-penalty case against Darlie Routier, which otherwise relied heavily on Davis's critique of Ms. Routier's behavior at her sons'

funeral and other character assassination. Routier was tried after Linch's mental health issues had already erupted into public view—which was by at least 1994, when his supervisors at SWIFS were so alarmed by his behavior that he was retrieved at home and taken to a local hospital to prevent him from endangering himself or others. ***While involuntarily hospitalized***, Linch was granted leave to depart the hospital on multiple occasions to perform work for SWIFS—including testifying in various cases, such as the notorious Kenneth McDuff murder case, tried in Guadalupe County. Linch later described how, while in transit from the McDuff trial back to the mental hospital, Linch and a colleague had stopped to pose for a photo under a statue in Seguin, Texas dedicated to the "world's biggest nut":

Ex. 67. In short, Linch's struggles with alcoholism and depression were no secret. Moreover, they were directly related to his work for Dallas County and were publicly

aired as part of Linch's decades-long frustration about being underappreciated, overworked, underpaid, and undertrained. *See* Ex. 71. Linch's formal grievance against his SWIFS supervisor was being appealed during the 1999 Flores trial and, before his grievance was resolved, he abruptly quit. *See id.* Davis could not have been oblivious to all of these developments.

In 2000, a series of *Dallas Morning News* articles blew up the story of Linch's problematic history. At that time, Davis also denied knowing anything about Linch's "personal life." He claimed: "I've never had any reason to question his personal life because I've never seen it have any affect [sic] on his professional ability. I've considered him to be probably one of the most recognized authorities in this area, certainly on trace evidence." *See* Holly Becka and Howard Swindle, *Routier Trial Expert Cast Doubts on His Own Abilities: Prosecutors Say Forensic Analyst Competent*; *Defense Questions Credibility of Testimony*, DALLAS MORNING NEWS (May 10, 2000). But in the same article in which Davis denied knowing anything about Linch's history, Davis's co-counsel in the Routier case, Toby Shook, admitted the following: "I think it was no secret that Charlie [Linch] had some drinking problems." *Id.*

Additionally, the work of Linch, whom Davis felt was "probably one of the most recognized authorities" on trace evidence, has been associated with at least one established wrongful capital conviction (of Michael Blair) and is implicated in

others, including Routier's and this case. *See* Ex. 67. In short, the face of Davis's assertions regarding Linch merit skepticism.

During Davis's prolific career as a prosecutor of death sentences in the State of Texas,[152] Davis has been dogged by serious and credible allegations of prosecutorial misconduct, some of which courts have already found to be true. Aside from allegations raised by Darlie Routier, and now by Charles Flores, both of whom continue to assert their innocence, Davis has been accused of misconduct in numerous other death-penalty cases.[153]

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[152] *See Death penalty cases prosecuted by McLennan County's Davis*, WACO TRIBUNE-HERALD (May 24, 2014 Updated Dec 8, 2016) (describing 22 death penalty trials that Davis had prosecuted, putting 20 defendants on death row, as "likely a record among active Texas prosecutors"), *available at* https://wacotrib.com/news/local/crime-and-courts/death-penalty-cases-prosecuted-by-mclennan-county-s-davis/article_900e77d7-b084-55a9-8ff2-eb4b7daa8085.html#:~:text=McLennan%20County%20First%20Assistant%20District,record%20among%20active%20Texas%20prosecutors.&text=George%20Jones%3A%20Davis'%20first%20death%20penalty%20case%20in%201995 (last accessed Jan. 19, 2021).

[153] In 1997, Davis prosecuted Gregory Wright in Dallas County and was later accused of multiple instances of prosecutorial misconduct. No hearing on these claims was ever authorized. But Wright went to his death asserting his innocence and insisting that another man, John Adams, was the perpetrator. Wright's co-defendant, John Adams, was also prosecuted by Greg Davis. Adams made *Brady* allegations similar to Wright's about an undisclosed deal with a testifying witness, but a federal court granted him relief on an IAC claim instead. *See Adams v. Quarterman*, 324 F. App'x. 340, 355-56 (5th Cir. 2009). Adams was re-tried and received a life sentence instead of the death penalty. In October 2007, Davis prosecuted Kosoul Chanthakoummane in Collin County. Ten years later, when Chanthakoummane was facing an imminent execution date, the CCA authorized all four claims in a subsequent habeas application raising junk-science issues that implicate prosecutorial misconduct—including the suspect use of forensic hypnosis at issue in the Flores trial. *See Ex parte Chanthakoummane*, No. WR-78,107-02, 2017 Tex. Crim. App. Unpub. LEXIS 426, *1-2 (Tex. Crim. App. June 7, 2017). The CCA ultimately denied relief, but three judges dissented, urging the Court to reconsider the issue of hypnosis as a forensic technique and citing the Flores case. *See Ex parte Chanthakoummane*, No. WR-78,107-02, 2020 Tex. Crim. App. Unpub. LEXIS 443, *12 (Tex. Crim. App. Oct. 7, 2020) (Newell, J., dissenting, Richardson and Walker, JJ., joined) (stating that Applicant's argument that "hypnotically refreshed identification

In February 2000, Davis prosecuted Roderick Newton in Dallas County. Davis and his team withheld *Brady* evidence. On the eve of Newton's execution, the CCA granted a stay and remanded his 11.071 application. A Dallas trial court recommended relief, with the elected DA confessing error, and the CCA thereafter granted Newton a new trial. *Ex parte Newton*, No. AP-76,456, 2010 WL 4679950, *1 (Tex. Crim. App. Nov. 17, 2010) ("The State conceded that material exculpatory evidence was withheld from applicant. The habeas court adopted the State's unopposed findings of fact and conclusions of law and recommended that this Court grant relief.").

In early 2009, Davis prosecuted Raul Cortez, a defendant in a multi-defendant case, in Collin County. There is a *Brady* claim in Cortez's pending federal habeas proceedings, hinging on an undisclosed implied plea deal with a co-defendant—a maneuver found in the Flores case. Cortez's petition alleges that the prosecution had a tacit agreement with Cortez's co-defendant's counsel that they would discuss a plea agreement for a more lenient sentence *after* the co-defendant testified, implicating Cortez in the murders. *See Cortez v. Stephens*, No. 4:13-cv-83 (E.D. Tex. 2015). The federal pleadings show that Davis essentially admitted to the factual predicate of this allegation in an affidavit submitted in the state habeas proceeding.

information led to unreliable identification testimony deserves further consideration. The Court ought to file and set this case to thoroughly examine this issue.").

In 2012 and 2013, Davis was lead prosecutor for two death-penalty prosecutions against co-defendants: Rickey Cummings and Albert Love. Both of these African-American men have continued to maintain their innocence. Cummings' federal habeas petition has raised multiple claims of State misconduct, including claims that (1) the prosecution misused post-indictment grand jury proceedings; (2) that the prosecution knowingly elicited false and misleading testimony at trial about who sent inculpatory text messages from defendant's phone; (3) that the prosecution engaged in misconduct when Davis repeatedly and knowingly misattributed incriminating evidence to Cummings; and (4) that the prosecution engaged in several *Brady* violations regarding four categories of suppressed evidence (including a detective's romantic relationship with a victim's aunt). Cummings' briefing also describes a pattern of burying *Brady* evidence and continuing to resist production during post-conviction proceedings, as in Flores' case. Cummings has been granted a stay and abeyance to return to state court to exhaust these claims, which cast substantial doubt on a case that relied heavily on circumstantial evidence, unfounded gang innuendo, and a highly unreliable, incentivized eyewitness. *See Cummings v. Davis*, 6:18-cv-00125-ADA (W.D. Tex. 2019).

Meanwhile, the case that Davis prosecuted against Cummings' co-defendant, Albert Love, fell apart. In Love's case, the State had presented a theory of the facts

contrary to that presented at Cummings' trial. After the CCA granted a new trial to Love due to Fourth Amendment violations raised on direct appeal, *Love v. State*, 543 S.W.3d 835, 858 (Tex. Crim. App. 2016), the McLennan County DA's Office, from which Davis departed in 2014, has decided not to pursue the death penalty against Love in a retrial; yet Love continues to insist on his innocence. *See* Tommy Witherspoon, *State drops death penalty in retrial of former death row inmate Albert Love*, WACO TRIBUNE-HERALD (June 8, 2020).[154]

Greg Davis, no longer a prosecutor, is named in an ongoing civil action brought by a former state court judge in Collin County. The judge has sued "various state and local law enforcement officials, alleging they violated the Constitution by investigating and prosecuting her in retaliation for unseating an incumbent judge and making rulings they disagreed with." *Wooten v. Roach*, 964 F.3d 395, 398 (5th Cir. July 6, 2020) (concluding that some, but not all of the defendants can rely on immunity defenses, thus permitting the lawsuit to go forward). The *Wooten* lawsuit arose from an FBI investigation of Davis and two other Collin County prosecutors for allegedly "using grand juries for politically motivated investigations, including Wooten's." *Id.* at 400. The misuse of grand juries is a technique Davis may have learned during his time in the Dallas County DA's Office in the 1990s. Such misuse

[154] *Available at* https://wacotrib.com/news/local/crime-and-courts/state-drops-death-penalty-in-retrial-of-former-death-row-inmate-albert-love/article_dd82565d-87b3-52be-bf74-ea650a035220.html (last accessed Jan. 19, 2021).

is evident in the Flores case, where ADA January went repeatedly to the grand jury to seek a means to prosecute Charlie Flores's loved ones and, post-indictment, to adduce questionable evidence to justify an undisclosed deal given to co-defendant Ric Childs, the actual shooter of Betty Black.

Collectively, this history of a DA's Office that prompted a win-at-all-costs approach and of these two prosecutors should be taken into account in assessing the likelihood that they breached constitutional and ethical duties in seeking to convict Charlie Flores. *See* Claims IV-VIII below.

CLAIMS

The merits of Claims I-X are described below. The basis for finding that each satisfies the procedural requires of Article 11.071, section 5(a) is pled in the "Summary of Claims and Satisfaction of Section 5(a)" above.

I. THE NEW SCIENTIFIC CONSENSUS IN THE FIELD OF EYEWITNESS IDENTIFICATIONS RENDERS MRS. BARGANIER'S IN-COURT IDENTIFICATION OF CHARLIE FLORES NOT JUST UNRELIABLE BUT HER PREVIOUS FAILURE TO IDENTIFY HIM IS EXCULPATORY.

Charlie Flores's conviction hinges on an eyewitness identification made, for the first time, thirteen months after the witness in question had observed two men get out of a strange car in her neighbor's driveway before dawn on January 29, 1998. But what was not known until 2017 is that this witness, Jill Barganier, had been given the opportunity to identify Flores as one of these two men within a few days of her initial observation: on February 4, 1998. Moreover, it was not known until 2017 that, on February 4, 1998, she had been shown a very recent, recognizable photograph of Flores in a six-person photo lineup; but she *failed* to pick him out of that lineup when her memory of what she had seen was relatively fresh.

New scientific understanding regarding the reliability of eyewitness identifications, which was not available until 2020 and which contradicts the scientific understanding relied on by the State at trial, requires relief under both

Article 11.073 of the Texas Code of Criminal Procedure and the U.S. Constitution. *See* TEX. CODE CRIM. PROC. art. 11.073(a); U.S. CONST. amend. 14.

Claim I, based on a new scientific consensus in the discrete field devoted to assessing eyewitness identifications, can easily satisfy the elements of Article 11.073 and 11.071 section 5(a). The new scientific understanding regarding the reliability of eyewitness identifications, upon which Mr. Flores relies, was not available until 2020 *and* contradicts the scientific understanding relied on by the State at trial. Therefore, Claim I can easily satisfy the elements of Article 11.073 and 11.071 section 5(a).

A. The Legal Standard

To show that Article 11.073 applies to a claim for habeas relief, the applicant must first establish that the "relevant scientific evidence" "(1) was not available to be offered by a convicted person at the convicted person's trial; *or* (2) contradicts scientific evidence relied on by the state at trial." TEX. CODE CRIM. PROC. art. 11.073(a) (emphasis added). As explained further below, Mr. Flores can satisfy both of these threshold requirements—although only one is required.

Aside from satisfying one of the two threshold requirements, for a habeas court to ultimately grant relief, an applicant must plead, and then prove, these three elements:

> relevant scientific evidence is currently available and was not available at the time of the convicted person's [last habeas application] because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before [the relevant date]; *and*
>
> the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; *and*
>
> had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

Id. at (b)(1) & (2) (emphasis added).

Because Mr. Flores's habeas application is a subsequent application, Article 11.073 further dictates that the "claim or issue could not have been presented . . . in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which . . . a previously considered application, as applicable, was filed." *Id.* at (c). The statute expressly explains how to determine "whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date[.]" *Id.* at (d). The habeas court is required to consider—"shall consider"—"whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed" since "the date on which . . . a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application." *Id.* at (d)(2).

B. Facts Relevant to Claim I

The key facts on which Claim I depends did not come to light until a 2017 evidentiary hearing. Not until Flores was permitted to reopen the record, following the stay of his execution in June of 2016, were facts regarding Mrs. Barganier's previous attempts to make an identification of the second man (the car's passenger) she had observed finally disclosed. Only then were the facts ascertainable that are distinctly relevant to the new scientific consensus at issue in this claim.

On March 23, 1999, thirteen months after Mrs. Barganier had seen two men get out of a Volkswagen in the driveway of the house next door, she came to the courthouse to testify for the State in the Flores case. 35 RR 2. At some point that day, before Mrs. Barganier was called to the stand, but after she had seen Charlie Flores in the courtroom, she told the prosecutors that she could *now* identify him as the car's passenger. 36 RR 85-86, 92. The court and defense were informed of this fact during an unrecorded bench conference.

Defense counsel announced an intent "to object to her testimony on the grounds that her in-Court identification is tainted by the hypnotic episode that she had undergone." 36 RR 15-16.[155] After this mid-trial development, the trial court held a hearing, outside the presence of the jury, to ascertain whether Mrs. Barganier

[155] This development memorialized after-the-fact when Judge Nelms put this background on the record during the Zani hearing the next morning. 36 RR 15-16.

should be allowed to testify regarding her identification—because of the hypnosis session. The hearing was only held because she had submitted to a hypnosis session, conducted by a police officer, in the time between her initial observation of the men and her alleged identification thirteen months later that, according to the State, had yielded no new information. 36 RR 18-117.

During a hearing, outside the presence of the jury, Mrs. Barganier testified while being questioned by defense counsel, in essence, that she had no memory of being shown Flores's photo during the preliminary investigation *at all*:

> Q. Okay. All right. Do you recall when you were shown a lineup which included the photograph of Charles Flores ?
>
> A. No, I don't.
> ….
>
> Q. Well, I know at some point they showed you a photographic showup, is what they are called, that included a picture of Charles Flores. And my question is; Were you shown that showup before or after you did the composite of the passenger?
>
> A. I don't know.
>
> Q. At some point though you were -- you do recall being shown that showup of the passenger?
>
> A. No.
>
> Q. Okay. And if we were to tell you that among the showups that you saw was a picture of Charles Flores and that you didn't pick him out?
>
> A. Okay.

> Q. I guess my question is: When were you shown the photographic lineups? Obviously you were shown on January 30th and on January 31st. When were you — when else were you shown a photographic lineup?
>
> A. I was shown a lot of photographic lineups. I couldn't tell you -- if I didn't pick him out of there, ***I assume I wasn't shown one with him in there.***

36 RR 106-107 (emphasis added). The prosecution pointedly did not clarify the facts (and relevant records had not been disclosed before trial); therefore, the record did not establish that Mrs. Barganier had *in fact* been previously shown a photo lineup containing Flores's picture—and had failed to identify him.

Later, in front the jury, the prosecution further muddied the facts by creating the distinct impression that, *if* Mrs. Barganier had been shown a photo lineup with Flores's picture in it, it had likely been an old photo, taken before he was apprehended:

> Q. Did you have any idea whether or not a photograph of the Defendant was in the lineup that you saw? Do you have any idea whether he was in there or not?
>
> A. I was -- I never asked them or --
>
> Q. Okay. So you don't know?
>
> A. No, I don't know.
>
> Q. Okay. Do you have any idea as to how old any pictures were, whether or not the Defendant had been apprehended on February 4th or not?

A. No, I don't know that.

36 RR 293.

Thus, the trial record does not include the following critical facts, discovered only *after* an evidentiary hearing in October 2017:

- Police had shown Mrs. Barganier multiple photographic lineups (and potentially other photos) between January 29th and February 4th, 1998, but the contents of most of those arrays remains unknown.[156]

- Mrs. Barganier was definitely shown a six-person photo lineup featuring a photograph of Flores on February 4, 1998, but did *not* identify him.

- The six-person photo lineup featuring Flores included his most recent mugshot, which had been taken only a few months before the photo was shown to Mrs. Barganier.

- The photo of Flores included in the six-person photo lineup had been obtained by the lead detective in the Farmers Branch PD from the Irving PD sometime *before* February 4, 1998.

- The photo lineup was not presented to Mrs. Barganier with any now-standard instructions, such as an instruction that the suspect may or may not be in the lineup.

- The photo lineup was not presented in a double-blind procedure, because the detective who showed her the array (Callaway) believed Flores to be a suspect and had been responsible for obtaining and choosing the photograph of Flores that was used in the lineup.[157]

[156] What was known at trial is that she had succeeded at identifying the car's driver, picking Ric Childs out of two different photographic lineups soon after the murder.

[157] The first studies on the importance of double-blind procedures were not published until the mid-2000s. 5 EHRR 22-23, 107.

4 EHRR 121-22; AppX57. These facts were not ascertainable until 2017 because the State had not previously disclosed the relevant documentation (before or during trial).

Of these facts, the most critical to this claim is that Mrs. Barganier had tried and failed to identify Charlie Flores when she *first* had the opportunity to do so, thirteen months before her in-court identification. Today, it is uncontroverted, based on facts adduced for the first time during a 2017 evidentiary hearing, that Mrs. Barganier was definitely exposed to a recognizable photograph of Flores (No. 2) in a six-person photo line-up shown to her at the Farmers Branch police station on February 4, 1998:

AppX30. Also, it is now undisputable that, on February 4, 1998, Mrs. Barganier was ***unable*** to make any identification of the man she had seen with Ric Childs the morning of the crime based on this array, even though it included a mugshot of Flores taken only a few months before the crime:

AppX39; Ex. 35. In other words, at the early stage of the investigation, Mrs. Barganier *rejected Flores* as matching her memory of Ric Childs's accomplice.[158]

Also relevant to this claim is that it remains unknown whether the photo lineup above was the first (or last) time that investigators presented Mrs. Barganier with an image of Charlie Flores. It is only known that she signed a variety of Farmers Branch Police Department Photographic Lineup Forms that are no longer paired with photo arrays. 4 EHRR 177-78. These forms, like the array above, were only made a part of the record in 2017. *See* AppX13; AppX22; AppX24; AppX25. However, as discussed below, prior exposure to images of Flores in other, now-lost photo lineups would likely have artificially biased her toward picking him out of the array at issue; yet she still did not identify him at that time. She was only able to do so thirteen months later, after numerous other intervening events. The focus of *this* claim is on the science that applies to that first known attempt—and failure—to make an identification.

[158] Indeed, Flores looked nothing like the composite sketch of Ric's accomplice that she had used a computer to create earlier that very same day. *See* AppX28.

C. Application of Law to Fact

1. Article 11.073(a) is satisfied on either prong: neither the new science in question, nor the factual evidence that makes the new science relevant, were available on the applicable date; moreover, the new scientific evidence contradicts scientific evidence relied on by the State at trial.

As discussed in greater detail in section C.2, the new scientific consensus in the field of eyewitness identifications is that a failure to identify an individual the first time a recognizable photo of him is presented in a lineup is *exculpatory* and that any identification made *after* that first exposure is critically tainted and thus unreliable. This scientific understanding was not available to Flores at either his trial or in the writ proceeding that followed his May 19, 2016, application.

The scientific field of eyewitness identification was still in the early stages of development at the time of the Flores trial in 1999. And even at the time of the writ proceeding initiated in May 2016, there was still no science that would have permitted Flores to challenge the identification's reliability based on Mrs. Barganier's failure to make an identification the first time she was exposed to a recognizable photo of Flores. As explained further below, the relevant scientific understanding upon which Flores relies today solidified into a consensus only in 2020.

Additionally, as explained above, the facts that make the new science relevant to Flores's case were not available on the date of Mr. Flores's previous habeas

application. Until the 2017 evidentiary hearing that followed his previous application, Mr. Flores had no access to the facts outlined in section B above because the State had failed to disclose them. Therefore, he could not have raised a claim based on those facts, even if the relevant science had been available—which it was not. Notably, in the 2017 evidentiary hearing during which the salient facts came to light, the State adamantly insisted that the larger context of Mrs. Barganier's initial observation, her other interactions with law enforcement, and her ultimate identification were all irrelevant to Flores's then-pending "hypnosis claim."

Because the new scientific evidence was not available to be offered by Flores in his 2016 habeas application, the scientific evidence in this Claim satisfies Article 11.073(a).

The scientific evidence in this Claim can also satisfy Article 11.073(a) because it contradicts the scientific understanding the State relied on at trial. Specifically, the new scientific evidence presented in this Claim, showing that a failure to identify an individual the first time he appears in a lineup is exculpatory and that an identification made after that first exposure is critically tainted and unreliable, contradicts the (then-current) scientific understanding upon which the State relied at trial to argue that Mrs. Barganier's identification was reliable.

In making the argument that Mrs. Barganier's identification was reliable (and untainted by the hypnosis session to which she had been subjected), the State at trial

relied on an understanding of memory that has been debunked by intervening scientific developments. Specifically, the State argued that Mrs. Barganier's belated identification was not only reliable, but that no intervening events had made the identification unreliable—including, implicitly, the fact that she had previously had the opportunity to pick Flores's recognizable photo out of a six-person photo lineup and had failed to do so.

The defense objected to the reliability of Mrs. Barganier's identification, pointing out that "419 days has passed between then and yesterday." 36 RR 111. In response, the State relied on the expert opinions of a clinical psychologist (Dr. George Mount) and the officer-hypnotist (Officer Roen Serna) in successfully urging the court to hold that the identification testimony was reliable and thus admissible. Based on these witnesses' understanding of human memory, the State argued that the hypnosis session was essentially irrelevant to Mrs. Barganier's in-court identification, both because the hypnotic memory retrieval technique was appropriate, and because it had had no effect on the subsequent identification, which was assumed to be reliable. 36 RR 115.

The court then deemed her identification testimony admissible relying on a scientific understanding that (1) there was nothing wrong with Mrs. Barganier's initially failing to make an identification and then later "remembering" Flores upon

seeing him in court; and (2) no intervening events had contaminated her memory and made her identification unreliable.

Then, in the previous habeas proceeding, the State argued, based on this same understanding of human memory, that the entire hypnosis issue was a red herring, asserting that there was no causal connection between the hypnosis session and Mrs. Barganier's subsequent in-court identification. But the new scientific understanding that has emerged, as of 2020, in the discrete field of eyewitness identification research shows why the scientific perspective upon which the State relied is incorrect: only the first "bite at the apple" can ever be reliable; and when that first bite fails, the failure is actually *exculpatory*.

2. Article 11.073(b) is also satisfied.

a. Relevant scientific evidence is currently available and was not available at the time of Flores's last habeas application filed in May 2016.

In determining whether relevant scientific evidence was available through the exercise of reasonable diligence, the habeas court "shall consider whether the field of scientific knowledge … on which the relevant scientific evidence is based has changed" since "the date on which … a previously considered application, as applicable, was filed" TEX. CODE CRIM. PROC. art. 11.073(d). Because the new scientific consensus upon which Flores relies in this Claim did not even exist until 2020, it was certainly not available in May 2016 when his first subsequent state

habeas application was filed. Therefore, the new science upon which he relies was not ascertainable through the exercise of reasonable diligence. In a report attached to this habeas application, Dr. John Wixted, a leading eyewitness identification expert, explains what the new scientific understanding of eyewitness identifications is, and how and when it emerged. *See* Ex. 72.

The science of eyewitness identification started to change "rather dramatically" beginning in 2017, and in a way that is directly relevant to this case. *Id.* ¶14. The trigger for the change was a paper that Dr. Wixted co-authored with Dr. Gary Wells of Iowa State University. Dr. Wells, like Dr. Wixted, "has been recognized as one of the foremost experts in the field of eyewitness identification," dating back to the 1970s in the case of Dr. Wells. *Id.*

Although both are leading scientists within the field, Dr. Wixted and Dr. Wells were unlikely collaborators. When the memory lab that Dr. Wixted runs turned its attention fully to eyewitness identification in 2012, he and Dr. Wells often "clashed vigorously and frequently" with each other, and they have published multiple papers arguing strongly *against* the views being hypothesized by the other. As Dr. Wixted reports, "[b]etween 2012 and 2017, it was easily the most high-profile debate in the field." *Id.* Then, in 2017, the editor of *Psychological Science in Public Interest* invited these two scientists with competing understandings of eyewitness identification to write a paper together summarizing where they did and did not

agree. *Id.* Initially, they "flatly refused to even consider the possibility" because of the depth of their disagreements; but they eventually agreed to try. By working together to assess the current state of the science in this discrete field, they found some common ground. The title of the jointly-authored paper that came of this collaboration is: "The relationship between eyewitness confidence and identification accuracy: A new synthesis." *See Psychological Science in the Public Interest, 18,* 10-65. Ex. 72 ¶14.

The paper soon attracted a great deal of attention among scientists in their field because, as Dr. Wixted puts it, other scientists "were shocked to see our names on the same paper but also because of the altogether novel message we presented to the field." *Id.* Until this paper was published, confidence in the reliability of eyewitness identification had become subject to extreme doubts. That is, by 2017, there was a widespread recognition of a causal connection between wrongful convictions and eyewitness identifications, fueling the impression that eyewitness identification is generally unreliable.[159] Ex. 72 ¶15. But ***the new perspective*** put forward for the first time in the Wixted-Wells article "was that eyewitness identification is actually highly reliable" in certain circumstances, and *only* in those circumstances. *Id.* ¶14. As Dr. Wixted explains:

[159] This Court, in *Tillman v. State*, 354 S.W.3d 425 (Tex. Crim. App. 2011), recognized the concerns about the role of eyewitness identification testimony in wrongful convictions.

> [An eyewitness identification] is highly reliable in the sense that a high-confidence identification ("That's him! I'll never forget that face!") implies high accuracy (pointing strongly in the direction of guilt), whereas a low-confidence identification ("It looks like him but I can't be sure") implies low accuracy (pointing weakly in the direction of guilt). A lineup rejection or a misidentification of a filler, by contrast, points in the direction of innocence. Critically, however, this is only true *the very first time* the suspect is presented to the witness. This is because many post-identification factors (*e.g.*, seeing a photo of the suspect on the news) can and typically do contaminate memory, thereby making the suspect's face more familiar than it otherwise would be.

Id. ¶15 (emphasis retained). Moreover, only quite recently—in 2020—has the field come to appreciate that even the exposure to a recognizable image of the suspect's face on the first test unavoidably contaminates memory. *Id.* (citing Wells, G. L., Kovera, M. B., Douglass, A. B., Brewer, N., Meissner, C. A., & Wixted, J. T. (2020) Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence. *Law and Human Behavior, 44*, 3-36).

This new understanding of the limits of eyewitness identification was included, for the first time, in a consensus statement joined by several leading experts in the fields ***in 2020***. *Id.* (citing Wells, G. L., Kovera, M. B., Douglass, A. B., Brewer, N., Meissner, C. A., & Wixted, J. T. (2020). Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence. *Law and Human Behavior, 44*, 3-36).

Importantly, in 2017, Dr. Wixted *et al.* began the move toward an understanding that "there is no way to *decontaminate* memory (*i.e.*, it is not possible

to later conduct an independent test of uncontaminated memory at some later point in time)." *Id.* As such, when it comes to face recognition, as is the issue in this case, "there are no second chances to test uncontaminated memory (*i.e.*, there are no "do overs"). Only the first test can do that. Every test beyond the first, including any identification that occurs at trial, involves a test of *contaminated* forensic memory evidence." *Id.* ¶16 (emphasis retained).

This fundamental change began with the Wixted-Wells 2017 paper, published in *Psychological Science in Public Interest*, and then earned general acceptance in 2020. *Id.* ¶17. To be able to pinpoint a moment of fundamental change so precisely is, as Dr. Wixted recognizes, unusual in any scientific field—because of the very nature of scientific research. "At any given time, many scientists have recently published papers making data-based claims that contradict what other scientists have claimed in their recently published papers." *Id*. Then, "[a]fter some debate, and after each scientist attempts to replicate findings that an opposing scientist has reported, and after face-to-face discussion and argumentation at scientific conferences, some progress is often made." *Id.* That process is inherent in "the normal give-and-take of science." *Id.* That is, "the normal give-and-take involves an initial period of disagreement and often heated debate, with multiple contrasting perspectives represented in the scientific literature simultaneously. At some point, after laboratory studies and empirical analysis, the evidence becomes clear enough that leaders in

the field come to a consensus about which of the competing perspectives is correct." *Id.* Therefore, it is significant when a consensus is finally reached—and published—because "it signals to the field that a change in scientific thinking has occurred." *Id.* The 2020 sea change was presaged by the publication of the Wixted-Wells 2017 paper highlighting "the importance of focusing only on the *initial* eyewitness identification test and ignoring all later tests." *Id.* (emphasis added). The sea change solidified into a consensus with the publication of a the above-referenced "white paper" providing new consensus recommendations for properly conducting an eyewitness identification memory test. *See* Wells, G. L., Kovera, M. B., Douglass, A. B., Brewer, N., Meissner, C. A., & Wixted, J. T. (2020). Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence. Law and Human Behavior, 44, 3-36.

As Dr. Wixted acknowledges, "[m]ultiple lines of evidence led to this new understanding, but one line of evidence [was] especially compelling." Ex. 72 ¶18. He summarizes this key evidence that motivated him to pursue his recent research as follows:

> Data from the Innocence Project shows that eyewitness misidentifications contributed to 69% of more than 375 wrongful convictions later overturned by DNA evidence. But in DNA exoneration cases for which testimony about the initial identification exists—92 out of 161 cases examined in Brandon Garrett's 2011 book *Convicting the Innocent*—every witness who misidentified an innocent suspect with high confidence at trial initially did so with low confidence, assuming they picked the suspect at all. Some did not even

> do that because they picked another face or rejected the lineup. Critically, this means that none of these 92 initial IDs were strongly probative of guilt. In all of these cases, however, the police tested memory again, often multiple times. By the time of trial, in front of a jury, all 92 of the witnesses were absolutely certain that the defendant was the perpetrator they saw commit the crime. From the jury's uninformed, but understandable perspective, the eyewitness evidence seemed highly probative of guilt. *Had the criminal justice system understood that only the first test involves uncontaminated forensic memory evidence, it is possible that none of these wrongful convictions would have occurred.*

Id. (emphasis added).

However, the key findings that Dr. Wixted describes were not even recognized as scientifically significant until he and other scientists published a scholarly paper drawing attention to them. *See* Wixted, J. T., Mickes, L., Clark, S. E., Gronlund, S. D. & Roediger, H. L. (2015). Initial eyewitness confidence reliably predicts eyewitness identification accuracy. *American Psychologist*, *70*, 515-52. Before then, it was "a completely overlooked observation presented in one sentence on page 49 (and repeated on page 64) of one 367-page book." Ex. 72 ¶18.

After that, it was only in 2017 that this new data-based insight was "considered in relation to various additional lines of research all pointing to the same conclusion: ***the only relevant test of eyewitness memory is the first test***." *Id.* This new understanding emerged only after Drs. Wixted and Wells dug into the underlying data (including the data mentioned in Garrett's 2011 book). The Wixted-Wells 2017 paper built upon Garrett's findings concerning DNA exonerations and

also reanalyzed data dating back to the 1990s. *Id.* Not until that point did "the consensus scientific understanding" of when eyewitness identifications *could* be deemed reliable begin to change. *Id.*

Before 2017, the view that had developed in the scientific community from the data was that "eyewitness identification is unreliable even on the first test and even if the lineup procedure was pristine" and that "confidence in an identification was thought to be only weakly informative about accuracy in the lab and possibly not at all in the real world." *Id.* The scientific consensus was, in essence, that the research showed only that eyewitness identification was generally unreliable. *Id.* However, Drs. Wixted and Wells showed in 2017 that, while the underlying data supporting the older empirical studies was fine, "the data had been incorrectly analyzed." *Id.* Their new insight was that a "very strong relationship between confidence and accuracy—and very high accuracy associated with suspect identification made with high confidence—was evident in every one of these prior studies." *Id.* They argued that, even though that evidence was present in every prior study, what was not understood in those previous works was that the confidence had to be there *at the outset*—when the identification was first attempted and made. This insight, they argued, had been "unintentionally obscured by the way the data had been analyzed" in the previous studies. *Id.* Dr. Wixted opines that "the proper way to analyze these data was evident" to him only because of his "training and expertise

in signal detection theory, which is a longstanding theoretical framework for understanding recognition memory in the basic science literature." *Id.* ¶20. Until Dr. Wixted started to apply signal detection theory to eyewitness memory in his lab in 2012, the theory "had not been widely used in the applied field of eyewitness identification to guide data analysis. *Id.* (citing authorities).

Thus, in their 2017 paper, Drs. Wixted and Wells demonstrated that research that had previously been widely interpreted to mean that eyewitness identification is unreliable in fact showed that identification "is actually highly reliable ***on the first test***. It is highly reliable in the sense that a high-confidence suspect identification is very accurate, whereas a low-confidence suspect identification is much less accurate (which makes sense given that an expression of low confidence is how an eyewitness signals the fact that the identification might be in error)." *Id.* (emphasis retained).

Dr. Wixted is now confident that the discovery that he and Dr. Wells made in 2017 sparked a significant change, culminating in a new consensus reached in 2020**.** He points to several bases supporting this conviction. First, he notes a memo (dated January 6, 2017) written by then Deputy Attorney General of the United States, which was sent to all heads of federal law enforcement agencies and all federal prosecutors. The subject of the memo was "Eyewitness Identification: Procedures for Conducting Photo Arrays." The memo states that:

> The Department of Justice last addressed procedures for photo arrays in its 1999 publication, *Eyewitness Evidence:*

> *A Guide for Law Enforcement*. Research and practice have both evolved significantly since then. For example, a growing body of research has highlighted the importance of documenting a witness's self-reported confidence at the moment of the initial identification, in part because such confidence is often a more reliable predictor of eyewitness accuracy than a witness's confidence at the time of trial.

Id. (quoting DOJ 2017 Memo). The DOJ 2017 Memo echoes one of the main claims in the Wixted-Wells 2017 paper and cited the paper, too—although it had not even been published yet—as stating, "…our thesis about the diagnosticity of confidence applies only to the *initial* confidence of the witness at the time of identification, not to later feelings of confidence that might be the product of post-identification contamination." *Id.* ¶21 (quoting DOJ 2017 Memo, emphasis added). Since then, the impact of the Wixted-Wells 2017 paper "has been phenomenal." *Id.* As Dr. Wixted noted at the time when he drafted his report for this case, the paper had already been cited 253 times, per Google Scholar, whereas a scientific paper considered to have a "decent impact" would have been cited about 30 times. *Id.*

"Inflection points" in scientific fields "can generally be difficult to pinpoint because such changes tend to happen incrementally over a long period of time." *Id.* But one can pinpoint rare moments when a consensus in scientific understanding emerges "when a scholarly society or a federal organization (*e.g.*, the Department of Justice) brings together leading scholars to make unanimous recommendations to

the field." *Id.* As Dr. Wixted explicates, this has happened 4 times over the years, beginning in 1998, in the field of eyewitness identification:

- In 1998, the American Psychology-Law Society (a prominent scholarly organization) commissioned Gary Wells and other leading scientists to write a consensus "white paper" on best practices for eyewitness identification. The paper was published in a journal called *Law & Human Behavior* [Wells, G. L., Small, M., Penrod, S. J., Malpass, R. S., Fulero, S. M., & Brimacombe, C. A. E. (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads. *Law and Human Behavior*, 22, 603–647]. It recommended, for example, that there be only one suspect per lineup, that the lineup be administered in double-blind fashion, and that instructions be read to the witness indicating that the perpetrator may or may not be in the lineup. Notably, it did not recommend that repeated testing be avoided on the grounds that only the first test provides a test of uncontaminated memory evidence.

- One year later, in 1999, the DOJ commissioned a group of 34 scientists, attorneys, and law enforcement officials (the "Technical Working Group for Eyewitness Evidence") to assist with the document that [the Acting U.S. Attorney General] referred to in her 2017 memo. The DOJ report listed recommendations included in the 1998 white paper and many more, but it said nothing about the uncontaminated nature of the first test only (nor did it recommend against repeated testing).

- Next, in 2014, the National Academy of Sciences brought together a team of leading scientists, attorneys, and law enforcement officials to make updated science-based recommendations about eyewitness identification. Their recommendations appeared in a document entitled *Identifying the Culprit: Assessing Eyewitness Identification*, and its recommendations were largely similar to those recommended by the DOJ in 1999. However, their Recommendation #7 went further in recommending that juries be made aware of prior identifications. As they put it "The committee recommends that judges take all necessary steps to make juries aware of prior identifications, the manner and time frame in which they were conducted, and the confidence level expressed by the eyewitness at the time" (p. 6). This recommendation was an indication of growing awareness that there might be a reliability concern related to repeated testing.

- Finally, ***<u>in 2020</u>***, the American Psychology-Law Society again commissioned Gary Wells and other leading scientists to write an updated consensus "white paper" on best practices for eyewitness identification. The paper was again published in *Law & Human Behavior* in March of 2020, and [Dr. Wixted is] one of the authors. [Wells, G. L., Kovera, M. B., Douglass, A. B., Brewer, N., Meissner, C. A., & Wixted, J. T. (2020). Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence. *Law and Human Behavior*, 44, 3-36]. For the first time in any publication expressing a scientific consensus, and based in no small part on [the Wixted-Wells] 2017 paper (which strongly emphasized the importance of the very first memory test), the explicit recommendation was made to avoid repeated tests beyond the first. Recommendation #8 is termed the "**Avoid Repeated Identifications Recommendation"** and reads as follows: "Repeating an identification procedure with the same suspect and same eyewitness should be avoided regardless of whether the eyewitness identified the suspect in the initial identification procedure" (p. 8).

Ex. 72 ¶25 (emphasis added).

The 2020 white paper provides extensive justification, grounded in empirical data, for the new recommendation to forego repeated identification-attempts under any circumstances:

> This recommendation holds no matter how compelling the argument in favor of a second identification might seem (*e.g.*, the original photo of the suspect was not as good as it could have been; the witness was nervous during the first identification test and is calmer now; the initial identification was made from a social media profile, but it would be more desirable to have an identification made using proper police procedures). ***The importance of focusing on the first identification test cannot be emphasized strongly enough*** … eyewitness identification evidence has a unique characteristic that makes it unsuitable for what might be called 'repeated testing.' Whether the eyewitness is asked to make an identification with a showup or a lineup, there is only one

> uncontaminated opportunity for a given eyewitness to make an identification of a particular suspect. ***Any subsequent identification test with that same eyewitness and that same suspect is contaminated by the eyewitness's experience on the initial test.***"

Id. ¶25 (emphasis added).

Dr. Wixted observes that a further point first presented in the Wixted-Wells 2017 paper is "directly relevant to the Flores case, namely, that filler IDs and non-IDs in a lineup test are ***probative of innocence***." *Id.* ¶27 (emphasis added). This additional point is critical: "if a witness fails to identify the suspect by choosing a filler or rejecting the lineup, it is not the case that it provides no information about the guilt of the suspect (as is usually assumed)." *Id.* Instead of being a non-event, this particular outcome—found in the Flores case—is actually exculpatory. *Id.* This additional new understanding, from a scientific perspective, is "that only the outcome of the first memory test involving a given suspect (*e.g.*, Charles Don Flores) and a given eyewitness (*e.g.*, Jill Bargainer) provides a test of uncontaminated memory"[160]—and a *failure* to pick anyone at that time, before further contamination occurs, is actually evidence of innocence. *Id.* Because later tests necessarily involve test of contaminated memory, they cannot fairly overturn the implications of the first test.

[160] Jill Barganier's name was misspelled "Bargainer" in trial transcripts reviewed by Dr. Wixted, and thus he uses this spelling in his expert report.

In sum, the new scientific consensus is that, after a witness has failed to identify law enforcement's suspect the first time that the witness is given the chance to do so, any subsequent claim by that witness to be able to identify that same suspect is not reliable. Because later identifications are unavoidably based on contaminated forensic memory evidence and thus are unreliable, they should not be admissible in a court of law. Moreover, if the witness's first attempt to make an identification resulted in a failure to pick anyone out of the lineup, that fact is *exculpatory*; thus, the failure during the first test of memory should be admissible—but as *exculpatory* evidence.

Based on the new scientific consensus regarding the relative reliability of eyewitness identifications, Dr. Wixted offers the following case-specific conclusions reflecting a reasonable degree of scientific certainty:

- It is uncontroverted that witness Jill Bargainer did not identify Charles Don Flores when she was first presented with a photo lineup containing a picture of his face. What the field of eyewitness identification has come to recently understand (post 2016) is that this first lineup test provided the *only* potentially uncontaminated test of memory because the test itself contaminated memory (by making the face of the suspect irreversibly more familiar in the mind of the witness).

- Scientists are now of one mind that this first uncontaminated test is the only memory test that triers of fact should take into consideration for purposes of determining the guilt or innocence of the suspect. In the case of Charles Don Flores, because the outcome of the first test was that witness Jill Bargainer rejected the lineup, the only relevant eyewitness evidence in this case is *probative of innocence,* not guilt. Therefore, if there is other evidence that a trier of fact could find probative of guilt, then Jill Bargainer's failure to identify Charles Flores the first time she had an opportunity to do so should

be construed, not just neutrally, but as countervailing evidence pointing in the direction of innocence.

- Eyewitness evidence from a first test is probative of guilt under the assumption that a pristine lineup test was used.

- [T]he lineup procedure used in this case was not pristine, and concerns were raised in a 2017 evidentiary hearing that it was biased against Flores because (1) standard instructions indicated that the perpetrator may or may not be in the lineup were not read to Ms. Bargainer, and (2) the photo of Flores stood out relative to the other photos in the array. Under the assumption that the non-pristine lineup procedure was biased against Flores, the fact that, even then, Ms. Bargainer did not identify him makes the initial evidence, if anything, ***even more probative of innocence***. In other words, on the only uncontaminated test of memory (the first test), it seems clear that Flores did not come close to matching the memory of the passenger she saw exiting the VW vehicle the morning of the crime. Instead, the photo of Flores differed from Ms. Bargainer's memory to such an extent that she did not pick him even with a procedure that seemed biased to encourage her to do so.

Ex. 72 ¶30 (emphasis added).

Importantly, Dr. Wixted reached these conclusions after starting with the assumption that the photo lineup that Mrs. Barganier had been shown featuring Flores was "pristine," thereby giving the entire benefit of the doubt to the position that, *if* she had been able to make an identification during the critical, first test of memory, then she would have been doing so without undue influence from law enforcement. *Id*. ¶¶10-12. But as Dr. Wixted notes, the evidence does *not* support the assumption that the lineup Mrs. Barganier was shown was in fact "pristine." For instance, he notes improprieties arising from: (1) Ms. Barganier's interactions with law enforcement before she was first presented with a photo lineup containing

Flores's image; and (2) the photo lineup itself (in which Flores's photo was distinct from the others in multiple ways). *Id*. ¶10. According to Dr. Wixted, "[b]oth of these issues raised concerns that the lineup procedure was biased against Mr. Flores." *Id.* But even though the context was seemingly biased *against* Flores, Mrs. Barganier failed to identify him. Therefore, her *failure* to pick Flores out under these circumstances is "***even more probative***" of Flores's innocence. *Id*. ¶30.

In sum, this Claim relies on scientific evidence that was not available when Flores's 2016 habeas application was filed, because the relevant scientific field had not yet achieved the current understanding highly relevant to Flores's case. Moreover, the dispositive facts that demonstrate why the new scientific understanding, as applied to Flores's case, is *exonerating* did not come to light until an evidentiary hearing in October 2017.

b. The scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application.

Claim I is based primarily on the expert opinions of Dr. John Wixted and the scientific research and data upon which he relies. Dr. Wixted's opinion testimony would be admission under Texas Rule of Evidence 702. Dr. Wixted is qualified as an expert in the science of eyewitness identification "by knowledge, skill, experience, training, or education[.]" TEX. R. EVID. 702. Additionally, Dr. Wixted's opinions are relevant and reliable. Therefore, Dr. Wixted's scientific knowledge

would "help the trier of fact to understand the evidence or to determine a fact in issue." *Id.*

i. Dr. Wixted is eminently qualified by relevant knowledge, skill, experience, training, and education.

Dr. Wixted is a Distinguished Professor of Psychology at the University of California–San Diego (UCSD). His current research focuses on understanding "episodic memory," with a particular focus "on the reliability of eyewitness memory utilized in forensic contexts." Ex. 72 ¶1. He investigates the cognitive mechanisms that underlie recognition memory, using signal detection theory as a guide. A related line of his research involves investigating how episodic memory is represented in the human hippocampus, work that is based mainly on single-unit recording studies performed with epilepsy patients. His recent research has also focused on the applied implications of signal detection-based models of recognition memory. *Id.*

Dr. Wixted was awarded a Ph.D. in clinical psychology from Emory University in 1987, but from the outset, his academic career has been committed to conducting empirical research. His research has long focused on the nature of human memory. He served as editor-in-chief of *Psychonomic Bulletin & Review* (1998-2002) and has served as an associate editor of multiple journals over the years, including the publication widely regarded as the premier journal in the field of experimental psychology (*Psychological Review*). He also served as chair of the Department of Psychology at UCSD for 10 years (2003-2013), and, in 2011,

received the Howard Crosby Warren Medal for outstanding achievement in experimental psychology. In 2019, he was elected to the American Academy of Arts & Sciences. *Id.* ¶2.

Dr. Wixted has published more than 150 peer-reviewed articles and has also edited authoritative texts in the field of memory. Recent publications in this field include:

- Wixted, J. T. (2018). Stevens' Handbook of Experimental Psychology and Cognitive Neuroscience, 4th Edition (Editor in Chief). With volume editors Elizabeth Phelps & Lila Davachi (Learning & Memory); John Serences (Sensation, Perception & Attention); Sharon Thompson-Schill (Language & Thought); Simona Ghetti (Developmental & Social Psychology); E. J. Wagenmakers (Methodology). New York: Wiley.

- Wixted, J. T. (2017). Cognitive psychology of memory. Vol. 2 of Learning and memory: A comprehensive reference, 2nd edition (J. Byrne, Ed.). Oxford: Elsevier.

- Wixted, J. T. & Wells, G. L. (2017). The Relationship between Eyewitness Confidence and Identification Accuracy: A New Synthesis. Psychological Science in the Public Interest, 18, 10-65.

- Wixted, J. T., Squire, L. R., Jang, Y., Papesh, M. H., Goldinger, S. D., Kuhn, J. R., Smith, K. A., Treiman, D. M. & Steinmetz, P. N. (2014). Sparse and distributed coding of episodic memory in neurons of the human hippocampus. Proceedings of the National Academy of Sciences, 111, 9621-9626.

- Ingram, K. M., Mickes, L. & Wixted, J. T. (2012). Recollection can be weak and familiarity can be strong. Journal of Experimental Psychology: Learning, Memory, and Cognition, 38, 325-339.

- Wixted, J. T. (2004). Methodology. Vol. 4 of Stevens' Handbook of Experimental Psychology, 3rd edition (H. Pashler, Ed.). New York: Wiley.

Id. ¶3 (*see also* his *curriculum vita* attached to his report). In the year in which his expert report was prepared (2020), the following research articles and book chapters were published or forthcoming:

- Schurgin, M. W., Wixted, J. T., & Brady, T.F. (2020). Psychophysical scaling reveals a unified theory of visual memory strength. Nature Human Behaviour, https://doi.org/10.1038/s41562-020-00938-0.

- Mickes, L. & Wixted, J. T. (in press). Eyewitness memory. In M. J. Kahana & A. D. Wagner (Eds.) Oxford Handbook of Human Memory. Oxford University Press.

- Urgolites, Z. J., Wixted, J. T., Goldinger, S. D., Papesh, M. H., Treiman, D. M., Squire, L. R., & Steinmetz, P. N. (2020). Spiking activity in the human hippocampus prior to encoding predicts subsequent memory. Proceedings of the National Academy of Sciences, 117, 13767-13770.

- Wixted, J. T. (2020). The forgotten history of signal detection theory. Journal of Experimental Psychology: Learning, Memory, and Cognition, 46, 201-233.

- Finley, J. R., Wixted, J. T., & Roediger, H. L. (2020). Identifying the guilty word: Simultaneous versus sequential lineups for DRM word lists. Memory & Cognition, 48, 903-919.

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Id. ¶4.

Dr. Wixted has been accepted as an expert witness in multiple jurisdictions in both civil and criminal cases, in which he has testified specifically on issues pertaining to the reliability of eyewitness identification for both defendants and the prosecution. *Id.* ¶5.

Based on the foregoing, there is no doubt that he is qualified and that he would be accepted by Texas courts as an expert on the current and previous scientific understanding of eyewitness identification.

ii. Dr. Wixted's opinions are relevant and reliable.

Dr. Wixted's report (Ex. 72) explains in clear terms the methodology he employed to assess the facts relevant to Flores's claim and then to apply the new scientific consensus to those facts. *Id.* ¶¶9-12

First, he carefully reviewed a body of case-specific materials, identified in Exhibit 2 attached to his report. His focus was "on information pertaining to memory tests on Jill Bargainer with respect to Mr. Flores." *Id.* ¶9. He ascertained that "the first test occurred early in the police investigation, on or about February 4, 1998"

when Ms. Barganier was presented with a six-person photo lineup containing a recognizable photo of Mr. Flores. *Id.* At that time, Barganier could not identify anyone. The last "memory test," per Dr. Wixted, occurred at trial in the courtroom, when Barganier identified Flores, for the first time, as the person she had seen accompanying Ric Childs on the morning that Mrs. Black was murdered. *Id.*

Dr. Wixted explained that his ultimate conclusions, which follow the new scientific consensus, are "based on the assumption that Ms. Barganier's first known exposure to Mr. Flores's image was part of a properly conducted ('pristine') lineup test," but noted that "the facts do not support that assumption." *Id.* ¶10. Therefore, he went on to "also consider the implications of the improper photo lineup procedure used with Mrs. Bargainer." *Id.* He identified some of the improper or "non-pristine" aspects of the lineup procedure to which she was exposed as follows: "(1) Ms. Barganier's interactions with law enforcement before she was first presented with a photo lineup containing Mr. Flores's image, and (2) the photo lineup itself"—both of which raised concerns of bias against Flores. *Id.* Dr. Wixted emphasized that his "main goal," however, was to focus on what the "recent sea change in scientific understanding of eyewitness identification teaches regarding Ms. Barganier's ultimate representation that she was able to identify Mr. Flores." *Id.*

After conducting an independent review of the post-conviction evidence to establish the relevant facts, Dr. Wixted next reviewed the recent changes in the

scientific understanding of eyewitness identification that are outlined above. *Id.* ¶11. His methodology in this review of the science was grounded in the generally accepted view "that a change in scientific thinking becomes apparent when leaders in the field publish a consensus statement, which is why [he] traced consensus statements pertaining to eyewitness identification, beginning in 1998 and occurring again in 1999, 2014, 2017, and most recently in 2020." *Id.* He documented "the fact that the consensus statement published in 2017 was the first time the field came to accept that eyewitness identification is reliable on a properly conducted lineup test the first time memory is tested but not on later tests because later tests are likely to test memory that has been contaminated by post-identification events." *Id.* He then summarized the new concept, never before accepted by the field, and how it emerged, stating that a "dramatic change in thinking [by a few thought-leaders] in 2017 made it clear that there was something very special about the first time a witness's memory of a suspect previously unknown to the witness is tested. In the 2020 consensus statement, this new understanding was updated by indicating that the first memory test itself unavoidably contaminates memory. Therefore, the first test is the *only* uncontaminated test of memory. All later tests, including the one that occurs at trial, involve tests of contaminated forensic memory evidence." *Id.* (emphasis added).

In sum, Dr. Wixted examined the results of Mrs. Barganier's first test, noting that "only the *first* memory test can provide uncontaminated evidence relevant to the guilt or innocence of Mr. Flores," and even "assuming that the lineup test was pristine and then under the more realistic assumption that the lineup test was biased against Mr. Flores[,]" he concluded that her initial failed attempt to make the identification is exculpatory. *Id.* ¶12.

This sound methodology, relying on empirical evidence and tethered to the relevant case-specific facts, produced opinions that a Texas court would deem relevant and reliable.

iii. <u>The scientific knowledge in Dr. Wixted's expert report would help the trier of fact.</u>

Dr. Wixted's relevant and reliable opinions would help the trier of fact in assessing the reliability of Mrs. Barganier's belief that she could identify Flores as someone she had seen outside of the crime scene thirteen months earlier. Moreover, his opinions would help the trier of fact understand why the factual circumstances surrounding the identification make the identification utterly unreliable—considering, during the *initial* test of her memory, soon after her observation, she had failed to pick Flores's photo out of the lineup. Most importantly, Dr. Wixted's opinions would illuminate for the trier of fact how Mrs. Barganier's initial failure to identify Flores, when she was first presented with the opportunity to do so within days of her observation of the two perpetrators, is actually *probative of his*

innocence. *Id.* ¶27. Finally, Dr. Wixted's opinions would help the trier of fact appreciate that the potential bias against Flores (suggested by several elements of the first presentation of his photograph to Mrs. Barganier) makes her failure to identify him then "***even more probative of innocence."*** *Id.* ¶30 (emphasis retained).

Because the foremost responsibility of the trier of fact would be to consider the question of guilt, it is indisputable that the opinions of this highly qualified expert would be helpful, and thus admissible, under the Texas Rules of Evidence.

c. Had the scientific evidence been presented at trial, on the preponderance of the evidence, Flores would not have been convicted.

As explained in Section VII of the Factual Background above, Mrs. Barganier's eyewitness identification testimony was critical to saving the State's incoherent, entirely circumstantial case.

The State's case at Flores's 1999 death-penalty trial depended on farfetched, circumstantial evidence, buttressed at the eleventh hour by Mrs. Barganier's compelling, yet wholly unreliable, testimony identifying Flores as the passenger she had seen exiting Ric Childs' Volkswagen Beetle, outside of the Blacks' house. This testimony was deemed admissible in reliance on the then-current scientific understanding that there was nothing wrong about Mrs. Barganier's having initially failed to make an identification and then later "remembering" Flores upon seeing him in court. Indeed, the State argued in the previous habeas proceeding that no

intervening events, including a hypnosis session conducted by a police officer, would have contaminated her memory and that her belated identification thus was properly admitted. However, the State did not take into consideration the fact that the initial photo lineup itself unavoidably contaminated memory.

The State has also long contended, based on an inaccurate representation of the trial record and misuse of the 2001 affidavits, that plenty of other evidence purportedly supports the conviction. An accurate reading of the trial record, however, shows that, without Mrs. Barganier's eyewitness identification (which the current scientific understanding exposes as unreliable), there was no preponderance of competent evidence to support the conviction.

For instance, the State has long cited evidence that Charlie Flores was with Ric Childs soon before Mrs. Barganier saw Ric Childs outside of the murder victim's house. But this "other evidence" came solely from Jackie Roberts and Vanessa Stovall, two of Ric's drug-addled girlfriends, one of whom (Jackie) was an accomplice to the crime. Moreover, these highly compromised witnesses only succeeded at putting the men together in two *different* parts of the Dallas metroplex at the same time—and at a time that contradicted Mrs. Barganier's timeline. 34 RR 153; 35 RR 71-89; 36 RR 281.

Likewise, the State has pointed to evidence of Flores's supposed "admissions" that he had been present at the scene but had "only shot the dog." This testimony

came from two utterly unbelievable witnesses: Homero Garcia and Jonathan Wait, Sr. A meth addict facing charges for being a felon in possession of drugs and a firearm, Homero Garcia signed a statement claiming that Flores had confessed to him, but that statement, typed up by law enforcement, was signed months after the murder and the date of the alleged confession while Garcia was in FBI custody, coming off a four-day meth binge, and facing accusations that he had been caught with the murder weapon. 36 RR 229, 232-33. At trial, Garcia said of the typed statement: "I don't recall telling the FBI half of this stuff." 36 RR 228. He also dodged a subpoena and was not attached in time to be cross-examined. 38 RR 68-69. Wait Sr., a self-professed drug addict and alcoholic, was a habitual FBI snitch. He barely knew Flores. After Wait Sr. had spent months trying to ingratiate himself with the FBI in hopes of obtaining a reward for assisting in Flores's apprehension, Wait Sr. testified to a far-fetched story about having obtained a "confession" from Flores. 37 RR 79-96. Notably, Wait Sr. only shared this story for the first time at trial, and, as discussed in Section V of the Factual Background, it is incredible on its face.

Neither Garcia nor Wait Sr. can be fairly characterized as "those close to" Flores, as the State has contended. They were highly compromised individuals motivated by their own interests to fabricate evidence helpful to the State. Moreover, the full gamut of impeaching evidence relevant to the testimony of these and other

State's witnesses has long been suppressed. *See* Factual Background, Sections III-V, and claims below.

The State has also relied on a convoluted "bigger-gun-was-used-to-shoot-the-dog" hypothesis, debunked in the Factual Background's Section V; *see also* Claim II below. The prosecution pushed that baseless hypothesis in its Opening Statement at trial, absent any evidentiary support for it. Indeed, the State urged the jury to accept a chain of inferences that would make any logician cringe. The argument went like this: Mrs. Black had been killed by a bullet, recovered from the scene, fired from a .380 pistol; a bigger gun, a .44 magnum revolver, was found in a closet at Ric's grandmother's house a few days after the murder, this bigger gun must have belonged to Ric;[161] as such, Ric (who was indisputably present) must have used this bigger gun to shoot the dog, and Flores, who had been with Ric hours before, must also have been at the Blacks' house, armed with the .380 pistol (never recovered), which he used to shoot Mrs. Black. 34 RR 27-29, 38. In treating this baseless "bigger-gun-was-used-to-shoot-the-dog" hypothesis as fact, the State has previously cited 36 RR 147-50 of the trial record. Yet if one looks to the underlying record, those pages encompass testimony from the medical examiner, who expressly

[161] Ric did not testify and thus did not attest to what gun he had used. But soon after Flores was convicted and sent to death row, Ric signed a judicial confession stating that *he* had shot Mrs. Black; Ric received a 35-year sentence, served 15 years, and was then paroled.

disavowed an ability to opine about what kind of weapon may have been used to shoot the dog:

> Q (prosecutor). Before we look at the photographs, did you form an opinion after observing Elizabeth Black and this dog as to whether or not the shot from Elizabeth Black could potentially have come from a weapon with higher or lesser velocity than the shot from the dog? Were you able to make any conclusions based on what you saw?
>
> A (medical examiner). No, not a firm conclusion.

36 RR 147.

Despite pressure from the prosecutor, the medical examiner maintained that she could not conclude that the dog had been shot using a gun of a "higher velocity" because dogs are smaller than humans. *Id.* She also noted that the gunshot wound that the dog had sustained was atypical. 36 RR 148. Importantly, the medical examiner noted "let's face it, I don't routinely do dogs." 36 RR 146. Aside from noting a lack of experience performing autopsies on dogs, the medical examiner emphasized that, while she could analogize to humans such as herself, "I hope it's obvious I'm not a Doberman." *Id.* Yet the prosecutor kept pressing:

> Q. Has it been your experience that a larger caliber of bullets and weapons, would typically produce a larger bullet hole in a typical case?
>
> A. In a typical case, but remember, the gunshot wound of probable entrance in the dog is not a typical entrance defect.

36 RR 149.

The State's continued reliance on the "bigger gun" hypothesis also ignores: (1) that multiple witnesses had told law enforcement that Ric routinely carried a small handgun, likely a .380; (2) that when arrested, Ric was in possession of an opened box of the *exact* brand of ammunition for a .380 that was recovered from the crime scene; and (3) that the only evidence suggesting that the .44 magnum had been used in the crime came, mid-trial, from a subsequently disgraced trace-evidence analyst (with a track record of crossing the line to provide the Dallas County DA's office with special assistance in death-penalty cases) who has since disavowed his own testimony. 34 RR 265-66; 35 RR 256; 36 RR 208-15; *see also* Claim II below. Likewise, the State's reliance on the trace-evidence testimony does not account for the fact that the analyst, Charles Linch, in question only found the subject "evidence"—purported potato starch inside the .44 magnum—after the gun's chain of custody had been destroyed, after it had been lying around the DA's office for some unknown period, and after he was explicitly directed by ADA January to look for "potato." Nor does the State's reliance on this hypothesis account for the fact that Linch was called to the stand the day after his hasty "testing," just as the State's case was unraveling, and before the State knew that Mrs. Barganier was going to be allowed to testify about her alleged identification. *See* Claim II.

The trial record, as historically characterized by the State, also does not account for State actors' significant false representations at trial, exposed only after

Flores's execution was stayed in 2016. For instance, relying on its representation of the trial record, the State has long maintained that neither officer who participated in the hypnosis session performed on Mrs. Barganier knew that Flores was a potential suspect in the murder. Yet, during the 2017 evidentiary hearing, it was established that both officers who had sat in on the hypnosis session were active in the investigation and one had pointedly lied to the trial court about already knowing that Flores was a suspect. AppX8; 4 EHRR 285-86. Additionally, in the Zani hearing, the State incorrectly insisted to the trial court that, during the hypnosis session, nothing was suggested to Mrs. Barganier, no feedback was provided, and nothing was done to reinforce any aspect of her recollection. Yet if one simply looks at the recording of the hypnosis session itself (which was not before the jury) one finds:

- The officer-hypnotist suggested many things to Mrs. Barganier, including repeatedly asking her leading questions about the suspects' hair: "Is his hair short, is it shaved, is it neatly cut?" [asked about the driver whom she had already identified as Ric Childs and whose hair she had described repeatedly as "dirty, long, and wavy"]; "Does he have it neatly cut or is it trimmed?" [asked about the passenger whose hair she had already described during the hypnosis session as "A lot like his friend's" and "long."]

- The officer-hypnotist provided considerable "feedback" by repeatedly making comments to Mrs. Barganier such as "you're doing good" and "you're doing fine."

- The officer-hypnotist repeatedly reassured Mrs. Barganier that her memory might improve after the hypnosis session, *e.g.*: "You will also remember everything that you've said in this session and you might find yourself being able to recall other things as time moves on."; "You'll remember everything

> that was said in this interview. And as I said, you'll be able to recall more of these events as time goes on."

AppX26. That the State's representation of the trial record has not incorporated such clear evidence of testimonial falsehoods should cast doubt on the State's rosy characterizations of that record.

Any objective reading of the trial and habeas records reveals that Mrs. Barganier's mid-court epiphany regarding her ability to identify Flores saved the State's incoherent case, which had been crafted on the fly, largely from highly compromised drug addicts and dealers looking for leniency. Flores can show that, without the State's experts (Dr. Mount and Officer Serna) having blessed Mrs. Barganier's eyewitness identification testimony as reliable, and had the trier of fact instead heard what the *new* scientific consensus would have made of her initial failure to identify Flores, he would not have been convicted.

Even setting aside the State's inaccurate representations of the strength of the trial record, because the new scientific evidence in this claim would provide a trier of fact with *novel* exculpatory evidence, the State cannot rely solely on its oft-repeated contention that the jury would have convicted Flores even without Mrs. Barganier's identification. In sum, Claim I satisfies all germane elements of Article 11.073 and Article 11.071, section 5(a). Charlie Flores should be granted a new trial.

D. This Claim Is Distinct from the Challenge to the Use of "Investigative Hypnosis" Raised in Flores's First Subsequent Habeas Application Previously Rejected by this Court.

In his first subsequent habeas application, although Flores challenged the reliability of Mrs. Barganier's memory, his claim, which this Court ultimately rejected, was based on the argument that her memory was tainted by a hypnosis session performed on her at the police station, and that claim was supported by scientific studies of the effect of hypnosis on memory. *See Ex parte Charles Don Flores*, No. WR-64,654-02, 2020 WL 2188757, *1 (Tex. Crim. App. May 6, 2020) (unpub.).

In that previous application, Mr. Flores specifically challenged the State's position at trial that "nothing in that [hypnosis] videotape 13 months later, in the State's opinion, has tainted her in any way for her in-Court identification," and "the hypnosis had little or nothing to do with her in-Court identification at all." 36 RR 116. The previous application argued that the scientific understanding of hypnosis had changed, such that the State's position at trial that hypnosis is a reliable memory-retrieval tool and that the hypnosis session, in any event, did not influence Mrs. Barganier's subsequent identification, was untenable.

The State defeated Flores's hypnosis claim. The State did so by convincing the habeas court that Article 11.073, section (b) was not satisfied, based on the following arguments:

- First, the State asserted that Mrs. Barganier was not really hypnotized.[162]

- Second, the State insisted that, because Mrs. Barganier did not enlarge on her descriptions of the men during the hypnosis session, that shows that her subsequent courtroom identification was unrelated to the hypnosis.

- Third, the State argued that Texas law still permits admitting hypnotically enhanced testimony into evidence, citing *Zani v. State* 758 S.W.2d 233, 243 (Tex. Crim. App. 1988) and *State v. Medrano*, 127 S.W.3d 781, 783 (Tex. Crim. App. 2004).[163]

- Fourth, the State, relying on Dr. Mount's trial testimony, claimed that the hypnosis session had complied with Texas law.

- Fifth, the State argued that, because hypnosis has always been "controversial," none of the intervening scientific studies exposing its unreliability generated anything really new.

- Sixth, the State suggested that, because the leading scientist studying the reliability of forensic hypnosis, Dr. Steven Lynn, was already voicing concerns about forensic hypnosis in 1999, he could have testified at Flores's trial.[164]

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[162] This argument was contrary to the views of Mrs. Barganier, the hypnotist, and both parties' experts. 6 EHRR 79-80; 142-43; 221. Experts for both parties agreed that the subject's belief that she had been hypnotized was dispositive. Also, the hypnosis session's content shows that Barganier was highly motivated to come up with information helpful to the police and earnestly believed that hypnosis would enable her to do that. At the session's conclusion, she repeatedly asked the officer: "Did I do ok? . . . Did I help in any way?" AppX26.

[163] The State objected to informing the habeas court that the case upon which *Zani* was based had been reversed in *State v. Moore*, 902 A.2d 1212 (N.J. 2006). A copy of the case was, however, admitted into evidence during the 2017 evidentiary hearing, but *Moore* is not mentioned in the findings of fact and conclusions of law proposed by the State and signed by the habeas court.

[164] This argument ignores the salient fact that Flores, an indigent, was broadsided mid-trial with the news that Mrs. Barganier intended to make an identification and the requisite "Zani hearing" was hastily convened the very next morning.

- Finally, the State relied primarily on its go-to argument: that Flores would have been convicted even without Mrs. Barganier's testimony.[165]

Yet none of these arguments, other than the State's position that Flores would have been convicted even without Mrs. Barganier's testimony, are applicable to the instant claim.

The instant claim is utterly distinguishable from the hypnosis junk-science claim in Mr. Flores's previous application in that scientific evidence related to eyewitness identification was held to be *not relevant* to the previous application's hypnosis claim—at the State's urging. The State was adamant when litigating against the hypnosis claim that the hypnosis session was the *only* event relevant to Flores's claim, and that the only science that should be considered was the study of hypnosis, which the State argued had produced nothing new in the decades since Flores's trial. In convincing the habeas court to adopt its advocacy positions, the State drafted proposed findings of fact and conclusions of law (FFCL) that were later adopted wholesale by the habeas court. Those FFCL expressly *reject* the notion that

[165] In Flores's previous habeas proceeding, the State aggressively resisted Flores's efforts to expose the unreliability of the other evidence that reputedly supports the 1999 conviction. The State argued that looking at anything other than the hypnosis session was not "relevant" to evaluating whether Flores should be awarded a new trial. 3 EHRR 23 (State's counsel arguing "this is not a hearing where they're going to be able to come in and challenge all of the other record evidence."). Using this argument, the State convinced the habeas judge to dramatically truncate Flores's witness list. Then, having succeeded at slamming the door on efforts to expose past misrepresentations of the trial record's contents, the State invoked an inaccurate summary of that record, as it has been doing for two decades, in its proposed FFCL, which the habeas court ultimately adopted wholesale. *See* Section VIII of the Factual Background.

any advances in the distinct field of eyewitness identification had anything to do with the hypnosis claim that Mr. Flores pled in his previous application. *See, e.g.*, FFCL at (339) (195th Dist. Court Oct. 5, 2018) ("The Court finds that Dr. Kovera's testimony concerning ***eyewitness identification procedures is not relevant to the specific claim raised by Applicant in his subsequent writ application.***").

Thereafter, this Court adopted the habeas court's FFCL, which had been prepared by the State, without amendment. *See Ex parte Charles Don Flores,* 2020 WL 2188757, at *1. Then this Court held:

> Article 11.073 §(b) provides (1) that applicant must show that (A) the relevant scientific evidence was not previously available, and (B) the evidence would be admissible at trial, and (2) had the evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted. We agree with the trial judge's findings and conclusions that applicant fails to meet the dictates of Article 11.073 §(b). Therefore, based upon the trial court's findings and conclusions and our own review, we deny relief on applicant's first claim.

Id.

The Court's decision does not clarify which aspect of Article 11.073, section (b) Flores failed to satisfy. *Id.* However, because Claim I involves: (1) a different scientific field from the hypnosis claim; and (2) a scientific consensus that was only established in 2020, the only element of section (b) that would apply to both the previous hypnosis claim and the instant claim is the element that "had the scientific evidence been presented at trial, on the preponderance of the evidence the person

would not have been convicted." TEX. CODE CRIM. PROC. art. 11.073 (b)(2). Yet, as explained above and demonstrated elsewhere in this habeas application, previous assumptions about the integrity of the State's reputedly inculpatory evidence are not defensible.

Claim I depends entirely on the brand-new scientific understanding of ***eyewitness identifications***, and that scientific understanding ultimately treats the hypnosis session as irrelevant. In applying the science on which Claim I relies, the facts that matter are quite limited:

- Mrs. Barganier was first presented with a photographic lineup containing a recognizable picture of Flores on February 4, 1998.

- She failed to pick him out of that photographic lineup.

- Current understanding of human memory establishes that any subsequent attempts to identify him were wholly unreliable because her memory was thereafter contaminated by, at the very least, the first known attempt.

- Her initial failure, especially considering the non-pristine circumstances of the procedure, which created a bias toward picking Flores, is actually probative of Flores's *innocence*. Therefore, the State's typical go-to argument—that Flores would have been convicted even without Mrs. Barganier's testimony—does not resolve the issue. Because the evidence of Mrs. Bargainer's initial *failed* attempt to make an identification (using the photo lineup) is highly relevant, not the last test (her courtroom identification). The outcome of the first test, when she failed to identify him, is probative of innocence.

- The belief that she was able to identify him thirteen months later upon seeing him in the courtroom after many intervening events was unsound and contrary to the current scientific understanding of the specific, narrow circumstances when eyewitness identifications can be deemed reliable, *i.e.*, when the *very*

> *first* test of memory is undertaken and the witness makes an identification with high confidence.

Most importantly, none of the new science presented here was presented during the writ proceeding that commenced in 2016; and the 2020 scientific consensus upon which Mr. Flores now relies plainly did not exist at that time or, dispositively, when he filed his previous habeas application in May 2016.

In short, Claim I does not rely on a critique of the hypnosis session and how it may or may not have induced inordinate confidence in what was actually a false memory that emerged later. Claim I is concerned only with the new science that shows the extent to which any and all eyewitness identifications can be deemed reliable after that "first bite at the apple."

E. Conclusion

For the foregoing reasons, Mr. Flores has more than satisfied the pleading burden imposed by Article 11.073 and Article 11.071, section 5(a) for Claim I. Therefore, Claim I should be remanded to the trial court for further factual development. Moreover, Flores has already adduced considerable, competent evidence to support Claim I. Therefore, relief in the form of a new trial is warranted.

II. THE STATE'S TRACE-EVIDENCE EXPERT HAS DISAVOWED HIS OWN TESTING AND TRIAL TESTIMONY AS UNRELIABLE; AND CONTEMPORARY STANDARDS FOR FORENSIC LABS DEMONSTRATE THAT THE STATE'S EXPERT'S METHOD AND TEST RESULTS DO NOT REFLECT BASIC SCIENTIFIC COMPETENCY.

Charlie Flores's conviction was obtained utilizing expert testimony from Charles Arlan Linch, a former trace-evidence analyst with the Dallas County crime lab, a.k.a. SWIFS. Mr. Linch's expert opinion, obtained mid-trial, was the only evidence supporting an inferential link between the crime scene and a .44 magnum revolver, which had been recovered from a closet in Ric Childs' grandmother's house the day after he was arrested. More specifically, the *only* evidence that supported an inference that this particular weapon had been used at the crime scene was a trace of purported "potato starch" that Mr. Linch found inside its barrel while conducting mid-trial testing, fourteen months after the weapon was first found by police.

The State used the evidence of "potato starch" to support a hypothesis that it first shared with the jury in its Opening Statements; notably, it posited this hypothesis about the .44 magnum to the jury *before* Linch had done any testing, and thus *before* there was any evidence to support the State's hypothesis. The State pushed the "potato starch" evidence thereafter to develop support for the following (convoluted) hypothesis, which it seemed to elaborate on the fly during trial: whoever had shot Mrs. Black and her dog appeared to have employed potatoes as

"silencers;" only one bullet and casing were found at the scene—for a .380 pistol—but that weapon was never found; the State believed that the dog had been shot by a "bigger gun" (but was unable to wrest scientific testimony to support this contention from the medical examiner); a .44 magnum revolver is bigger than a .380 pistol; therefore, Charlie Flores must have been present at the Blacks' house when Betty Black was shot, and he must have been the one to shoot her with the .380, because co-defendant Ric Childs had likely instead been armed with the .44 magnum revolver found at his grandmother's house that (the State argued) had been used to shoot the dog.[166]

!?!

Only the mid-trial "testing" and expert opinions from Mr. Linch enabled the State to use this "bigger-gun-was-used-to-shoot-the-dog" theory to posit repeatedly in Closing Arguments that Flores must have been the one to shoot Mrs. Black, and that as such, he should both be convicted and considered more culpable than his absent co-defendant. *See* 39 RR 44, 95, 96, 100, 101, 102, 103, 106 (ADA January arguing "I suggest to you the true theory in this case is that [Flores] is the shooter of Elizabeth Black, a 64-year-old grandmother.")

[166] As noted in Section VI of the Factual Background above, the prosecutors pursued this line of argument (and supporting evidence from Linch), although the lead prosecutor knew, from information that had been obtained from Ric's accomplice Jackie Roberts over a year before trial, that Ric had admitted that *he* shot Mrs. Black. Ex. 9.

Quality-control standards that now govern forensic labs like SWIFS have changed significantly since Mr. Linch performed his testing in 1999. Significant changes have also occurred since Flores's previous habeas application was filed in May 2016. Evidence of these changes is provided by the expert testimony of chemist and quality consultant and laboratory auditor Janine Arvizu. *See* Ex. 73. Even more, Mr. Linch has now expressly ***disavowed his testing and his trial testimony***. *See* Ex. 74. Relief under both Article 11.073 of the Texas Code of Criminal Procedure and the U.S. Constitution is warranted. *See* TEX. CODE CRIM. PROC. art. 11.073(a); U.S. CONST. amend. 14. Claim II, based on Mr. Linch's recent disavowal of his trial testimony, and new expert opinion regarding changes in quality-control for forensic labs like SWIFS, can easily satisfy the elements of Article 11.073 and 11.071 section 5(a).

A. The Legal Standard

The legal standard for a claim under Article 11.073 raised in a subsequent state habeas application is described in Section I.A of Claim I above. That briefing is incorporated here by reference.

B. Application of Law to Fact

1. Article 11.073 is satisfied because the new science in question was not available on the applicable date and contradicts scientific evidence relied on by the State at trial.

Claim II satisfies all three elements to prevail under Article 11.073:

(a) Flores relies on scientific evidence that was not available at trial or at his previous habeas application in May 2016;

(b) The scientific evidence would be admissible under the Texas Rules of Evidence; and

(c) Had the new scientific evidence been presented at his trial, on the preponderance of the evidence, Flores would not have been convicted.

a. Relevant scientific evidence is currently available and was not available at the time of Flores's last habeas application filed in May 2016.

In considering whether Article 11.073's requirements are satisfied, the habeas court is required—"shall consider"—"whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed" since "the date on which … a previously considered application ... was filed" TEX. CODE CRIM. PROC. art. 11.073 (d)(2). The date in question is May 2016. Changes corresponding to each of the three distinct categories found in Article 11.073 (d)(2) support Claim II:

- The field of quality assurance in forensic science in the United States and the generally accepted standards for forensic laboratories have changed considerably since the trial in 1999 and since May 2016;

- A testifying expert's scientific knowledge (Mr. Linch's trace-evidence analysis for the State) has changed since 2016, as evidenced by an affidavit Mr. Linch executed in 2020; and

- A scientific method on which the relevant scientific evidence is based has changed since 2016.

The comparison of old and new science at issue in Claim II requires walking through each of the following: (i) the scientific evidence presented at trial and how it was adduced; (ii) the relevant factual information about Mr. Linch's method and his circumstances, only ascertainable after Flores's previous habeas application was filed in May 2016; (iii) the evolution of scientific understanding regarding the need for quality controls in forensic laboratories; (iv) an expert assessment of Mr. Linch's testing method and results in light of the recently disclosed facts and current quality-control standards associated with competent science; and (v) Mr. Linch's own unequivocal disavowal of his previous testing method and results.

i. The State solicited and then offered the "scientific" opinions of trace-evidence analyst Charles Linch at trial in 1999.

Before discussing how the scientific evidence the State relied on at trial, through Mr. Linch, has changed, it is important to revisit the scientific opinions he offered at trial. The larger context is also important. For instance, a firearms and toolmark expert at SWIFS, Raymond Cooper, was *not* asked to examine the .44 magnum revolver that Mr. Linch was asked to examine; Cooper never even saw this weapon until he was in court testifying. *See* 38 RR 103-105.

Here is the basic timeline of events leading up to Mr. Linch's trial testimony on March 24, 1999:[167]

On January 31, 1998, law enforcement collected a .44 magnum revolver found in a closet at Ric's grandmother's house the morning after his arrest. 36 RR 204-205.

On February 2, 1998, potato fragments recovered at the crime scene were delivered to SWIFS. On December 4, 1998, SWIFS returned the potato fragments to the DA's Office. Ex. 65.

At some point, someone took the .44 magnum from the Farmer's Branch evidence locker to the DA's Office, without documenting the transfer Thereafter, on March 19, 1999, during the short interval between the end of voir dire and the beginning of the presentation of evidence, an investigator with the DA's Office delivered the .44 magnum to SWIFS. Ex. 75.

On March 22, 1999, ADA January made repeated promises in his Opening Statement that the State would establish that "a larger caliber weapon, . . a revolver," had been used to shoot the dog and that Flores had used a smaller .380 caliber pistol to shoot Mrs. Black. 34 RR 27-29, 38.

[167] Several key events in this timeline were only ascertainable after SWIFS finally produced key case-specific records in 2017.

On March 23, 1999, following the second full day of the State's presentation of evidence, ADA January called SWIFS and spoke with a SWIFS employee "to see if there was something needed to be done on the 44Mag revolver before" the DA's Office came to retrieve it so that it could be offered into evidence. Ex. 19. ADA January then expressly told SWIFS: "all he wanted was to have it [the .44 Magnum] ***checked for Potatoes on or inside the barrel***." *Id.* (emphasis added). ADA January was assured that the weapon would be taken to the "Trace Section" to be checked per January's explicit instructions:

Conversation with: Jason January

Date and time of conversation: March 23, 1999, 0825

Synopsis of conversation: Jackie informed me that there was going to be someone comming out here to get the evidence for court. I called Jason to see if there was something needed to be done on the 44Mag revolver before we released it. He informed me that all he wanted was to have it checked for Potatoes on or inside the barrel. I told him that I would take it to the Trace Section to see if they could check for that. He said that he would resubmit the 45 pistol after the trial to have it put into the Drugfire database.

Id. ADA January knew that Mr. Linch worked in the trace-evidence section, and he and ADA Davis had previously worked with Mr. Linch on other capital cases.

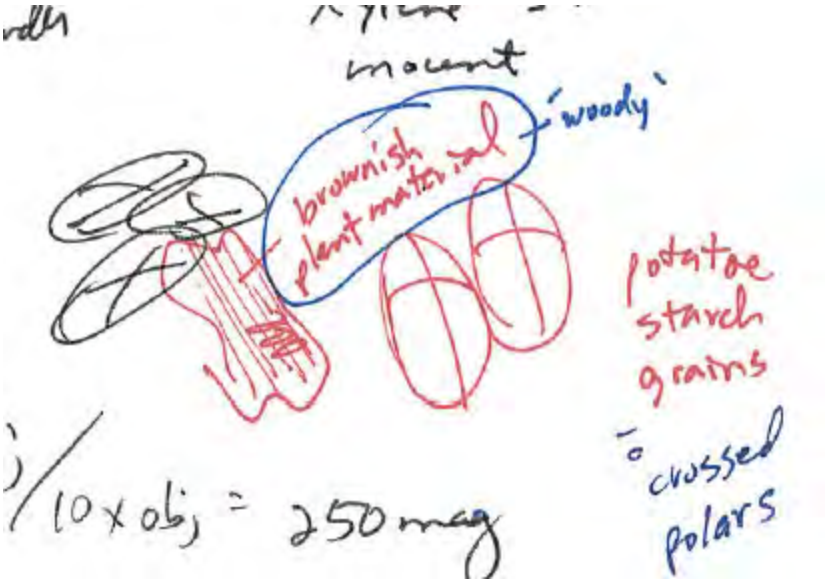
Later on that same day, March 23, 1999, ADA January called Mr. Linch directly and asked if he was finished with the weapon, to which Mr. Linch responded "what weapon." 36 RR 215.

Later still on March 23, 1999, after getting the directive from ADA January that the prosecution wanted the "Trace Section" to find "potatoes on or inside the barrel," Mr. Linch prepared a report describing his analysis of the .44 magnum, identified as "item 75."[168] Ex. 75.

Mr. Linch's report, generated the same day he examined the .44 magnum, states: "A sterile surgical blade and powder free latex gloves were used to remove gray/black granular material from the grooves of the item 75 revolver barrel interior. This material was examined by polarized light microscopy and found to consist of starch grains, white and blue cotton fibers, and amorphous apparent carbonaceous particles." *Id.* That one paragraph is the entirety of Mr. Linch's explanation in the report about his method and test results. *See id.*

Although his underlying casefile was not produced until nearly two decades thereafter, the casefile shows that Mr. Linch's process was captured in no more than a few scribbled notes (in which he misspells the key word "potato" as "potatoe"):

[168] Somewhat confusingly, Mr. Linch refers to both the .44 magnum and the microscope slide he created with particles allegedly removed from the revolver as "item 75."



Ex. 65. Mr. Linch's methodology consisted of making this hasty sketch and photocopying a few pages from a treatise called *The Particle Atlas*, which includes a short entry about "potato starch." *Id.*

The next day, on March 24, 1999, the State planned to call Mr. Linch to the stand. 36 RR 215. Before he testified, however, ADA Davis laid the groundwork for Mr. Linch's testimony by focusing the jury's attention on the .44 magnum revolver—a noticeably bigger gun than the .380 pistol that had been identified as the murder weapon (but which was never recovered). SX53. Davis did so by utilizing Amy Bartlett, the officer who had found the .44 magnum in a closet at 11807 High Meadow. Davis asked this officer a series of leading questions to emphasize the size of the ammunition associated with this type of firearm relative to a .380—even though the witness made it clear that she was "not very good with guns":

> Q. Looking now at State's Exhibit Number 54, am I now holding the .44 — one of the .44 caliber shells that you found inside State's Exhibit Number 53 [the .44 magnum]?
>
> A. Yes.
>
> Q. Okay. It's a fairly large round of ammunition, isn't it?
>
> A. Yes.
>
> Q. Are you familiar with .380 auto ammunition?
>
> A. Vaguely. I'm not very good with guns.
>
> Q. Okay. Let's take a look at some .380 auto ammunition. Would it certainly be fair to say that .44 caliber ammunition is a good deal bigger, is it not, than the .380 ammunition?
>
> A. Yes, it is.

36 RR 204-205. ADA Davis also wanted to prepare the jury to hear more about that .44 magnum, asking calmly about testing that *he* knew Mr. Linch had only done the day before and that Officer Bartlett knew nothing about:

> Q. Okay. Now, when you recovered [the .44 magnum] and the shells that were inside there, did you yourself do any testing on that weapon?
>
> A. No, sir.
>
> Q. Okay. Was that item along with the ammunition, was that later submitted to the Southwestern Institute of Forensic Sciences for some testing?
>
> A. After I put it in the evidence locker, I'm not quite sure where it went after that point.

36 RR 204-05.

When Mr. Linch took the stand soon thereafter, he testified misleadingly. He did not state that he had been expressly asked to look for traces of potatoes; instead, he said: "I was asked to look for any foreign residues that may be on or in the revolver." 36 RR 210. Since the record of ADA January's call to SWIFS was not produced to defense counsel until 2017, defense counsel in 1999 had no means to impeach Mr. Linch about having been given advance notice of exactly what kind of "foreign residue" the State was looking for.

Next ADA Davis asked Mr. Linch if, "[l]ooking at the outside portion of the barrel, did you find any unusual material on the outside of the barrel" of the .44 magnum? 36 RR 210-211.

Mr. Linch responded: "No, sir. It was very clean and appeared to have been polished. There was a slight amount of what appeared to be new lubricant in the chamber area." 36 RR 211. Defense counsel did not know that the .44 magnum had been in the possession of the DA's Office for some time or that it had been brought from the DA's Office to the crime lab on the eve of trial. Thus, defense counsel had no way to anticipate that this testimony too was misleading because it implied that, when found by *police*, the gun appeared to have been newly cleaned.

ADA Davis used the insinuation that the gun had "previously been cleaned," "at least" on the outside, as a means to build suspense about what Mr. Linch had,

nevertheless, managed to unearth deep inside the barrel. Mr. Linch described peering into "the lands and grooves," where he spied "some granular gray/black material that I scraped out with a scalpel onto a glass microscope slide." 36 RR 211.

Next, Mr. Linch testified about what he purportedly found after looking at this substance under a microscope:

> When the material was scraped on the glass microscope slide, it appeared gray/black and granular. Then I looked at it using a standard compound microscope or – and observed with that microscope some white cotton fibers and blue cotton fiber, and some other amorphous particles.
>
> Then I looked at it under the polarized microscope. And using polarized light microscopy, I saw several particles that are identified as starch grains. They have a very specific appearance under polarized light microscopy.

36 RR 212.

ADA Davis then leaned in toward the epiphany the State had been seeking:

> Q. Now, when you say starch grains, are we talking about some sort of plant material?
>
> A. Plants store their sugars, carbohydrates, and starch grains just as animal store their energy sources as fats. So it would be from a raw plant product.
>
> Q. Okay. And included in that raw plant category, would **potatoes** be included in that category, sir?
>
> A. Sure. **Potatoes** are rich in starch grains.

Q. Okay. And did you form some conclusion as to whether or not the starch grains that you saw coming from inside that barrel were consistent with being **potato** starch grains?

A. There are different types of starch grains depending on their polarized light and microscopic appearance. The **potato** starch grains are actually shaped like **potatoes** with a cross through them as observed under polarized light microscopy.

These starch grains did have the **potato** shape, and there were other smaller grains that could be from other sources, including **potato**. But in the atlas I referred to, they were most consistent with **potato** starch grains.

Q. Okay. If we were to look at other starch grains coming from other sources, for instance, they may have a different shape, a different size, and they may not have that cross marking; is that correct?

A. These particles come in different sizes depending on how long the cell has been accumulating the carbohydrate into the particle. The smaller ones are the more common appearance. You see that on powdered surgical gloves. You see it from other starch sources. But the large ones are more characteristic of that that you find from a raw **potato**.

Q. And again, the starch grains that you saw inside the barrel were of the larger variety; is that correct?

A. They were both. They were the large ones and the small ones.

Q. Okay. Would the outside portion of the **potato**, would that – such as the peel – would that – or the covering – would that have a different shape to it perhaps?

A. Yes, sir. The peel, appears different microscopically. There are vacuoles of air within the vessels, and any type

> of woody plant, back, or **potato** peel has a generalized characteristic that you recognize under the microscope.

36 RR 213-214 (emphasis added).

Mr. Linch's testimony that he had observed numerous microscopic starch grains of multiple sizes consistent with raw potato *seemed* to be the product of an objective, scientific method that had produced a reliable, verifiable result. This perception was false.

ii. Evidence only ascertainable after May 2016 shows that Mr. Linch's testing and testimony were utterly unreliable.

Neither Mr. Linch's report nor "item 75," the microscopic slide that Mr. Linch had created that purportedly contained the material he scraped from the barrel of the .44 magnum, were admitted into evidence or shown to the jury. Flores similarly did not obtain access to these materials until after May 2016. Moreover, Flores did not obtain the SWIFS call records, Mr. Linch's "casefile," or Linch's SWIFS personnel records until July 2017. Ex. 24.

In 2016, while Flores was under warrant and facing an imminent execution date, his former counsel, Bruce Anton, contacted Dallas County's relatively new Conviction Integrity Unit (CIU). Anton noted that things were missing from the recently obtained police file, such as most information about the photo lineups that had been used with witnesses during the police investigation. A few days later, counsel for Flores raised an issue related to Charles Linch's [misspelled "Lynch"]

"fiber evidence." Soon thereafter, counsel asked to see Mr. Linch's trial report. Ex. 76.

Thereafter, at the request of the CIU, SWIFS generated a report of the archived evidence in the Flores case. Mr. Linch's trial report was disclosed on or around April 27, 2016. After receiving the report, Flores's counsel moved expeditiously to file a motion seeking access to the slide that Mr. Linch had created and to obtain expert assistance to scrutinize that slide. However, on May 3, 2016, State's counsel announced its intent to *oppose* the motion—and the State did oppose it. *Id.*

Less than two weeks later, on May 19, 2016, Flores's first subsequent state habeas application was filed, raising, *inter alia*, the junk-science hypnosis claim that has since been rejected. With the execution date looming, and while waiting for the CCA to rule, Flores's counsel continued to confer with the CIU about gaining access to Mr. Linch's slide and any other underlying work product. *Id.*

On May 27, 2016, the CCA stayed Flores's execution date and remanded one claim (the hypnosis junk-science claim) for further factual development. *Ex parte Charles Don Flores*, WR-64,654-02, 2016 WL 3141662 (Tex. Crim. App. May 27, 2016) (unpub.). Thereafter, on June 1, 2016, Flores's expert, Raoul Guajardo, was finally given access, at SWIFS, to the slide that Mr. Linch had created in preparing to opine at the Flores trial. Ex. 76.

On June 17, 2016, Mr. Guajardo forwarded a "synopsis" of his testing, which was critical of Mr. Linch and which was shared with the Dallas CIU. *Id.*

Soon thereafter, the counsel who had filed the first subsequent state habeas application on Charlie Flores's behalf withdrew from the representation. An interim judge appointed the Office of Capital and Forensic Writs to take over. Then the parties had to wait for a new judge to assume responsibility for the 195th district court before the case could proceed. A new judge, the Honorable Hector Garza, assumed the bench in January 2017. Ex. 24.

From the first status conference onward, counsel for the State took the position that discovery—and, ultimately, any evidence to be admitted during the evidentiary hearing—should be limited to the hypnosis issue. *See*, *e.g.*, 3 EHRR. Consistent with its opposition to further discovery, the State objected to Flores receiving the CIU file on his case, which included information regarding Mr. Guajardo's assessment of Mr. Linch's work. Ex. 76.

Counsel for Flores finally obtained the CIU file on the Flores case, including Mr. Guajardo's informal report and Mr. Linch's trial report, on September 26, 2017. *See* Ex. 24; Ex. 77; Ex. 75. After examining Mr. Linch's slide and comparing it to Mr. Linch's testimony, Mr. Guajardo noted:

- Mr. Linch had testified that he had seen "*numerous* starch granules consistent with potato starch granules" and that "*large* granules" in particular were consistent with potato starch. But when scanned using a 40X microscope by

Mr. Guajardo, the slide revealed only "two small starch granules" that appeared to be the same size. (emphasis added)

- The slide Mr. Linch had created had "not [been] stained with iodine, a simple test for starches that stains the starch granules dark blue" and that makes it easier to locate starch granules on a slide.

- The slide "did not contain any marked location areas of where the starch granules were located" to facilitate re-examination and replication by a future analyst.

- Mr. Linch had taken no photographs of the slide to document his process.

- The .44 magnum would need to be reexamined to rule out the possibility that the slide had been contaminated with corn starch, since the "cross characteristics" about which Mr. Linch had testified are "not unique to potato starch granules," but are also found in corn starch and other starch granules.

Ex. 77. Mr. Guajardo's preliminary assessment was prepared without benefit of Mr. Linch's casefile documenting the examination process or Linch's personnel records, because these had not yet been produced.

SWIFS records, only disclosed in 2017, after Mr. Guajardo had examined Mr. Linch's slide, revealed greater context. These records show that when he was asked to come to the prosecution's rescue during trial, Mr. Linch was in the midst of appealing a formal grievance against his supervisor. The very day after Mr. Linch's save-the-day testimony for the State, Mr. Linch received news from SWIFS' director that Mr. Linch's grievance lacked merit. Ex. 71. That, however, would not deter Mr. Linch, who had long felt underappreciated and was then in the process of accusing SWIFS of creating "a hostile work environment" where "***the ones who have a direct***

role in putting people on death row are getting" smaller raises. *Id*. (emphasis added). At that time, Mr. Linch informed his supervisors that he planned to appeal his formal grievance about "demeaning" retaliation that he believed he had experienced in the form of a denied promotion and denial of his request to give a lecture to prosecutors. *Id*.

Mr. Linch's long-standing feelings of being underappreciated and "demeaned" at SWIFS contrasted sharply with his warm relationship with the Dallas County DA's Office. As is now known, Mr. Linch's personnel file included many thank-you notes he had received from DAs' offices over the years. One such thank-you note was penned by Jason January soon after the Flores trial. On April 20, 1999, ADA January had sent a letter on Dallas DA letterhead to SWIFS Director Jeffrey Barnard, praising the help the prosecution had received from SWIFS personnel in the Flores case. ADA January called out Mr. Linch's work, in particular, as "critical to the State's theory of the case":

> **CHARLES LINCH** - provided last minute testing and testimony in this case which proved to be critical to the State's theory of the case. He once again performed in a timely and professional manner.
>
> Frank Crowley Courts Building 133 N. Industrial Blvd., L.B. 19, Dallas, Texas 75207-4399 (214) 653-3600

Ex. 64.[169]

[169] Former ADA January's assertion in this letter regarding how "critical" Mr. Linch's "last minute testing and testimony" had been makes it peculiar that January would later say in a sworn

Mr. Linch's casefile for the Flores case, containing the notes he made while conducting the "testing," was also not disclosed until 2017. An expert in quality-control for forensic laboratories, Janine Arvizu, subsequently analyzed Mr. Linch's casefile and explained what the casefile notes reveal about the work that Mr. Linch performed on the .44 magnum revolver that the DA's Office had delivered to him during trial. *See* Ex. 73.

Mr. Linch's casefile reflects that his entire process consisted of the following: he "used a scalpel to remove gray/black powder from grooves inside the barrel. He mounted a xylene suspension of the material on a slide, and analyzed it by polarized light microscopy." *Id.* at 8; *see also* Ex. 65. The casefile also contains Mr. Linch's handwritten notes (attached as Exhibit 3 to Ms. Arvizu's report), which consisted only of a diagram of three ovals, each with a cross inside, adjacent to an amorphous shape drawn in red ink and labeled as "brownish plant material." The diagram also includes two upright ovals drawn in red ink and labeled with characteristic "crossed polars," and identified as "potatoe *(sic)* starch grains." The identification as "potatoe

affidavit, dated April 25, 2001, that, in his "opinion, if Mr. Linch's testimony were redacted from the trial testimony, the evidence would still be sufficient to convict Charles Don Flores of capital murder in the death of Betty Black." Ex. 25. But this inconsistency is just one of several reasons why former ADA January's post-conviction affidavit, provided to support the State's opposition to Flores's initial state habeas application, is wholly unreliable. *See* Factual Background at Section VI above.

starch" was made in red ink, and the "crossed polars" entry was made in blue ink. *Id.*

The handwritten notes led to a one-paragraph report, dated March 23, 1999, in which Mr. Linch identified starch grains as the material he had scraped from the barrel of the revolver. *See* Ex. 75.

Ms. Arvizu also inventoried the supporting materials in Mr. Linch's casefile (which were also not produced until 2017). The references he cited consist of six annotated pages (title page and pages 208-212) from *The Particle Atlas* by C. Walter McCrone and associates, from Walter C. McCrone Associates, Inc. On page 209, as Ms. Arvizu notes, "the entry for arrowroot starch has been manually circled[.]" On page 210, as Ms. Arvizu further notes, "under the only photograph of potato starch (#216 'slightly uncrossed polars'), there is a manual notation 'fully crossed' along with a drawing of an oval with a clear cross inside." Ex. 73 at 9.

As explained further below, the new scientific evidence presented by Mr. Guajardo and Ms. Arvizu, which was only available after 2016 (in part because of the State's suppression of Mr. Linch's casefile and personnel files), demonstrates that Mr. Linch's trial testimony was unreliable.

iii. <u>Evidence only ascertainable after May 2016 shows that forensic labs like SWIFS have, since Charles Linch was employed there, moved to adopt standards for laboratories that promote generally accepted scientific competency.</u>

When Mr. Linch was enlisted to opine for the State at the Flores trial, most forensic labs, including SWIFS, were not accredited and had few quality controls in place. As quality-control expert Janine Arvizu explains, testing laboratories adopt quality-control systems to provide "a formal, systematic means of identifying, controlling, and monitoring each of the factors that can affect the reliability of test results." *Id.* at 3. "The scope and rigor of a laboratory's quality system should be designed and operated to be commensurate with the intended use of the laboratory's results." *Id.* In Ms. Arvizu's professional opinion "[w]hen test results will be the basis for consequential decisions"—such as criminal convictions—the appropriate level of quality control should "necessarily be higher." *Id.*

One way a laboratory's commitment to quality-control can be assessed by third parties is an accreditation process whereby a specific laboratory's practices and protocols are judged against a specific set of published standards. *Id.* at 3-4. The International Organization for Standardization (ISO) issues consensus standards that, as Ms. Arvizu explains, "are the basis for accreditation of testing laboratories (in disciplines ranging from environmental to forensics) throughout the United States and worldwide." *Id*.

In a report prepared for this case, Ms. Arvizu provides an overview of the process whereby forensic laboratories have moved towards adopting quality-control

standards, so that the testing conducted in such laboratories reflects generally accepted scientific competency—which Mr. Linch's 1999 testing does not:

> In the 1990s (and continuing until 2009), only a minor fraction of the forensic laboratories in the United States opted to pursue accreditation. Those who did typically sought accreditation from a program developed and managed by an organization of forensic laboratory managers: American Society of Crime Laboratory Directors – Laboratory Accreditation Board (ASCLD/LAB). This program required partial compliance with internally-developed standards that were substantially less demanding than ISO standards. The requirements documented in the ASCLD/LAB Manual (described as Essential, Desirable, and Important) were far below international standards, but they reflected the beginning of the forensic community's gradual acceptance of the scientific consensus for a laboratory to demonstrate competency.
>
> For decades, accreditation and mandatory adherence to international consensus standards have been *de rigueuer* in the laboratory testing industry. In contrast, forensic laboratories have been slow to implement universally accepted quality systems. In the late 1990s, most forensic laboratories in the United States lacked formal quality assurance programs that effectively controlled the analytical process. Even well-funded, high-visibility programs like the FBI laboratory were not accredited and lacked efficacious quality systems.

Id. at 4 (citing U.S. Department of Justice Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*, April 1997).

Ms. Arvizu also reports on the specific status of SWIFS in 1999, when Mr. Linch performed his trace analysis for the Flores case. At that point in time, SWIFS had never been accredited, and it "lacked an effective quality system." *Id.* Additionally, SWIFS laboratory lacked "independent oversight and mandatory

proficiency testing[.]" *Id.* In 1999, SWIFS was "deficient in three important areas that directly and significantly affected the trace analysis testing performed in Mr. Flores's case: **validation**, **impartiality**, and **recordkeeping**." *Id.* at 5 (emphasis added).

As Ms. Arvizu opines, "validation" is a fundamental part of rendering any forensic discipline truly "scientific." "Validation is the formal process through which scientists determine the suitability of an analytical method for providing useful test information. A validation study collects empirical results to evaluate whether or not a specific analytical method is appropriate for its intended use. The performance characteristics (*e.g.*, accuracy and specificity) and error rates of a method are experimentally determined during a validation study. The determination of whether a result from a given method is usable or not depends on specifically what question(s) the test result is expected to answer." *Id.* at 5.

As Ms. Arvizu notes, "it is generally accepted" in the scientific community at large "that a test method must have been successfully validated prior to its use for analysis of unknowns." *Id*. That is why, since at least 1990, "international consensus standards for testing laboratories (ISO Guide 25, 1990) have mandated the validation of test methods that are used to test unknown samples." *Id.* The ISO standard in effect at the time that Mr. Linch undertook his testing specifically states:

- 5.4.5.1 Validation is the confirmation by examination and the provision of objective evidence that the particular requirements for a specific intended use are fulfilled.

- 5.4.5.2 The laboratory shall validate non-standard methods, laboratory-designed/developed methods, standard methods used outside their intended scope, and amplifications and modifications of standard methods to confirm that the methods are fit for the intended use. The validation shall be as extensive as is necessary to meet the needs of the given application or field of application. The laboratory shall record the results obtained, the procedure used for the validation, and a statement as to whether the method is fit for the intended use.

Id. at 5-6.[170] But these standards were not then embraced by ***most forensic labs***.

Ms. Arvizu explains how, since the 1990s, "the forensic science community in the United States has steadily been making progress toward validation of traditional analytical methods that rely on instrumental methods of analysis (*e.g.*, methods based on analytical chemistry, such as controlled substance testing)." *Id.* at 6. But Ms. Arvizu observes that some disciplines, such as "feature-comparison methods," have lagged behind in developing quantitative validation methods, relying instead "on an analyst's subjective evaluation of patterns to determine whether an evidentiary sample and a known sample are or could be from a common

[170] Ms. Arvizu further observes that "[e]ven the early version of the ASCLD-LAB forensic accreditation program (Manual, 1997) had an Essential Requirement (*i.e.*, 100% compliance was required) for procedures to be thoroughly tested using known samples to demonstrate their efficacy prior to use of the procedure for casework." Ex. 73 at 6.

source." *Id*. Feature-comparison is the kind of testing that Mr. Linch purported to do in this case.

Ms. Arvizu illustrates the problem of unbridled subjectivity associated with the kind of feature-comparison testing that Mr. Linch performed, quoting a 2016 report on the validity of feature-comparison methods issued by the President's Council of Advisors on Science and Technology:

> Without appropriate estimates of accuracy, an examiner's statement that two samples are similar – or even indistinguishable – is scientifically meaningless: it has **no probative value**, and **considerable potential for prejudicial impact**. Nothing – not training, personal experience nor professional practices – can substitute for adequate empirical demonstration of accuracy.

Id. at 6 (emphasis added).

Another foundational component of a true "scientific process" is that it must involve methods and results that are "reproducible." *Id.* at 6-7. As Ms. Arvizu explains, to be reproducible, "scientific methods and results must not only be objective, they must also be accurately and completely documented." *Id.* "Contemporaneously generated permanent records" are essential, as such records "provide the information that is essential for an independent scientist to assess the rigor and reliability of the testing process, as well as the information necessary for the subject testing to be repeated under comparable conditions." *Id.* at 7. A laboratory's records and documents should exist to "enable an independent party to understand and evaluate the entire analytical process in a given case. The supporting

records should provide an auditable trail of the specific actions, conditions, results, and decisions that gave rise to a particular result." *Id*. Ms. Arvizu cites standards that support this approach to record-creation and record-keeping. *See id.* at 7-8 (quoting ISO/IEC 17025:1999). Appropriate record-keeping is essential if a laboratory's test methods and results can be reproducible. Yet, historically, this was not a standard that governed forensic labs like SWIFS.

Additionally, the testing process has to be conducted in an *objective* manner. As Ms. Arvizu clarifies, "this means that scientific methods should not be influenced by factors such as individual perspectives, personal values, innate or learned biases, and personal or institutional interests." *Id*. at 7. Ms. Arvizu highlights the importance of objectivity within the context of a testing laboratory, a goal "formally recognized in consensus standards for decades." *Id.* For many years now, "standards have directly addressed the need to prevent conflicts of interest and ensure the impartiality of laboratory activities." *Id.* at 7-8 (quoting ISO Guide 25:1990 & ISO 17025:1999). But again, forensic labs like SWIFS had not adopted these basic standards.

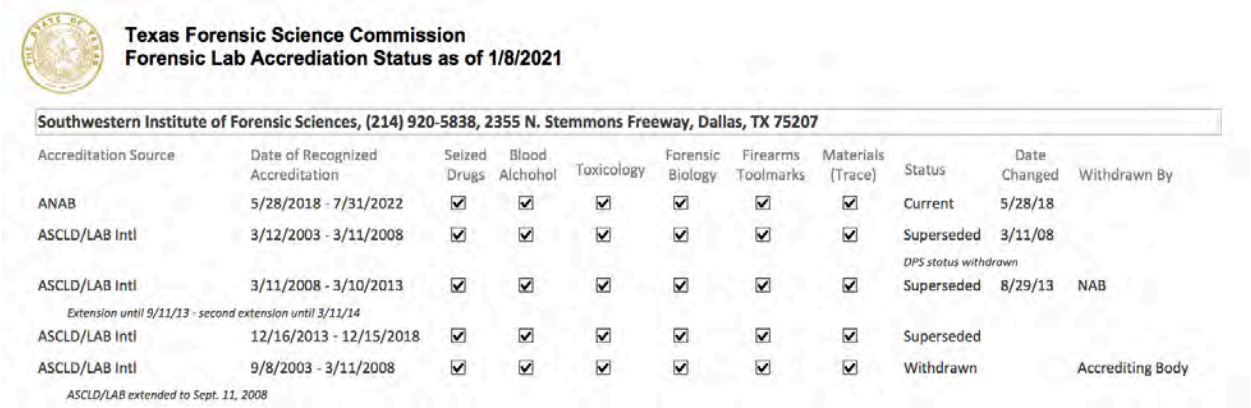
Notably, in the time since Mr. Linch performed his work at SWIFS for the Flores cases, numerous cases of "laboratory malfeasance and an increasing body of literature on biases in the sciences" have launched significant changes, reflected in the current edition of ISO/IEC 17025 published ***in 2017***. This industry publication "includes a new and significantly expanded section on requirements necessary to

ensure the impartiality of laboratory activities." *Id.* at 8. Ms. Arvizu highlights the following new standard as particularly germane in light of the considerable risks of bias suggested by Mr. Linch's performance in the Flores case:

> ISO 17025:2017: "The laboratory shall identify risks to its impartiality on an on-going basis. This shall include those risks that arise from its activities, or from its relationships, or from the relationships of its personnel." "If a risk to impartiality is identified, the laboratory shall be able to demonstrate how it eliminates or minimizes such risk."

Id.

SWIFS does not appear to have sought and obtained its first accreditation of any kind until 2003—four years after Mr. Linch performed his work for the Flores case and then permanently resigned from SWIFS. *See*:



Texas Forensic Science Commission
Forensic Lab Accrediation Status as of 1/8/2021

Southwestern Institute of Forensic Sciences, (214) 920-5838, 2355 N. Stemmons Freeway, Dallas, TX 75207

Accreditation Source	Date of Recognized Accreditation	Seized Drugs	Blood Alchohol	Toxicology	Forensic Biology	Firearms Toolmarks	Materials (Trace)	Status	Date Changed	Withdrawn By
ANAB	5/28/2018 - 7/31/2022	☑	☑	☑	☑	☑	☑	Current	5/28/18	
ASCLD/LAB Intl	3/12/2003 - 3/11/2008	☑	☑	☑	☑	☑	☑	Superseded	3/11/08	
								DPS status withdrawn		
ASCLD/LAB Intl	3/11/2008 - 3/10/2013	☑	☑	☑	☑	☑	☑	Superseded	8/29/13	NAB
Extension until 9/11/13 - second extension until 3/11/14										
ASCLD/LAB Intl	12/16/2013 - 12/15/2018	☑	☑	☑	☑	☑	☑	Superseded		
ASCLD/LAB Intl	9/8/2003 - 3/11/2008	☑	☑	☑	☑	☑	☑	Withdrawn		Accrediting Body
ASCLD/LAB extended to Sept. 11, 2008										

Available at https://www.txcourts.gov/media/1450331/texas.pdf (last accessed Jan. 22, 2021). In any event, there was no means to assess the method and circumstances of Mr. Linch's testing until after his casefile and other core records were finally disclosed in 2017.

iv. An expert assessment of Charles Linch's testing method and results, based on the recently disclosed facts and current quality-control standards, shows that his work was not competent science.

The facts regarding the method that Mr. Linch had used were only disclosed *after* May 2016, when Flores's previous habeas application was filed. Only after those facts were disclosed was a quality-control expert like Ms. Arvizu able to analyze and assess the reliability of both his method and his results in light of contemporary scientific standards.

Ms. Arvizu notes that Mr. Linch "used polarized light microscopy to conclude that starch was present on the evidence from this case. Based on comparison to photomicrographs published in an atlas, he testified that the starch grains he identified '…were most consistent with potato starch grains.'" Ex. 73 at 9. "Microscopy," as Ms. Arvizu imparts, "is a well-characterized technique for investigations of trace materials." *Id*. Despite Mr. Linch's representations at trial, however, "there is no evidence that the application of this technique in the analytical method used by Linch was documented and had been validated for the identification of starch in general, or specifically for potato starch." *Id.* at 10.

Through the late 1990s, this kind of standardless approach was a ubiquitous problem with feature-comparison methods conducted in forensic labs. That is, this kind of analysis was common in spite of the fact that the approach had "never been validated." *Id.* As Ms. Arvizu observed, "Linch's records do not include notations

for any of the quality control measures necessary in a valid analytical method (*e.g.*, concurrent analysis of known positive and negative controls; replicate tests; correlation of results for different characteristics; participation in proficiency testing). There is no indication that any relevant characteristics (*e.g.*, length of grains, refractive index) were measured, or that a starch indicator stain was used for confirmation of identity." *Id.*

Ms. Arvizu examined Mr. Linch's casefile (only produced in 2017) to assess the integrity of his record-keeping. She found that his casefile included copies of a few particle atlas pages with annotated micrographs from a variety of starches. She observed that the limited notations on the references he consulted actually *contradict* Mr. Linch's testimony that the observed grains were "most consistent with potato starch." She saw that the entry for Arrowroot Starch that had been circled, and the associated photomicrograph ("213C crossed polars") had grains similar to Mr. Linch's drawing on the casefile worksheet. On the atlas page for potato starch, Ms. Arvizu found a photomicrograph of grains titled "216 slightly uncrossed polars." A grain analogous to that on the worksheet and "fully crossed" had been manually entered in the margin. To Ms. Arvizu,"[t]hese records indicate that during his analysis, Linch concluded that the evidence sample grains corresponded most closely to Arrowroot starch, and were ***less consistent with potato starch***." *Id.* at 10 (emphasis added).

Ms. Arvizu's critique of Mr. Linch's record-keeping regarding his use of an unvalidated method is supported by the following:

> Linch's records do not identify the number of starch grains identified, or their location(s) on the slide. In addition to this basic information, his records do not document any of the qualitative identification features that would be expected, including: the number and size range of identified granules; granule surface markings; degree of agglomeration; and the visibility and position of hilum.

Ms. Arvizu also underscores the unsettling discrepancies eventually uncovered between the contents of the microscope slide Mr. Linch created and his testimony about what he observed on that slide:

> Independent analysis of the #75 slide performed in 2016 revealed a number of significant discrepancies with the work and testimony in 1999. Linch testified that he observed "several" starch grains, including large potato shaped grains, and smaller grains that "could be from other sources, including potato." Independent analysis of the slide under polarized light by Raul Guajardo revealed only two small starch granules with extinction crosses. No large ovoid starch granules were observed. In addition to this material discrepancy, the independent analysis identified the slide mounting medium as permount (a toluene-based medium), while Linch's record documented the use of xylene.

Id. at 10-11.

In short, Mr. Linch's scant records leave out basic information, fail to provide any kind of specific, quantitative data to account for what he later purported to have seen, and the lone attempt that has ever been allowed to try to replicate Mr. Linch's testing revealed numerous discrepancies between the biological material found on his slide and the testimony that he provided in court.

In addition to concerns about Mr. Linch's use of an unvalidated method to generate "poorly documented test results that were inconsistent with [his] testimony," Ms. Arvizu found a basis for "serious concerns regarding [Linch's] lack of impartiality." *Id.* at 11. Ms. Arvizu described the basis for this "particularly troubling" circumstance by referencing his SWIFS personnel file, which shows long-standing emotional distress, volatility, pronounced frustration over unaddressed concerns about lack of appropriate training, and other sustained work-related stressors, combined with significant mental health challenges, including severe depression and alcoholism:

> At the time he performed the test in Mr. Flores's case in 1999, Charles Linch was approximately five months from his final departure from the laboratory. His nearly two decade tenure with the laboratory was fraught with incidents that reflect a difficult and seriously strained relationship between Linch and the laboratory. Over the years, Linch's employment status was volatile. He threatened to resign, and withdrew his resignation. On two occasions, Linch was rehired soon after he voluntarily terminated his employment. He complained that he was over-worked and under-paid, and that he was unfairly denied promotion and training opportunities.
>
> Throughout 1998 and 1999, the relationship between Charles Linch and laboratory management was strained at best; Linch described it as a hostile work environment. During five months prior to the Flores trial, Linch filed a grievance against his supervisor and was counseled three times about the need to improve relationships and communication. Five days after his testimony in the Flores case, Linch prepared a hand-delivered letter requesting appeal of a grievance he had filed alleging unfair treatment by his supervisor, and lack of opportunity for promotion. During the period of the Flores trial, Linch was experiencing considerable stress in his working environment.

> By his own statements, Linch's personal mental health challenges (severe depression and alcoholism) were exacerbated by his dissatisfaction with the laboratory and his position. Although he felt maligned and ignored by laboratory management, Linch took pride in his work in high profile and capital cases where he had what he described as "a direct role in putting people on death row." Linch valued the positive feedback he received from prosecutors and the media, but he felt ignored, misused, and taken advantage of by laboratory management.

Id. at 11-12 (relying on documentation in Mr. Linch's personnel file). Based on these facts, Ms. Arvizu found that Mr. Linch's work environment "posed a significant risk to Linch's impartiality." *Id.* at 12. Arvizu further concluded that "[c]ognitive bias influenced Linch's work and his testimony, whether or not he was aware of it." *Id.* (citing *Anal. Chem.* 2020, 92, 12, 7998-8004).

Severe, work-related stress was not the only risk that Mr. Linch's testing might reflect bias; Ms. Arvizu also found that "the specific circumstances that led to Linch's testing and testimony in the Flores case suggest bias and other conditions adverse to obtaining valid and reliable results." *Id.* at 12. Ms. Arvizu cites these concerning facts:

- the lab was contacted by the lead prosecutor on the case **during trial** on March 23, 1999;
- the records reveal that the prosecutor **gave Mr. Linch specific directives about what the prosecutor wanted him to find:** specifically, evidence of potato inside the gun's barrel;
- the "testing" was then performed **that same day**, memorialized in a short report that does not seem to have been vetted by any other SWIFS employee; and

- **the very next day**, Mr. Linch testified, disclosing only his report, without the underlying notes that contradict his key finding.

Id.

In sum, nothing about Mr. Linch's method or results comport with the kind of standards associated with competent science. The problems that Ms. Arvizu found with Mr. Linch's method and results are numerous and profoundly concerning. *See id.* at 13. Most importantly, Ms. Arvizu concluded that "[w]hen reviewed in consideration of contemporary standards for forensic laboratories, including the standard that is the basis for the SWIFS laboratory's current accreditation, the work in this case was ***severely deficient***, rendering both the results and the testimony unreliable." *Id.* (emphasis added).

v. Charles Linch himself has acknowledged that neither his testing nor his testimony would be deemed acceptable in light of today's consensus standards for forensic labs.

It is rare and remarkable when a person can publicly own up to past mistakes and admit that a former self acted in a way that would, with the benefit of contemporary understanding, be viewed as inappropriate. Mr. Linch has done just that. He has recently provided a sworn declaration containing an insightful critique of his role in the Flores case and disavowing his previous testing and testimony. *See* Ex. 74. More specifically, he has acted like a *scientist*, training an objective eye on

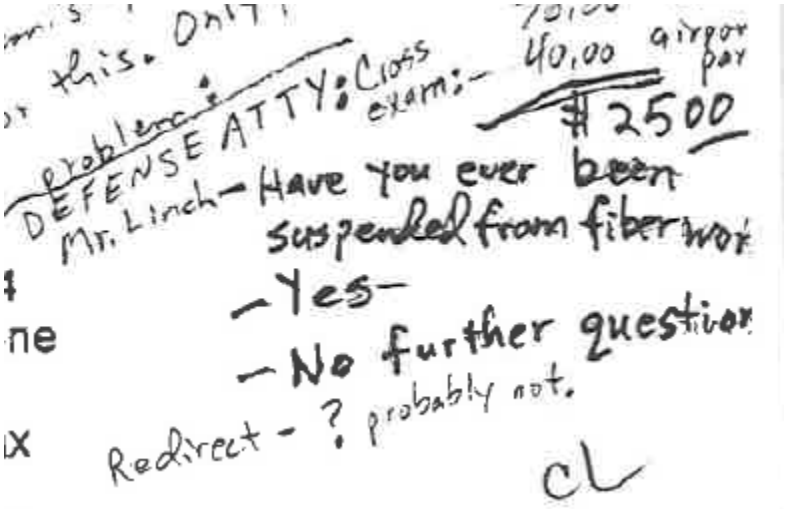
his own past practices and assessing them through the lens of his present understanding.

Mr. Linch spent nearly twenty years at SWIFS, primarily as a trace evidence analyst. But during the last nine years of his tenure, from 1990-1999, he was called upon to work in a staggering array of disciplines: "forensic microscopy, hair and fiber examination, firearm discharge distance determination, GSR analysis (atomic absorption), glass examination, paint analysis, fracture match, fabric separation, crime scene/autopsy evidence collection, and crime scene reconstruction/blood stain analysis, energy dispersive X-ray determination of elements in clothing/tissue items, and X-ray crystallography identification of powders." *Id*. ¶1. Mr. Linch's declaration notes that "accredited labs limit staff to working in only 2 or 3 of these areas." *Id.*

Mr. Linch observes that he was "frequently asked to testify about the results" of his analyses in the 1990s, "including in several high-profile capital murder cases in and around Dallas County." *Id.* Those cases included the trials of: Kenneth Duff, Kevin Hailey, Jason Massey, Darlie Routier, and Michael Blair. Mr. Linch states that he remembers the Flores case all of these years later "because it was the only time I recall being asked to look for evidence of potato residue inside a firearm." *Id.* ¶4. The Flores case was the last case for which he testified at the behest of the Dallas County DA's Office because he resigned from SWIFS soon thereafter while a formal grievance he had filed against his supervisor was still pending. *Id.* ¶3. He then took

a job in the trace evidence section of the Virginia Department of Forensic Science. *Id.*

Mr. Linch admits that, by the time of the Flores trial in 1999, he "had concerns about the general efficacy of trace evidence analysis and about the lack of competent leadership at SWIFS." *Id.* His personnel files demonstrate that he raised these concerns internally—and frequently. Mr. Linch repeatedly entreated his supervisors to allow him to get more and better training, although his tactics were, perhaps, not always very diplomatic. For instance, in 1998, he made notes on a fax cover sheet pressing for funding to attend FT-IR Microscope Training. In his note, he anticipates what defense attorneys would ask him on the stand during future cross-examinations due to his lack of training:



Ex. 71.

In terms of his specific work on the Flores case, Mr. Linch, after having a chance to study his casefile and his trial testimony, noted these salient points about the context:

- The idiosyncratic exam request was rushed: The .44 magnum revolver that Mr. Linch ultimately examined "was submitted to SWIFS for testing by an investigator with the Dallas County DA's Office" on March 19, 1999 (the eve of trial) "but without any specific exam request." It then sat in the firearms section until the DA's Office called on March 23, 1999 (*during* trial). Then, as Mr. Linch notes, "it became a rush to the Trace Evidence Section for a potato residue exam"—something Mr. Linch had never done before—"that same day. " Ex. . 74 ¶5.

- The information he was provided was inadequate: He was not told "why or how the DA's Office believed that there might have been potato starch inside the barrel of the .44 Magnum." *Id.* ¶6.

- The testimony was rushed: Mr. Linch was asked to go to court the day after his rushed examination and the drafting of his one-paragraph report. That meant that he "went to court and testified for the State about [his] analysis without opportunity for a pretrial meeting with the State or Defense counsel." *Id.*

Moreover, looking back from the perspective of greater experience and education at a forensic lab with quality controls, Mr. Linch said that he was "struck by two things." *Id.* ¶7.

First, Mr. Linch was struck "by the fact that it was presumed that I could be asked to conduct testing, prepare a report, and then opine about the results the very next day." *Id.* Those assumptions suggest that the prosecutors in the case had no doubt that Mr. Linch would deliver something helpful to the State—in record time

and without the prosecutors even needing to verify what he had found. As Mr. Linch explains, when he went to work for the state forensic lab in Virginia, that lab would not have permitted such a development. The Virginia lab "had a convention that required reports to be issued at least one week prior to trial." *Id*. Mr. Linch notes that "[t]his was just one example of the kind of quality control measure in place in Virginia." *Id.*

Additionally, "labs with more quality control measures," where Mr. Linch later worked, would not have expected him to undertake the rushed analysis "without assurances regarding chain of custody for the firearm[.]" *Id.* ¶8. Yet it is now clear that the chain of custody for the .44 magnum revolver was broken. The revolver was taken to the Farmers Branch police station, then, at some later point, undocumented, it ended up in the DA's Office. There it remained, until it was taken to SWIFS right before trial by an investigator in the DA's Office.

Moreover, in a lab with quality controls, Mr. Linch would not have been permitted to undertake this analysis "without some supervision and oversight to ensure objectivity and reliability." *Id.* ¶8. Mr. Linch was provided with no such supervision or oversight at SWIFS in 1999. In an accredited laboratory, his report would have been subjected to what Mr. Linch refers to as "Technical and Administrative Review." *Id.* "A second qualified examiner's review of the results is also [now] customary." *Id.*

By contrast, SWIFS, at the time of the Flores trial and throughout Mr. Linch's employment there, "had no rules or meaningful supervisor in the forensic lab[.]" *Id.* ¶7. This was likely why Mr. Linch was able to "freelance" extensively at the behest of DAs' offices, who at least appreciated his dedication to their own agendas. *See* Ex. 71.

Second, having learned, well after-the-fact, how his "potato starch" testimony fit into the State's case, Mr. Linch was struck by the absurdity of the State's argument in light of basic laws of physics and chemistry. He explains the problem in readily accessible terms:

- First, Mr. Linch notes: "I doubt there is anyone on the planet who can say that potato residues (starch particles) can be found in a revolver barrel if a potato is jammed on the barrel and the gun is fired. I would certainly expect potato residues to be found inside the barrel if the gun is *not* fired after the potato is jammed on and removed... Starch gelatinizes at about 60 degrees C (140 degrees F) and starch is soluble in boiling water, 100 degrees C (212 degrees F)." Ex. 74 ¶7.

- Then Mr. Linch explains: "Gunpowder ignites at temperatures higher than the decomposition temperatures of potato starch. A small explosion occurs in the barrel when the gun is fired. In addition, before the intense temperatures from that explosion travel the gun barrel, the tight-fitting bullet travels the barrel removing some foreign materials from the barrel." *Id.*

- Finally, Mr. Linch acknowledges what would be needed before one could make any fact-based assessment: "Experimentation would be required to see if intact starch particles can be found in a gun barrel (.44 cal) after firing with a potato jammed on the barrel." *Id.*

Putting these pieces of basic science together, Mr. Linch now recognizes that the inferences the prosecutors trying the Flores case in 1999 were attempting to make, which they did not share with Mr. Linch before or after he testified, "***have not been***, to [his] knowledge, ***proven by science***. The ability of potato residues to persist in a gun barrel after it has been fired is not, seemingly, known." *Id.* (emphasis added). Likewise, the question has not yet been answered: if a gun was fired with a potato jammed on the end of it on January 29, 1998, how would potato residue persist inside the gun's barrel until March 23, 1999—over a year later? Yet, unbeknownst to Mr. Linch, his testimony was used to support those unsound inferences.

In sum, Mr. Linch's testimony, based on a rushed, unvalidated, unreliable process, was used to support entirely unscientific assumptions that were not even shared with the person being exploited to provide the support. But ever since, his testimony has been invoked repeatedly, as if it amounts to legitimate support for Charlie Flores's conviction and for the State's false hypothesis that he, not Ric Childs, shot Betty Black.

Mr. Linch asserts in his sworn declaration: "If asked to testify about my results, I would decline to do so." *Id.* ¶8. He now disavows that testimony because: "Neither the testing nor the testimony regarding the results would be deemed acceptable in light of today's consensus standards for forensic labs or the standards I developed for myself over the decade that followed my time at SWIFS." *Id.*

In one of the few published cases applying Article 11.073, this Court held that scientific evidence is considered "newly available" where the opinion of the State's expert has changed since trial. *See Ex parte Robbins*, 478 S.W.3d 678, 690 (Tex. Crim. App. 2014). Moreover, in *Ex parte Robbins*, this Court made clear that a claim for relief brought pursuant to Article 11.073 should be remanded for a hearing where the facts alleged "are at least minimally sufficient to bring him within the ambit" of the statute. *Id.* Claim II plainly falls "within the ambit" of Article 11.073, based solely on Mr. Linch's disavowal of his testing and trial testimony. That evidence is, however, also supported by a sworn report, articulating the contemporary scientific perspective, by Ms. Arvizu, an expert in quality control for laboratory testing, as described both above and further below.

b. The scientific evidence supporting Claim II would be admissible under the Texas Rules of Evidence at a trial held on the date of the application.

Claim II is based primarily on the expert opinions of Ms. Janine Arvizu and the facts, scientific research, and data upon which she relies. Ms. Arvizu is qualified as an expert on quality control for forensic laboratories "by knowledge, skill, experience, training, or education[.]" TEX. R. EVID. 702. Additionally, Ms. Arvizu's opinions are relevant and reliable. Therefore, Ms. Arvizu's scientific knowledge would "help the trier of fact to understand the evidence or to determine a fact in

issue." *Id.* The expert opinions of Janine Arvizu would be admissible, thus satisfying Article 11.073(b)(1)(B).

Additionally, just as the testimony of Charles Linch was admissible at trial, the declaration disavowing his own testimony would be admissible.

i. Janine Arvizu is eminently qualified by relevant knowledge, skill, experience, training, and education.

Ms. Arvizu is a chemist, quality consultant, and auditor. Her education includes a B.S. degree in biochemistry (California Polytechnic State University at San Luis Obispo, 1976 with honors) and ABD in chemistry (All-But-Dissertation; completion of graduate coursework and qualifying examinations, Ph.D. candidacy, University of New Mexico). She is a Certified Quality Auditor (senior member, American Society for Quality, CQA certificate #19856) and specializes in quality assessments of testing laboratories and their results. For more than 20 years, she has assessed the reliability of forensic results. *See* Ex. 73 at 1; *see also* copy of her CV attached to her report as Exhibit 1.

Ms. Arvizu is also qualified by reason of her extensive experience. She has more than 35 years of technical, program management, and training experience in laboratory operations and management, quality assurance, and interdisciplinary analytical programs. She has developed and managed organizational and programmatic quality programs, and has extensive experience in the quality

assessment of laboratories and analytical data. She routinely conducts independent assessments of forensic test results "to help data users understand whether a specific result was generated in compliance with applicable requirements and published standards that represent the consensus of the relevant scientific community regarding quality measures necessary for scientifically valid and reliable testing." Ex. 73 at 1. She performs vertical audits of this nature "through a review of relevant documents and contemporaneous records, and in consideration of applicable standards," as she did in this case; she has also consulted on and audited massive projects for entities like the U.S. Department of Energy and the U.S. Navy. For the latter, for instance, she managed the independent evaluation of approximately 70 testing laboratories nationwide, using on-site audits, reviews of quality documentation, and blind proficiency testing. *See id*. at Exhibit 1.

Ms. Arvizu has been accepted as an expert witness and provided testimony more than 250 times in state, federal, and international court proceedings, including testifying regarding standards for all steps of the forensic analysis process, from collection of evidence through testing and reporting of results. *Id.* at 1.

ii. Janine Arvizu's opinions are relevant and reliable.

Ms. Arvizu's report (Ex. 73) outlines the methodology she employed and the facts and data that she used to form her opinions about the scientific validity and

reliability of trace analysis results reported by SWIFS analyst Charles Linch in his March 24, 1999 testimony in the Flores case.

She identifies the materials that she reviewed and relied on. These include case-specific materials, such as: the SWIFS casefile and report that Mr. Linch generated in analyzing a .44 revolver; the transcript of Mr. Linch's trial testimony; and numerous documents related to what Ms. Arvizu accurately describes as Mr. Linch's "lengthy…and oft-interrupted SWIFS career[.]" *Id.* at 2. Ms. Arvizu also relied on the informal report prepared by chemist Raul Guajardo, dated June 16, 2016.[171] *Id.* at 2.

Ms. Arvizu's independent assessment of Mr. Linch's performance in this case is based on these relevant case-specific records, as well as the status of quality assurance in forensic science in the United States and in SWIFS during the late 1990s, and on generally accepted standards for testing and forensic laboratories and authoritative scientific publications that exist today. *Id.* at 2-3. These standards include:

- American Society of Crime Laboratory Directors – Laboratory Accreditation Board (ASCLD-LAB) Manual, January 1997

[171] Ms. Arvizu noted: "My understanding is that, over the State's objection, Mr. Guajardo was afforded access on June 1, 2016, to the original microscope "slide 75" prepared and analyzed by Charles Linch on March 23, 1999 and about which he testified under oath at Mr. Flores's trial on March 24, 1999. That slide remained in the custody of SWIFS." Ex. 73 at 2.

- ISO/IEC Guide 25, Third Edition, 1990, General Requirements for the Competence of Testing and Calibration Laboratories

- ISO/IEC 17025:1999(E), ISO/IEC 17025:2005(E) and ISO/IEC 17025:2017(E), General requirements for the competence of testing and calibration laboratories[172]

- National Research Council, Strengthening Forensic Science: A Path Forward, 2009

- President's Council of Advisors on Science and Technology (PCAST), Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, September 2016

Id.

This sound methodology, relying on fundamental principles of scientific competency, and tethered to the relevant case-specific facts and industry standards, produced opinions that a Texas court would deem relevant and reliable.

iii. The scientific knowledge captured in Janine Arvizu's expert report would help the trier of fact.

Ms. Arvizu's relevant and reliable opinions would help the trier of fact in assessing the reliability of the scientific testimony that Mr. Linch provided at trial. In particular, her well-substantiated conclusions, summarized as follows, would be dispositive:

- The trace analysis performed by Charles Linch on March 23, 1999 used a method that had not been validated for the qualitative identification of potato starch. The testing process was poorly documented on the date of analysis,

[172] These versions superseded ISO Guide 25; the 2005 and 2017 versions are currently the basis for accreditation of forensic laboratories in the United States. Ex. 73 at 2.

and subsequent review of the retained evidence revealed significant discrepancies from Linch's recorded observations.

- In his trial testimony on March 24, 1999, Linch agreed with conclusions proposed by the prosecutor that were not supported by empirical evidence.

- The trace analysis result reported [by Linch] in the Flores case was generated using a subjective and unvalidated method, rendering it unsuitable for forensic use.

- The inherently subjective nature of [Linch's] analysis was exacerbated by adverse effects of the laboratory's inefficacious quality system. Trace testing was assigned to an analyst [Linch] who had not been proficiency tested, and whose testimony was not evaluated to ensure that it did not exceed what could be empirically sustained.

- Importantly, the testing and testimony were performed by an analyst [Linch] whose individual perspective and personal interests created serious risks to the objectivity of the process.

- The trace analysis result [Linch] reported in 1999 in the Flores case was the product of a laboratory that lacked an efficacious quality system; a subjective and unvalidated test method was performed by a seriously troubled analyst who operated and testified without oversight.

- The trace analysis work [by Linch] in the Flores case did not come close to complying with consensus standards for testing or forensic laboratories of the period.

- When reviewed in consideration of contemporary standards for forensic laboratories, including the standard that is the basis for the SWIFS laboratory's current accreditation, the work in this case was severely deficient, rendering both the results and the testimony unreliable.

Id. at 13.

Because the foremost responsibility of the trier of fact would be to assess the question of guilt, it is indisputable that the opinions of this highly qualified expert

would be helpful to the trier of fact and thus admissible under the Texas Rules of Evidence.

c. Had the scientific evidence been presented at trial, on the preponderance of the evidence, Flores would not have been convicted.

As explained in Sections VI & VII of the Factual Background and Section I.B.2.c of Claim I above, the State's incoherent, entirely circumstantial case was saved, during trial, by two developments. The first development was the trial court's decision to overrule the defense objection to Mrs. Barganier's testifying about her eleventh-hour courtroom identification. The second development was the State's decision to recruit Mr. Linch to come up with evidence, through what he now acknowledges was a standardless, unregulated process, and to then testify the next day. Without this evidence, cumulatively or severally, there was no competent evidence to support a conviction. Had the new scientific evidence presented in support of Claim II been available at trial, on the preponderance of the evidence, Flores would not have been convicted.

In examining the significance of Mr. Linch's testimony, one must look back to trial and the direct appeal, before information about Mr. Linch's troubling history became widely known. *See* Ex. 67. One must also look past what is now known about Mr. Linch's role testifying for the State in other cases where the defendant was subsequently exonerated or questions about innocence persist. *See, e.g., Ex*

parte Michael Nawee Blair, Nos. AP-75,954 & AP-75,955, 2008 WL 2514174 (Tex. Crim. App. June 25, 2008) (unpub.) (granting habeas applicant relief on actual innocence claim and vacating judgment of guilt and death sentence).[173] During his time on the stand in front of the jury in the Flores trial, Mr. Linch appeared to be a measured, objective "scientist"—likely a welcome contrast to the parade of drug addicts and dealers who testified for the State. He was the *only* seemingly credible witness who provided something like cogent testimony to support the State's "bigger gun" hypothesis. His testimony about the "potato starch" observed inside the .44 magnum revolver allowed the State to argue that this gun must have been used at the crime scene by Ric Childs—thereby supporting further inferences, per the State, that Ric had shot the dog and Charlie Flores was, by contrast, the party responsible for shooting Mrs. Black with a smaller .380 pistol.

In the direct appeal of Flores's conviction, in assessing a challenge to the sufficiency of evidence supporting the conviction, the CCA, without mentioning Mr. Linch by name, cites with approval his testimony as valid evidence that supported the conviction: "Polarized-light microscopy of granular material found inside the Magnum barrel identified starch grains consistent with those from a potato." *Flores*

[173] Mr. Linch played a crucial role in the conviction of Michael Blair, whom the CCA subsequently found "Actually Innocent." Indeed, Mr. Linch's trace evidence analysis in Blair's case was *the* basis for the conviction—which was ultimately vacated after DNA testing exonerated Mr. Blair.

v. State, AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (unpub. slip opin., unavailable on Westlaw or Lexis) at 6. Yet if the CCA (and the jury) had known then what we know now, Mr. Linch's testimony would have been an argument for reversal, not affirmance.

Further, if the jury had heard the expert opinion explaining how Mr. Linch's method and test results did not constitute competent science, and reflected the pronounced bias of "a seriously troubled analyst who operated and testified without oversight," the jury would have wholly disregarded his testimony. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009) (noting that "[f]orensic evidence is not uniquely immune from the risk of manipulation" and citing National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009)). As the late Justice Scalia recognized in writing for the Court in *Melendez-Diaz*: "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." *Id.* "And '[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.' A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the

prosecution." *Id.* Flores has adduced evidence that Mr. Linch was laboring under adverse incentives in 1999.

More importantly still, any trier of fact presented with the information in Claim II about the State's role in soliciting Mr. Linch's unvalidated, standardless test results would have cause to doubt the credibility of the State's entire case and the integrity of the underlying murder investigation.

Article 11.073 reformed the prejudice standard so that relief based on new science may be obtained by showing that, by a preponderance of the evidence, the applicant would not have been convicted if the new scientific evidence had been presented. TEX. CODE CRIM. PROC. 11.073 art. 11.073 § (b)(2). Flores has more than satisfied that element for Claim II as well.

C. Claim II Is Distinct from the Prosecutorial Misconduct Allegations Raised in Flores's Initial Habeas Application, Which Were Based on the State's Failure to Disclosure Charles Linch's History of Mental-Health Issues and Previous Hospitalization.

In his initial habeas application, Flores made allegations that the State had engaged in prosecutorial misconduct by failing to disclose certain personal information about Mr. Linch. Specifically, Flores previously alleged that the State had failed to disclose information that Mr. Linch had a history of alcoholism and mental-health issues and that he had been involuntarily hospitalized in the 1990s,

before Flores's 1999 trial, by some of his SWIFS colleagues. An evidentiary hearing on that claim was never authorized, and the CCA ultimately denied relief.

Claim II is distinct from that claim. For one thing, the initial habeas application's prosecutorial misconduct claim was not supported by any competent evidence. More importantly, the instant claim challenges the *substance* of the expert opinions Mr. Linch offered at trial, the deeply flawed method he used, and the lack of impartiality that likely tainted his entire approach—all as seen through the lens of contemporary scientific standards and in light of his recent disavowal of his own testing and testimony. *See* Ex. 73; Ex. 74.

D. Conclusion

For the foregoing reasons, Flores has more than satisfied the pleading burden imposed by Article 11.073 and Article 11.071, section 5(a) for Claim II. Therefore, Claim II should be remanded to the trial court for further factual development. Moreover, Flores has already adduced considerable, competent evidence to support Claim II. Therefore, relief in the form of a new trial is warranted.

III. NEWLY AVAILABLE EVIDENCE ESTABLISHES THAT MR. FLORES IS ACTUALLY INNOCENT OF THE CRIME FOR WHICH HE WAS CONVICTED.

Texas law recognizes that incarceration or execution of the actually innocent violates the Due Process Clause of the Fourteenth Amendment. *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996); *see also Herrera v. Collins*, 506 U.S. 390 (1993). Mr. Flores is entitled to relief from his capital murder conviction and death sentence because there is clear and convincing evidence that no reasonable juror would have convicted him of capital murder in light of all the evidence now available.

A. The Legal Standard

In reviewing this type of claim, the court ordinarily assumes the trial was error-free but that new facts establish the applicant's innocence. *Ex parte Elizondo*, 947 S.W.2d, at 208. In other words, to grant relief, the habeas court must be convinced that the new facts establish innocence. *Id.* at 209. Thus, prevailing on an "Actual Innocence," *Herrera*-type claim requires overcoming an exceptionally high burden. The CCA has described the burden as "Herculean" because the applicant must establish that no reasonable juror would have convicted him in light of the new evidence. *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). This is why, for sound, strategic reasons, habeas counsel often do not raise "Actual

Innocence" claims, even when a client has, in good faith, long maintained his innocence. For one thing, it is generally impossible to "prove a negative," which is what the standard requires. Mr. Flores can, however, carry this burden.

B. Application of Law to Facts

Charlie Flores can carry the onerous burden of proving his innocence because:

(1) Newly available scientific evidence about the relative reliability of eyewitness identifications, applied to Mrs. Barganier's testimony, establishes that her failed initial identification attempt is *exculpatory*;

(2) Newly available scientific evidence shows that the State's trace-evidence analysis was not just unreliable but fabricated;

(3) New evidence, in the form of a sworn statement from Charlie Flores and previously unavailable historical documents, support Flores's long-standing insistence on his innocence and the availability of an alibi defense;

(4) Without Mrs. Barganier's identification and Mr. Linch's potato starch testimony, no other purportedly corroborating evidence of his guilt is credible; and

(5) Having satisfied his pleading burden, Mr. Flores is contemporaneously seeking new DNA testing that could further support his innocence by pointing to the actual second perpetrator.

1. Newly available scientific evidence about the relative reliability of eyewitness identifications, applied to Mrs. Barganier's testimony, establishes that her failed initial identification attempt is *exculpatory*.

In light of the newly available scientific evidence about eyewitness identifications, no reasonable juror would have convicted Mr. Flores. As established in Claim I above, the State argued at trial and in the previous habeas proceeding that

Mrs. Barganier's in-court identification had nothing to do with the hypnosis session she had been put through soon after her observation on January 29, 1998; the State's position was that her epiphany thirteen months later was simply a function of seeing Mr. Flores in person in court. Moreover, the State's experts at trial (Dr. Mount and Officer Serna) vouched for the integrity of the process proceeding Mrs. Barganier's recall. But the new scientific understanding provided by Dr. Wixted, and outlined in Claim I above, establishes three important facts relevant to Mr. Flores's innocence.

First, it is now understood that the only reliable eyewitness identifications are those made with high confidence on the *first* test of memory.

Second, a failure to pick a suspect out of a lineup when first given the opportunity to do so is actually probative of that suspect's innocence.

Third, if the process whereby the witness was shown the lineup was not pristine and was biased to induce the witness to pick a given suspect, then the witness's failure to pick out that suspect is even more probative of his or her innocence.

The first known time when Mrs. Barganier was shown a recognizable photo of Mr. Flores was on February 4, 1998, at the Farmers Branch police station. She failed to identify him. Moreover, the process whereby she was invited to make an identification at that time was far from pristine. Evidence adduced for the first time

during a 2017 evidentiary hearing shows that the process was quite biased against Mr. Flores. For instance:

- the process was not double-blind but was instead conducted by someone (lead investigator Callaway) who knew that Flores was a suspect and had obtained and selected his photo to include in the six-person photo lineup;

- the process did not involve standard instructions stating that a suspect may or may not be present in the photo array;

- the photo of Flores that was included in the array was placed in the top center position, and his photo is the only one among the six photos not partially blocked by a white strip at the bottom of the image and the only one that features a distinctive background and bright clothing;

- the presentation of the photo array was made after Mrs. Barganier's memory had already been contaminated by: showing her other, unidentified photos; subjecting her to a highly suggestive hypnosis session in which she was asked whether the men had short "shaved" hair, contrary to her previous statements, but matching Flores's appearance; and using a computer program to make a composite sketch (which, notably, looked nothing like Flores):

See Factual Background, Section V.

All of these facts, viewed in light of newly available scientific evidence, are highly probative of Mr. Flores's innocence. *See* Claim I.

2. Newly available scientific evidence about the State's trace-evidence analysis is also exculpatory.

As demonstrated in Claim II above, Charles Linch's trace-evidence testimony about potato starch was critical to supporting the State's theory of the case. As also demonstrated above, Mr. Linch has recently disavowed his testing, his testimony, the way his testimony was procured, and the use to which it was put. His disavowal, buttressed by Ms. Arvizu's scientific perspective on the complete absence of basic quality controls when Mr. Linch did his rushed testing, eviscerates the evidentiary value of this testimony, previously been treated as inculpatory. Linch's testing, and the circumstances that prompted him to undertake it, now only add to the portrait of rampant prosecutorial misconduct in this case.

Mr. Linch's recent disavowal and previously unavailable documents shedding light on the chain of custody of the .44 magnum revolver support the inference that the starch particles that Linch scraped from the barrel of the firearm on March 24, 1999 were actually placed there after the chain of custody had been broken, likely at some point while the revolver was lying around the DA's Office. As Mr. Linch discusses, there is no scientific basis for believing that microscopic bits of potato could have survived in the gun's barrel if it had been fired, as the State argued it

was—let alone that such particles would still be present fourteen months thereafter, when that gun was brought from the DA's Office to SWIFS for Mr. Linch to do his mid-trial "testing." There is a good-faith basis to believe that, in fact, a person or persons in the DA's Office concocted the idea of putting potato inside the barrel to create a means to "prove" a link between the .44 magnum revolver and the crime scene, where potato fragments had been found. The only motivation that could have driven someone to go to such lengths would be a wholly improper one: an obsession with trying to falsely *diminish* Ric Childs' culpability while inculpating Charlie Flores.

If the jury had known the role played by state actors in fabricating the potato-starch evidence, the jury would likely have doubted everything the State had to say in this case about Mr. Flores's reputed guilt. That is, no juror would have been convinced of Mr. Flores's guilt beyond a reasonable doubt in this entirely circumstantial case devoid of any physical evidence linking Charlie Flores to the crime scene.

3. New evidence from Charlie himself, as well as other historical documents confirming his alibi, support his long-standing insistence on his innocence.

The evidence supporting Charlie Flores's 11.073 new-science claims alone is sufficient to make a *prima facie* case of Actual Innocence under *Ex parte Elizondo*, 947 S.W.2d 202. But he has also adduced evidence from "the horse's mouth," so to

speak, waiving his Fifth Amendment privilege and providing his own firsthand knowledge of the hours before Mrs. Black's murder and thereafter, up to the time of his apprehension. *See* Ex. 4. Moreover, Mr. Flores has adduced historical records that support his position that Myra Wait could have provided him with an alibi defense. Specifically, these records show that Myra did not testify only because she was systematically intimidated by law enforcement and the lead prosecutor and was then ignored by Charlie's own defense counsel after she informed them of facts that were plainly exculpatory. *See* Ex. 13; Ex. 36; Ex. 44.

Historical documents show that Myra stood by her description, which she shared with Charlie's lawyers, of the events of January 29, 1998, as well as her description of the circumstances that prevented her from testifying at Charlie's trial. *See* Ex. 13. These documents suggest that Myra would have been able to testify that, the night before Mrs. Black's murder, Myra, Charlie, and her daughters had had dinner together. Then some of his friends had come over. Because it was a school night, Myra and her girls went to bed. At that time, Charlie was still there at the trailer, hanging out with his friends. In the middle of the night, Myra was woken up by the sound of people arguing. These people proved to be Charlie, Ric, and a woman (Jackie) whom Myra had never seen before. After they were told to leave, Myra went back to bed. While she could not say what Charlie did right afterwards, he was there in bed with her at around 6:15 in the morning when her alarm went

off—and he was asleep. Myra got up to get her girls ready for school. Charlie got up soon afterwards and started making breakfast. He took one of her daughters to school and then came back. *See id.*

She would have further testified that, at some point that day, Ric came by and deposited his distinctive, multi-colored Volkswagen outside of their trailer (where he had previously left a motorcycle). A few days later, Charlie found out that Ric had been arrested as a murder suspect and that the police were looking for his Volkswagen. He then tried to get rid of the Volkswagen with help from Myra's younger brother Jonathan. *See id.*; *see also* Ex. 4.

A few days after that, Charlie got a call early in the morning from his father. His father had heard on KRLD radio that Charlie was wanted for capital murder. After he got off the phone, Myra, who had heard the same bulletin on the radio, asked him what was going on. He said he had some things to take care of but told her that he had not done this thing. He was upset that something Ric had done was being pinned on him. Later that same day, after Myra went by her mother's house at nearby Crystal Court, she was approached by investigators wanting to know about Charlie. She was taken into the Farmers Branch police station on the pretext that she had outstanding warrants. *See* Ex. 13.

At the police station, she was interrogated by Officer Callaway and others working on the Black murder case. They demanded information about where Charlie

was and other things that she knew nothing about. She was held overnight. In a statement that she wrote out and signed, dated February 7, 1998, she said that:

> approx. 7:25-7:30 heard report on radio that Charles was suspected of murder. I dropped my daughter off at school returned home and asked him what was going on. He was in the middle of a phone conversation so I told him I heard he was wanted and wanted to know what it was all about. He said, "I didn't do anything and I'll talk to you later. I have to take care of a few things and I'll be back." That was the last time I talked to him before being taken into custody.

See Ex. 13.

After she signed that first statement, the police let her go. But during the interrogation, they had threatened her—particularly with the prospect that she would lose custody of her kids if she failed to cooperate. Meanwhile, while Myra was in police custody, her mother (Connie Wait) had taken her kids, and Charlie had fled. *See id.*; *see also* Ex. 4.

Thereafter, Myra ended up moving in with Charlie's parents, who had no criminal history whatsoever. Undercover police were parked across the street from their house every day. They followed them whenever they went out, including to the grocery store and whenever Myra went to her mother's house to visit her children. Myra usually went over right before the girls were put to bed so she could at least say good night to them. She did not stay long because often the police would show up right after she got there and start interrogating her about Charlie's whereabouts. *See* Ex. 13; Ex. 4.

She was being followed everywhere. One day, she was pulled over and the officer searched her car and claimed to find part of a gun.[174] *See* Ex. 13.

After a couple of months, she learned that Charlie had decided to come back because he missed them too much. But on the way, he was pulled over in San Marcos for drunk driving and was thrown in jail. He had the ID of one of his brothers and was booked in under his brother's name. He then called his mother Lily. She decided to drive to San Marcos to post bond for him, and Myra agreed to go with her. *See id.*; *see also* Ex. 4.

When they got back to Irving, Charlie stayed at a friend's house. But the police who were watching Myra saw her go visit him. He was arrested on May 1, 1998, soon after leaving his friend Waylon's house. *See* Ex. 13; Ex. 4; Ex. 34.

Later that day, Myra was arrested too, while she was at her mother's place. *See* Ex. 13. When she got to the police station, it was clear that these were the same detectives who had arrested Charlie. They said they were coming after her, too, for "Hindering Apprehension" of a fugitive. They arrested Charlie's elderly parents as well. *See id.*; *see also* Ex. 69.

[174] Nothing of this nature was introduced into evidence at trial. The incident seems to be another example of how Myra was intimidated to push her towards falsely incriminating Charlie. A similar tactic was used with Homero Garcia, who had been caught in possession of the same caliber firearm as the murder weapon and, when interrogated months later, was encouraged to save himself by incriminating Charlie. *See* Factual Background, Section V above.

For the next three days, Myra recalled being questioned for an hour every two hours. Callaway was there, as well as an FBI agent. Early on, she gave them the key to a storage unit that she and Charlie had rented. *See* Ex. 13.

While in custody this time, three different "Voluntary Statements" were prepared by law enforcement that she purportedly signed. One has the date of May 6, 1998 on it. The statement is not in her handwriting, but she signed it. Two more so-called "Voluntary Statements," dated May 7, 1998, were written out by law enforcement. The signature on the second statement from that day does not match her signature, and she subsequently denied signing it or ever saying that Charlie had confessed to "shooting the dog." *See id.*

After Myra was held for several days in the Farmers Branch jail, she was transferred to the Dallas County facility. But she was eventually released because ADA January was unable to obtain an indictment. But then she was served with a subpoena from the DA's Office. During an interview there, she was subjected to more intimidation and threats involving losing custody of her children. *See id.*

Thereafter, she was threatened with the prospect of being arrested again for destroying evidence or for hindering Charlie's arrest. Myra claimed that ADA January threatened to bring charges against her after the trial was over if she did not testify for the State. Then he also promised that she would merely get probation if she testified, versus seven years in prison if she refused. *See id.*

Myra's reports of ADA January's coercive behavior, originally gathered years ago, are corroborated by recently uncovered evidence showing that ADA January employed similar tactics with several witnesses (including Judy Haney, Homero Garcia, and Waylon Dunaway). *See id.*; *see also* Ex. 37; Ex. 58; Ex. 34.

However, Myra's ability to provide an alibi defense was further undermined by Charlie's defense attorneys. Not long before Charlie's trial was supposed to begin, Myra received a call from his defense lawyer, Brad Lollar. Myra told Mr. Lollar that Charlie's parents had been arrested again the night before. According to Lollar's *own contemporaneous notes*, Myra then told him her account of what had happened the night before Mrs. Black's murder through the next morning, when she woke up around 6:15 a.m. and found Charlie asleep there beside her. *See* Ex. 36. Myra also told Charlie's counsel that she had never told the police that Charlie had said he was there or that he had shot the dog—as one of the so-called voluntary statements written by Callaway states. *See id.*; *see also* Ex. 13. The State, not the defense, subpoenaed Myra to appear at trial. She was there at the courthouse, waiting outside the entire time, along with Charlie's parents. After the third day, she asked Brad Lollar why the State had not called her as a witness. She was told that ADA January probably thought she would be a hostile witness. She then expected the defense to call her on the last day of trial. But they did not do so either, although she

had never told anyone that she did not want to testify, and she never said that she would plead the Fifth Amendment if called to the stand. *See* Ex. 13.

In his initial state habeas application, Charlie alleged that his trial counsel was ineffective for failing to put on his alibi defense through Myra. As explained at length above, Mr. Lollar's own notes show that, in interviewing Myra the week before the State began presenting its case, Myra confirmed what Charlie had been telling his counsel all along: that he had been sleeping in a trailer in Irving, Texas, beside Myra, at the time that two men were observed going into the Blacks' house through the garage in Farmers Branch, Texas. Ex. 36. Yet, several years after trial, his counsel alleged that, upon interviewing Myra, she had said that she could not provide an alibi defense. Ex. 25. This assertion was contradicted by counsel's own contemporaneous notes. Ex. 36.

Mr. Lollar (and only Mr. Lollar) also alleged in his response to Charlie's initial state habeas application that, at some point, Charlie had supposedly confessed to being present when Mrs. Black was shot. Ex. 25. This was also untrue. Mr. Flores adamantly denies that he ever told counsel (or anyone else) that he was present at the scene of the crime. *See* Ex. 4. Even on its face, the allegation seems to be a feeble attempt to excuse flagrantly incompetent (not merely ineffective) representation. Lollar admitted in his own affidavit that his proposed "strategy" was to allow the jury to believe that his client was present at the crime scene *in a law-of-parties case*,

suggesting that this could somehow be a means to *avoid* a death sentence in a case where he put on no penalty-phase evidence at all. Ex. 25. There can be no reasonable trial "strategy" that reflects a complete misapprehension of the governing law. *See* TEX. PENAL CODE §§ 7.01(a), 7.02(a), 7.02(b) (explaining basis for holding a person "criminally responsible as a party" for offense committed by another); TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(2) (special issue that merely requires juries to find that the defendant intended or anticipated loss of life to be eligible for the death penalty under a parties theory); *see also Tison v. Arizona*, 481 U.S. 137, 158 (1987) (permitting reliance on felony-murder rule to support application of the death penalty for a defendant who did not intend to cause the death, if he or she played a "major" role in the underlying crime and showed "reckless indifference" to human life). *See also* Claim IX below. Worse still, Lollar's affidavit does not acknowledge, let alone account for, his spontaneous decision to *urge* the jury to convict his client of "whatever they want"—with no discussion of the lesser-include offense (that, any case, made no sense in a law-of-parties case plainly involving a murder).

Trial counsel's untested and facially suspect affidavits, which were prepared for the State in 2001 to fight against ineffectiveness claims leveled against them, should not be treated as relevant, let alone dispositive, in adjudicating Mr. Flores' Actual Innocence Claim. To the extent that the State may seek to challenge Mr. Flores's allegations by recourse to the 2001 affidavits, it is important to recall that,

in the previous habeas proceeding, counsel for the State actively (and successfully) blocked Mr. Flores's attempts to call Lollar, Parks, January, Davis (and others) as witnesses. *See* 3 EHRR. As such, no court has ever allowed adversarial testing of, or even argument about, the 2001 affidavits. The trial court in the previous habeas proceeding refused to do so, in reliance on the State's insistence that no evidence outside the four-corners of the hypnosis session was relevant to assessing Mr. Flores's previous habeas claim. Because the CCA is "not equipped, let alone inclined, to hold evidentiary hearings," it is the trial court that has "the power and responsibility to ascertain the facts necessary for proper consideration of the issues involved." *Ex parte Reiner*, 734 S.W.2d 349, 358-359 (Tex. Crim. App. 1987) (Teague, J., dissenting) (discussed in *Ex parte Reed*, 271 S.W.3d 698, 754-755 (Tex. Crim. App. 2008) (Price, J., concurring)); *see also Manzi v. State*, 88 S.W.3d 240, 244 (Tex. Crim. App. 2002). Considering this principle, and the fact that these affidavits have never been subjected to adversarial testing, this Court should consider the 2001 affidavits only as proffers demonstrating that serious issues of material fact have not been resolved.

Rather, in *this* proceeding, what matters at this juncture is the evidence pled to this Court. "[T]he statutory scheme does not even contemplate that the State should respond to a subsequent writ, at least until this Court has authorized the applicant to go forward." *Ex parte Blue*, 230 S.W.3d 151, 163 n.49 (Tex. Crim. App.

2007); *see also Ex parte Henderson*, 246 S.W.3d 690, 694 n.6 (Tex. Crim. App. 2007) ("*Henderson I*") ("on the remand the State [may] challenge the applicant's claims with respect to validity and/or weight of the advances in biomechanical science . . . We are not called upon to address the merits of the applicant's claims at this juncture[.]").[175] As a former, esteemed member of this Court has explained, relying solely on conflicting affidavits is not a sound means to resolve material factual disputes. *See Manzi*, 88 S.W.3d at 255 (Cochran, J. concurring) ("trial judges who are confronted with contradictory affidavits, each reciting a plausible version of the events, ought to convene an evidentiary hearing to see and hear the witnesses and then make a factual decision based on an evaluation of their credibility."). Certainly, one-sided, untested, self-serving, and facially suspect affidavits are not a legitimate basis for resolving material factual disputes. *See* Factual Background, Section VIII.C.

When Mr. Flores's Actual Innocence claim is remanded, he should be permitted at last to test the credibility of the 2001 affidavits (which obviously were

[175] Certainly, this Court has once observed that "when the facts in such an application are incomplete, misstated, or subject to misinterpretation, a response may be helpful to this Court in determining whether the subsequent application surmounts the section 5 bar." *Ex parte Campbell*, 226 S.W.3d 418, 422 n.13 (Tex. Crim. App. 2007). However, the *Campbell* court faced a unique situation not applicable here. There, the applicant "hid the ball in his writ application" about the very nature of the testing he was seeking; the State's response told "a story [the] applicant saw fit to omit." *Id.* at 423. Specifically, the State pointed out that the applicant, who advanced claims based on new reports about a DNA lab's unreliability, omitted that he had had previously obtained post-conviction DNA testing which was both reliable and very incriminating. *See id.* at 423-424.

not before the jury). Then, the credibility of the 2001 affidavits should be evaluated within the process of revisiting the full evidentiary picture that was before the jury, assessing all new evidence that exposes the unreliability of the record evidence that was before the jury, and accounting for the new evidence that is probative of innocence.

Likewise, any dispute as to whether Mr. Flores's alibi evidence was previously available to present through the exercise of reasonable diligence involves a factual inquiry that must be resolved by a trial court on remand. *See Ex parte Campbell*, 226 S.W.3d, at 422 (to warrant a remand, applicant must have "*facially* surmounted the 'unavailability' hurdle" (emphasis added)). Indeed, even the dissenting judges in *Henderson I* assumed, in making the threshold determination, that the biomechanical evidence regarding causes of infant head trauma was previously unavailable. 246 S.W.3d at 696 (Keasler, J., dissenting); *id*. at 693 (Keller, P.J., joined by Hervey, J., dissenting). *See also Ex parte Kennedy*, No. WR-71,054-02, 2012 WL 86977 (Tex. Crim. App. Jan. 11, 2012) (unpub.) ("*Kennedy*") (instructing trial court to determine on remand whether the exculpatory third-party statement was previously available); *cf. Ex parte Overton*, No. 06-CR-3624-F, 214th Jud. Dist. Ct., Nueces, Co., May 31, 2012, at ¶ 2-3 (upon remand from this Court, resolving whether the new scientific evidence was in fact previously available).

In any event, the credibility of the 2001 affidavits has never been tested, and the mere existence of those highly problematic affidavits should not preclude this Court from finding that Mr. Flores has met his threshold burden and that he should be allowed to develop the evidence of his innocence. Indeed, in *Kennedy*, the fact that an applicant *pleaded guilty* did not prevent this Court from remanding the applicant's Actual Innocence claim for further proceedings. *Kennedy*, 2012 WL 86977, at *1 (remanding case for evidentiary hearing to determine credibility of affiant who swore a third party committed the murder to which Mr. Kennedy had pled guilty). *Kennedy* stands for an important proposition: a claim of Actual Innocence based on newly discovered evidence is cognizable even when pled by an applicant who has confessed his guilt on the record and in open court. *See* TEX. CODE CRIM. PROC. art. 26.13. *A fortiori*, Mr. Flores, who pled *not* guilty and has submitted his own sworn declaration in support of this claim, should be afforded the same opportunity. *See* Ex. 4.

4. Without Mrs. Barganier's identification and Mr. Linch's potato-starch testimony, no credible corroborating evidence supports the conviction.

Aside from the now discredited identification and potato-starch testimony, none of the other reputedly corroborating evidence presented at trial is credible. *See* Factual Background, Section VIII.

No rational juror would have credited Jackie Roberts' testimony that Charlie was with Ric when she was dropped off at her home in Farmers Branch around 7:15 a.m. on January 29, 1999. As discussed in Part IV of the Factual Background, Jackie herself was caught in multiple lies on the stand. Moreover, she was an accomplice to the crime, who worked closely with ADA January to hide her culpability and sculpt her testimony to suit January's purposes, in exchange for exceptional leniency (facts that were intentionally kept from the defense, and thus from the jury). Additionally, Jackie's key testimony—claiming that both Ric *and Charlie* had dropped her off in Farmers Branch soon before Mrs. Black was murdered about a mile away—was contradicted by her ex-husband Doug Roberts, who testified he had not seen a second person getting into Ric's Volkswagen when he saw Jackie returning home and Ric driving off. Jackie's testimony on this front was also contradicted by Vanessa Stovall's (similarly incredible) testimony that Ric and Charlie had been with *Vanessa* at the same time (from about 6:30 until 7:15 that same morning) in a different part of the Dallas metroplex. Most critically, both Jackie's and Vanessa's testimony on this key issue in the State's case was contradicted by Mrs. Barganier, the only apparently uninterested and uninvolved witness to testify about the timeline of Ric and Ric's accomplice's movements on the morning of the murder. Mrs. Barganier claimed to be certain that she had seen two men getting out of Ric's Volkswagen in Mrs. Black's driveway at 6:45 a.m.—a

time about which Mrs. Barganier was adamant because she kept to "real strict schedule." 36 RR 279-282. As such, Jackie and Vanessa's testimony on this critical question—of whether individuals who knew Charlie by sight had seen him with Ric shortly before the murder—was so contradictory as to be incredible to any rational juror.

Similarly, without the testimony of Mrs. Barganier and Mr. Linch, no rational juror would have found probative value in the reputed "confession" testimony from Homero Garcia and Jonathan Wait Sr. As described in Sections IV & VIII of the Factual Background, these two admitted drug addicts, one of whom was facing serious criminal liability for his own pending felony charges, and one of whom was a habitual snitch who had been trying to obtain FBI reward money for helping apprehend Charlie, were not credible. But the full circumstances whereby they had each, long after the fact, claimed that Charlie had "confessed" to them were not disclosed to the defense (and thus to the jury) at trial. It has taken years to unearth the undisclosed promises and manipulations undertaken by former members of the Dallas County DA's Office to engineer support for Mr. Flores's conviction. But if these practices had been before the jury, the jury would likely have doubted everything the State had to say in this case about Mr. Flores's reputed guilt. That is, no juror would have been convinced that Charlie Flores was involved in Mrs. Black's murder.

Further, the extraneous-offense evidence that the State has long held up as indicative of Charlie's guilt has to be viewed through an entirely different lens in light of the exculpatory evidence presented here. The evidence of Charlie's misconduct after learning that he was considered a suspect is best interpreted, not as indicative of guilt, but as the product of panic by someone, who rationally believed that he, a Hispanic male from a humble background who was indeed selling drugs, was being framed for a horrible crime he had not committed.

In short, after considering all of the long-suppressed facts and the new exculpatory evidence, the Court should find that Mr. Flores "can prove by clear and convincing evidence . . . that a jury would acquit him based on his newly discovered evidence[.]" *Ex parte Elizondo*, 947 S.W.2d at 209; *see also House v. Bell*, 547 U.S. 518, 537–538 (2006) (federal habeas courts evaluating gateway actual-innocence claims "must consider 'all the evidence,' old and new, incriminating and exculpatory") (quoting *Schlup v. Delo*, 513 U.S. 298, 328 (1995)). This Court has expressly held that Texas habeas courts must do the same—consider *all* of the evidence, including evidence "offered in . . . prior [habeas] applications." *Ex parte Reed*, 271 S.W.3d at 733–734 (citing *House*, 547 U.S., at 537–38).

C. *Claim* III more than satisfies the pleading burden associated with Actual Innocence claims.

Reviewing this Court's threshold assessments of other applications alleging Actual Innocence, it is clear that Charlie Flores has alleged sufficient facts. This

Court's remand and grant of relief in *Ex parte Graf*, for example, constitutes a useful basis of comparison. Mr. Graf was convicted of capital murder for the arson death of his two adopted sons, who died in a storage shed behind his house. The late-1980s fire science used against him at trial indicated that the shed was deliberately set ablaze. In 2012, he alleged, however, "that applications of scientific principles to fire investigation have advanced since the time of [his] trial," and thus "critical aspects of expert testimony concerning the cause of the fire in this case have since been disproven." *Ex parte Graf*, No. AP-77,003, 2013 WL 1232197, *1 (Tex. Crim. App. March 27, 2013) (unpub.) ("*Graf II*"). This Court found that such allegations made a *prima facie* case of innocence. *See Ex parte Graf*, No. WR-78-423-01, 2012 WL 5453930, *1 (Tex. Crim. App. Nov. 7, 2012) (not designated for publication).[176]

Mr. Graf satisfied his pleading burden in spite of the significant evidence suggesting his guilt. *See Graf v. State*, 807 S.W.2d 762 (Tex. App.—Waco 1990). That other evidence included the following: the bodies of his adopted sons were found lying face up and relaxed, with no burns inside their lungs or on their buttocks, indicating they were lying down while the fire raged and did not try to protect themselves, suggesting that they may have been sedated or killed before the shed caught fire; a gas can was observed in Mr. Graf's backyard patio; Mr. Graf had

[176] After the remand, this Court concluded that Mr. Graf did not prove Actual Innocence but granted relief on his claim of inadvertent presentation of false testimony based on the changed fire science. *Graf II*, 2013 WL 1232197, at *1.

marital problems, and shortly before the fire, his wife, concerned about his harsh treatment of her boys, said she would take them and leave; after the fire, Mr. Graf told his wife that "we have lost both boys" before he was told that two bodies had been found; even though witnesses described his treatment of the adopted boys as cold and unloving, Mr. Graf purchased life insurance policies on both boys about a month before the fire; shortly before the fire, Mr. Graf moved memorabilia of the two boys, including pictures, school papers, and other keepsakes into the shed, which were destroyed during the fire; and Mr. Graf had not moved any of *his* personal keepsakes into the shed. *Id*. at 764-767. No similarly incriminating evidence links Charlie Flores to Mrs. Black's murder.

The evidence adduced here of Actual Innocence, not just of a wrongful conviction, includes:

(1) new scientific evidence establishing that Mrs. Barganier's identification was not simply unreliable, but that her initial failure to pick Charlie Flores out of a photo lineup presented to her a few days after her observation *is probative of Flores's innocence*;

(2) new scientific evidence showing that the State's potato-starch evidence from Mr. Linch was not just unreliable but fabricated;

(3) new evidence in the form of a sworn statement from Charlie Flores shedding light on what he did, and did not do, the day of Mrs. Black's murder and thereafter;

(4) historical documents that support Flores' long-standing insistence on his innocence and the availability of an alibi defense.

Aside from the facially credible testimony of Mrs. Barganier and Mr. Linch, the only evidence inculpating Mr. Flores was incredible on its face and self-contradicting.

Moreover, new evidence suggests a coordinated effort to railroad Mr. Flores for a crime committed by Ric Childs, Jackie Roberts, and a second white male with long hair. No meaningful attempt to investigate a second white male with long hair seems to have been conducted, despite the fact that neighbors who were canvassed the morning of the murder who had seen the perpetrators (including Mrs. Barganier) described the perpetrators as two white males, both with long hair. In the incomplete and heavily redacted police file that was finally produced in March 2016, one finds a number of mugshots depicting white males with long hair, in addition to photos of Ric Childs, who was indisputably involved. Most of these photos of other white males with long hair are not identified. Some of these individuals are included in photo arrays that do not include either Ric Childs or Charlie that presumably (1) were shown to witnesses during the early stages of the Black murder investigation, and (2) therefore must contain at least one heretofore unidentified person whom the police considered to be a suspect. Here are some of these images:

AppX57.

The reproductions found in the police file are poor, and explanations of the photos are non-existent. But the presence of these photos in the file suggests that, at least early on in the Black murder investigation, *someone* in the Farmers Branch Police Department listened to what the witnesses were saying and had some thoughts about who Ric's real co-conspirator might have been. But soon thereafter, a directive

came from someone to shift the focus to Charlie Flores instead. This directive arose, not from an organic investigation of the *facts*, but rather, it seems, after SID investigators had a conversation with Ric Childs' brother, Roy, who did not know Charlie and had no known personal knowledge of events leading up to Mrs. Black's murder. SXR100. No documentation has ever been disclosed explaining how the Farmers Branch SID investigators knew Ric and his brother Roy or how Roy knew the name "Charlie Flores" or why ISD investigators went to "Roy" in Irving soon after Mrs. Blacks' murder in Farmers Branch.

As is discussed at length in the Factual Background above, there are many reasons to suspect the integrity of this shift in investigatory focus, including the following:

- the failure to disclose how investigators first obtained Charlie Flores's name, which was only revealed by *another* police department's records of their interactions with FBPD investigators;

- the calculated decision by one of the lead investigators to lie to the trial court, while under oath, about when Charlie's name and description were known to police;

- the excessive redaction of information from the belatedly produced police file;

- the absence of key documents referenced in other parts of the police file (*e.g.*, Jill Barganier's initial witness affidavit); and

- the notable discrepancies between handwritten notes of interviews and typed descriptions of those same interviews, as well as the decision to only produce the latter at trial and for years thereafter.

The great lengths to which the prosecutors and some members of law enforcement went to conceal and distort evidence that was favorable to the defense is difficult to fathom if state actors really had confidence that they were pursuing the right man.

Yet another abandoned lead, striking in the context of the other malfeasance, only stands out now because of the role that improved DNA testing methodologies have played in exposing so many wrongful convictions. *See* The Innocence Project, *DNA's Revolutionary Role in Freeing the Innocent*, *available at* https://innocenceproject.org/dna-revolutionary-role-freedom/ (last accessed Jan. 16, 2021). This clue, just hinted at in the trial record, is yet more evidence that investigatory decisions in this case were based on a desire to pursue, at the expense of the truth, only those angles that might help the State convict Charlie Flores. The clue in question is fleeting testimony in the trial record about a ***wad of green gum***.

Apparently, a wad of green gum was found at the crime scene near the slain bodies of Elizabeth Black and her dog, the morning of the murder. This fact came out at the 1999 trial, during the cross-examination of Investigator James Stephens of the Farmers Branch Police Department (FBPD). Seemingly, the defense was moved to ask about this gum because of a photo that Stephens had taken at the crime scene that had just been introduced into evidence:

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

A. (Stephens). Yes, sir.

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

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

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

A. Yes, sir.

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

A. Yes, sir.

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

A. It wasn't huge. It was –

Q. Noticeable?

A. Noticeable.

Q. It was green?

A. Yes, sir.

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

A. Yes, sir.

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

A. Yes, sir.

35 RR 272-73. Defense counsel did not ask anything further on this topic. On redirect, however, the following was established:

> Q (ADA Davis). The gum that was found there by the television in the living room, that was submitted for DNA analysis?
>
> A (Stephens). Yes, sir.
>
> Q. Are you aware the DNA test have shown that Charles Don Flores and Richard Childs [the two suspects] have been excluded as sources for that gum? Are you aware of that?
>
> A. Yes, sir.

35 RR 274. Mr. Flores has now obtained a copy of the DNA testing that was purportedly done on the gum. This recently produced record is dated **March 25, 1999**:

GeneScreen *2600 Stemmons Fwy. Suite 133 Dallas, Texas 75207 214 631-8152 800 DNA-TEST FAX 214 634-3322*

LABORATORY REPORT - FORENSIC IDENTITY

CASE DATA:

Referring Agency:	Dallas Co. District Attorney
Agency Reference #:	76915-01
Case Victim's Name:	Elizabeth Black
Case Suspect's Name:	Richard Childs, Charles Flores
GeneScreen Case #:	FOR2074C
Report Date:	March 25, 1999

Ex. 78. Yet the trial testimony quoted above occurred on **March 23, 1999**—two days *before* this report was generated. As such, the report could not have been produced to the defense before former ADA Davis made representations about the DNA testing during trial. *See also* SX R1, R100, R101 (trial exhibits containing what ADA

January told the court constituted all discovery the State had produced to the defense during trial, none of which includes the GeneScreen report). Nor has any record ever been produced to suggest how ADA Davis knew about these test results before the report was generated. In any event, that report shows that the wad of chewed gum was picked up during voir dire, tested, and then reportedly compared to samples of: (1) blood drawn from Ric Childs; (2) blood drawn from Charlie Flores; and (3) swabs taken from five children who, presumably, may have been in the Blacks' house at some point before Mrs. Black was shot. *See* Ex. 78. While it is reasonable to associate a wad of gum with children, what does not make sense is an assumption that one of these children would have deposited that gum on top of blood-soaked carpeting so recently that it was still visibly "green" the day of the murder.

But that wad of gum, after all of these years, could well point to Ric Child's actual co-conspirator: the other white male with long hair who had been seen entering the Blacks' house with Ric Childs on January 29, 1999. That white male, startled by Mrs. Black, could have spat out the gum that was found later that same morning.

Mr. Flores has not yet seen any record indicating who submitted the wad of gum to GeneScreen, who requested the comparisons that were made, and why the decision to seek this testing was not pursued until voir dire was already underway.

Nor has it yet been ascertained whether this piece of evidence has been retained.[177] But if this potentially exculpatory evidence can be found, and in light of progress that has been made in DNA testing methods since 1999, Mr. Flores will be pursuing a motion under Chapter 64 of the Texas Code of Criminal Procedure to have the gum retested. This plan is noted here because the prospect of matching the genetic profile of biological material left on that wad of gum with an individual (such as one of the white males whom someone in the Farmers Branch police department initially viewed as a potential suspect) could add to the substantial evidence of Mr. Flores' innocence already amassed in this Claim.

D. Conclusion

Mr. Flores has consistently maintained that he is innocent of Mrs. Black's murder and that he was not present at the Blacks' house when she was shot. The jury that convicted him in 1999 did not, however, hear from Charlie or his alibi witness (Myra) because of his lawyers' inexplicable actions and the trial prosecutors' misconduct. What the jury did hear, although fraught with contradictions, left them with no choice but to find Charlie guilty, especially after Charlie's own lawyer *conceded in Closing Argument* (without his client's permission) that Charlie had

[177] A recently produced SWIFS record, identifying the gum as "Item 22," reveals that the gum is not in SWIFS' "archived evidence storage areas." The SWIFS record further clarifies that Item 22 had been "released to" FBPD at some point. There is no further explanation in the SWIFS records as to when the item was released or why. *See* Ex. 79. State's counsel is, at time of filing, investigating the status of this evidence.

been present at the crime scene and then urged the jury to go ahead and find his client guilty of murder. 39 RR 86. But new evidence, scientific and otherwise, shows that the State engaged in extraordinary contortions to craft a case against Charlie Flores while trying to mask the clear culpability of co-conspirators Ric Childs, Jackie Roberts, and a second, still-unknown white male. Fundamental fairness, the cause of justice, and the governing law require that Charlie Flores be given an opportunity to present the exculpatory evidence, old and new, to the habeas court and then to a jury.

Because Mr. Flores has made a threshold showing of Actual Innocence, this Court should first remand Claim III to the district court for further factual development.

IV. LONG-SUPPRESSED EVIDENCE, IN VIOLATION OF *BRADY V. MARYLAND*, REVEALS A PATTERN OF RAMPANT MISCONDUCT BY THOSE INVESTIGATING AND PROSECUTING THE CASE AGAINST CHARLIE FLORES THAT WAS MATERIAL TO HIS CONVICTION.

Mr. Flores's constitutional rights to a fair trial and to due process were violated by rampant misconduct during both the investigation of the crime and his trial for capital murder. *See generally Brady v. Maryland*, 373 U.S. 83 (1963). This misconduct, outlined at length in the Factual Background above, was used to obtain a conviction based on flimsy, self-contradictory, and utterly confusing circumstantial evidence. Suppressed evidence, which was favorable to the defense because it inculpated others and/or provided significant bases for impeaching witnesses for the State, would have completely changed the State's case. The evidentiary profile presented at trial depended significantly on Charlie Flores's conduct *after* he learned that he was wanted for this crime. But that misguided conduct would have looked very different if viewed in light of the suppressed evidence showing that Flores was correct in believing that he was being railroaded by people abusing positions of power to protect those who were actually guilty.

The evidence adduced of prosecutorial misconduct must be assessed cumulatively. The cumulative misconduct shows that the guilt-phase trial was fundamentally unfair and Mr. Flores was prejudiced as a result.

A. The Legal Standard

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution is required to turn over evidence to the defense because its interest "is not that it shall win a case, but that justice shall be done." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). *Brady* was a death-penalty case in which the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "There are three components of a true *Brady* violation: (1) the evidence at issue, whether exculpatory or impeaching, must be favorable to the accused; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Canales v. Stephen*s, 765 F.3d 551, 574 (5th Cir. 2014) (quoting *Strickler*, 527 U.S. at 281–82).

1. The meaning of "favorable" evidence

Evidence "favorable" to the defense is not limited simply to exculpatory evidence. Impeachment evidence is also *Brady* material. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence that enables the defense to "attack[] the reliability of the investigation" is also *Brady* material. *Kyles v. Whitley*, 514 U.S. 419, 446 (1995). These principles were settled law well before Mr. Flores was tried in 1999.

2. The scope and nature of the underlying duty owed by prosecutors

Robert Jackson, who was Attorney General of the United States before his appointment to the nation's Supreme Court, aptly captured the unique power wielded by those charged with the privilege of representing the government in criminal proceedings:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed.

Robert H. Jackson, *The Federal Prosecutor* (April 1, 1940).[178] A corollary of this tremendous power is a duty to disclose favorable evidence even if those representing the State are not asked for it. *United States v. Agurs*, 427 U.S. 97, 110-11 (1976) (holding that there is a duty to disclose exculpatory information even if defense does not make specific request). Moreover, individual prosecutors have a duty, not just to disclose favorable evidence they have adduced, but also to learn of favorable evidence known to police and others acting on the government's behalf. *See Kyles*, 514 U.S. at 437. These disclosure duties—which are ongoing—exist because the Constitution does not countenance prosecutors placing the pursuit of victory over

[178] This address, given at the second annual Conference of United States Attorneys, is available at https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf (last accessed Jan. 18, 2021).

the interests of justice and fair play. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("it is as much his [or her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."). *See also Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) (noting that in criminal trials "we have held the prosecution to uniquely high standards of conduct"); *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.")

A *Brady* claim may be proven even when the disclosure failures were inadvertent. *Strickler*, 527 U.S. at 281–82. *A fortiori*, when a habeas applicant can establish, as Charlie Flores can, that the State intentionally withheld evidence that would have exculpated him or permitted eviscerating impeachment or, worse, when an applicant can prove, as Charlie Flores can, that the State manipulated evidence to make the defendant seem culpable, to make others seems less culpable, and to justify pursuit of the harshest punishment against him, the Constitution is offended. Such illicit actions "cast[] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice[.]" *Brady*, 373 U.S. at 88.

3. The prejudice/materiality element

In the capital case of *Kyles v. Whitley*, the Supreme Court explained that the materiality element is satisfied when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 434-35. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* The verdict that might not be "worthy of confidence" can be either the guilt- or punishment-phase verdict. *Id.*

In evaluating whether the evidence in question was material, the evidence is "considered collectively, not item by item." *Id.* at 436. In undertaking a materiality analysis, courts must look at the strength of the case taken to trial and then see if the suppressed evidence would have allowed the defense to undermine confidence in the State's key witnesses. *See Banks v. Dretke*, 540 U.S. 668, 698 (2004).

B. Application of Law to Facts

Mr. Flores's constitutional rights were violated, and relief is warranted under *Brady* and its progeny, because the State suppressed evidence favorable to the defense, including both exculpatory and impeachment evidence, and that suppression was material to obtaining a guilty verdict.

The tale of what happened at trial and what was not known to the defense is a complicated and sordid one, which has emerged despite significant barriers to

disclosure. Explaining the factual record necessarily involves recourse to various complex sub-plots and implicates an array of individuals who were facing significant criminal liability when the State manipulated them into providing testimony against Charlie Flores. But the few factual allegations that reputedly support the case against Charlie Flores are ultimately quite scant.

The State's case against Charlie Flores rested on the following: (a) a single witness, Jackie Roberts, who was an accomplice to the crime,[179] testified that Flores was with her and Ric Childs right before the latter drove to the Blacks' house in a distinctive Volkswagen that was observed by several neighbors; (b) a single witness, Jill Barganier, testified that Flores was the person she had seen getting out of the passenger side of the Volkswagen in the Blacks' driveway—but this identification was made for the first time thirteen months after-the-fact, upon seeing Flores in court; (c) two highly compromised and incentivized witnesses, Homero Garcia and Jonathan Wait Sr., testified that Flores had "confessed" to them that he had been present but had only shot the Blacks' dog; and (d) the State's trace-evidence expert, Charles Linch, testified that he had found potato starch in the barrel of a .44 magnum revolver, which the State argued supported its hypothesis that Ric had actually shot

[179] Jackie was arrested pursuant to a warrant for conspiracy to commit capital murder, but the State did not pursue an indictment; instead, it featured her as its star witness in the Flores trial. Ex. 15.

the dog, and thus Charlie must have shot Mrs. Black with a smaller .380 caliber gun that was never found.

Each of these flimsy pillars supporting the State's guilt-phase case could have been toppled using the suppressed evidence.

1. An overwhelming volume of evidence was suppressed.

When voir dire began in the Flores trial, no discovery had been produced to the defense. A few weeks later, a small amount of materials were disclosed. *See* SXR1. After a motion to compel further discovery was filed, a hearing was held during which the lead prosecutor, ADA January, promised to disclose a number of categories of material—if they existed; but then he did not do so. In retrospect, it is clear that he lied to the court during that hearing about what the State already possessed but would not disclose until after trial was already underway. For instance, ADA January represented to the court that he did not yet have any evidence of "confessions," when, by that date, the State had a statement (prepared by law enforcement and signed by Homero Garcia) that the State relied on heavily at trial as proof that Charlie had "confessed" to Homero; that statement had been obtained on May 18, 1998 while Homero was in FBI custody—but ADA January denied having anything of this nature on January 19, 1999, which was eight months *after* the State had acquired it from the FBI. 3 RR 4 (ADA January stating that he knew of no confessions "at this point"); *see also* AppX57 (containing document showing

Homero's statement was delivered to the lead detective the same day it was obtained).

Moreover, just before the jury returned its *punishment-phase verdict*, the State produced materials that ADA January characterized on the record as being everything that had been produced to the defense during trial. *See* SXR100, SXR101. Those materials include only a small fraction of the materials that the Farmers Branch PD (FBPD) had gathered while investigating Betty Black's murder, a much larger subset of which was not disclosed until nearly two decades later. This kind of stonewalling until mid-trial was itself unconstitutional. *See, e.g., United States v. Bundy*, 968 F.3d 1019, 1031 (9th Cir. 2020) (affirming dismissal of an indictment with prejudice against Clive Bundy and his sons because the government had "withheld key evidence favorable to the defense until after trial was underway—in clear violation of its duties under *Brady*" and noting that it is "beyond dispute that under *Brady* a defendant is entitled to evidence 'both favorable to the accused' and 'material either to guilt or to punishment.'") (quoting *Bagley*, 473 U.S. at 674).

The full contents of the original FBPD file will likely never be known. In 2016, a facially incomplete, "permanently" (and heavily) redacted set of materials was produced, which was made part of the evidentiary record in 2017. *See* AppX57.

Other evidence favorable to the defense was suppressed until the Southwestern Institute of Forensic Sciences (SWIFS) produced additional materials

in 2017. Moreover, a great deal of the suppressed evidence listed below could only be ascertained by identifying references in a vast array of police, criminal history, and court records that expose the existence of yet more materials that have never been produced. These records include evidence of the complex steps taken by the prosecution to give those who cooperated with the State notably lenient treatment in resolving their own criminal liabilities.

The State's case at trial was presented largely through highly incentivized and unreliable witnesses and resulted in shifting and inconsistent stories. But the jury was privy to only a glimpse of the underlying misconduct in the investigation. For instance, the jury learned, only through a defense witness, that, days after the murder, Jackie and Ric had been permitted to confer privately for hours, after both knew they were suspects, *while undercover officers stood by and watched them tamper with evidence*. 38 RR 193-94. However, as discussed below, the jury did not hear that neither Jackie nor Ric had said anything about Charlie Flores being involved in the murder—to anyone in their respective circles—until *after* they were taken into police custody and informed *by law enforcement* that Flores was the person whom law enforcement wanted Jackie and Ric to implicate. Jackie and Ric were both given the impression that they would be rewarded for doing so—and they were in fact both rewarded with extraordinary leniency. The State did not, however, disclose the maneuvers its actors took to both shield and control Jackie; nor did the State disclose

any of the details of the extraordinary plea deal that was given to Ric, although the plan to offer him this deal was already in motion before the Flores trial began and did not require him to testify.

The suppressed evidence suggests a dark story of a thoroughly corrupt investigation, a calculated coverup, and dishonest trial tactics designed to capitalize on Flores's marginalized status. Flores was an unconnected, Hispanic, high-school drop-out, then selling small quantities of drugs to his circle of friends. Ex. 4. A few months before Betty Black's death, Ric Childs, an intravenous drug-user, suddenly resurfaced in Charlie's life. *Id.* Unbeknownst to Charlie, Ric was not just a drug addict but also the son of a local police officer. Ex. 14. That son of a police officer then volunteered, out of the blue, to set up a drug deal between Charlie Flores and Ric's newest girlfriend, Jackie Roberts, with whom Ric was conspiring to steal drug money (belonging to Jackie's incarcerated husband, which she felt was rightfully hers). When the calamitous plan to steal the drug money, enacted while Ric was out on bond for serious drug offenses, resulted in the death of Ric's girlfriend's mother-in-law, Charlie became a convenient scapegoat. Moreover, Charlie's own crazed panic, which was perhaps a predictable reaction to the evidence that he was being set up for a murder he did not commit, was exploited to demonize him. But the Constitution requires that convictions arise from the crime ***as charged***, not from law enforcement's view that a particular person is a "bad cat" who can easily be

implicated so as to insulate the more privileged/preferred people who actually perpetrated the crime. SXR101.

To date, as much information about this sordid scheme has been gathered as is possible without court assistance. The Factual Background, above, contains a fairly comprehensive overview known aspects of the corrupt investigation and the suppression of material facts at trial. That briefing and the evidentiary proffers to which it cites are incorporated here by reference. Some of the specific suppressed evidence is surveyed below.

2. The State suppressed evidence relevant to attacking virtually every aspect of its case.

a. The State suppressed evidence that would have undermined Jackie Roberts' key testimony supporting the inference that Charlie Flores was with Ric Childs right before the murder.

Jackie Roberts' testimony, in conjunction with Jill Barganier's identification, created a reasonable inference that Charlie Flores was the second male who had been seen getting out of Ric Childs' Volkswagen and entering the Blacks' house through the garage the morning of the murder.[180] Significant information was, however,

[180] In truth, this inference is "reasonable" only if one ignores Vanessa Stovall's testimony entirely and concludes that either Jackie was wrong about the time when she was dropped off (7:00-7:15 a.m.) or Jill Barganier was wrong about the time when she thereafter saw the two men (at 6:45 a.m.). But if Ric had dropped Jackie off shortly before 7:00 a.m. and then went with another male directly to the Blacks' house, they could have arrived there by 7:00ish, about 15 minutes after what Mrs. Barganier remembered, since Jackie lived only a mile away from the Blacks in Farmers Branch. There is no scenario whereby Ric could also have driven to his

suppressed about (1) Ric's actions, (2) Jackie's complicity, and (3) Jackie's relationship with ADA January that would have been relevant to any rational calculus of her credibility.

i. Some of the suppressed information about Ric's actions

The State described Ric and Charlie as "the best of running buddies" at trial. 39 RR 46. There was no proof of such a relationship, however. Yet suppressed evidence would have provided insights into Ric's actions and relationships in the weeks, days, and even hours leading up to the murder. For instance, the State suppressed records showing that, soon before the murder, Irving police responded to a call about a threatening note Ric had left on a woman's car, seemingly after vandalizing it; the incomplete record shows that police knew who Ric was, knew where he was then living, and spoke with some other males with whom he was then living on an intermittent basis. This record refers to "history" Ric had with the Irving PD that was "attached"—yet that information was *not* in fact attached and has never been produced. AppX57.

Additionally, evidence was suppressed to hide Ric's history with Jackie's circle. Ric had some undisclosed history with Doug Roberts and used that relationship to gain entrée into Jason Clark's house. Ex. 12. The State suppressed

grandmother's house in North Dallas to wake up and do drugs with Vanessa *after* dropping Jackie off in Farmers Branch and *before* pulling into the Blacks' driveway next door to Jill Barganier.

evidence that Ric suddenly showed up at Jason Clark's house, through Doug Roberts, and began giving away free drugs. *Id.*

The State suppressed evidence that Ric had gotten the idea of using potatoes as "silencers" from watching a "cop show" at Jason Clark's house around the same time Ric started sleeping and dealing drugs with Clark's neighbor, Jackie Roberts. *Id.*

The State suppressed evidence that Ric was, at the time of his arrest, "in business" with Jason Clark—whose checkbook was found on Ric when he was arrested. According to a suppressed disclosure by Jackie, this "business" involved breaking into cars and stealing stereos but, perhaps, had more to do with acting on long-standing rumors that, before going to prison, Gary Black had hidden a significant amount of proceeds from drug sales in various cars, as well as in his parents' house. AppX57.

Similarly, the State suppressed evidence that Farmers Branch investigators were aware that Ric had obtained keys to a Camaro Z28 a few days before Mrs. Black's murder and that he had tried to steal this car a few hours before he shot Mrs. Black. Investigators knew this because they seemed to have been monitoring Ric's movements both before and after the shooting—although these facts too have been suppressed. SXR101. Therefore, the State knew that a key sequence of events that

the State developed through Jackie at trial was not true. But nothing about Ric's special relationships with both the Irving and Famers Branch PD was disclosed.

The State also suppressed handwritten notes of an interview conducted early on with Alan Weaver, Jackie and Doug's friend. Weaver was at the Emeline house when Jackie returned after being out all night. The notes record Weaver explaining that he had heard two doors slam (of Jackie's El Camino) and then a single door slam (of Ric's Volkswagen)—and had then seen Ric drive off. This report supports the inference that, when Doug said that he had only seen *Ric* drop Jackie off and had only seen *Ric* leave in his Volkswagen, that was because only *Ric* had gotten out of the El Camino with Jackie. Ex. 48. That is, suppressed evidence shows that Doug did not see Charlie with Ric at this critical point in time because ***Charlie was not there***.

The State also suppressed evidence that a vehicle belonging to Gary Black was found vandalized the same day Ric Childs was taken into custody, which suggests the existence of some other co-conspirator in the quest to find Gary Black's concealed drug money. AppX57. But no further information about the fruits of any investigation of this incident has ever been disclosed.

It is also now clear that the State also suppressed the identities of multiple white males who were initially seen as suspects, who may well have been Ric's actual "running buddy" and accomplice in the home invasion and murder. As

described in Claim III above, the FBPD file includes numerous photographs of white males with long hair, at least some of whom must have been viewed as suspects because their photographs were included in six-person photo lineups.[181] Here are some of the photos:

[181] These photo lineups are distinct from the two different six-person photo lineups that included photos of Ric Childs, which were shown to Mrs. Barganier.

AppX57. As white males with long, dirty hair, these individuals matched the descriptions that neighbors, including Jill Barganier, had provided of the perpetrators the morning of the murder. This information—that there were suspects that matched the neighbors' initial descriptions—was also suppressed. The State suppressed (and continues to suppress) the identities of most of these individuals and other information as to which of these individuals were suspected of being Ric's accomplice and why.

ii. Some of the suppressed information about Jackie's complicity

The State also suppressed (and actively argued against) evidence suggesting that Jackie was one of Ric's co-conspirators who had planned and enabled the attempted burglary of the Blacks' house.

At the outset, Jackie was an obvious suspect. The law-enforcement affidavit used to obtain her arrest noted that multiple people had described her as "irate" that Gary's hidden drug money was being kept from her. Ex. 15. The suppressed evidence also included Jackie's own admissions that Ric had told her he shot Mrs. Black and that she had believed that Gary's money was hidden in the bathroom walls (the precise area that was vandalized during the burglary). *See* Ex. 9. Relatedly, the State suppressed investigative notes showing that several people close to the Black family immediately suspected that Jackie had been involved in the crime. *See, e.g.*, AppX10 (investigator's note that Bob Barganier, next-door neighbor of the victim,

had called to report where Jackie might be hiding out);[182] AppX57 (investigator's note that, during an interview with Kimberley Cole, Doug Roberts' girlfriend, she had emphasized "Jackie talking alot [sic] about wanting to get the $ at the parents[']house. '100s of thousands.'").

Significantly, the State also suppressed evidence that the murder victim's son, Gary Black, suspected that his estranged wife Jackie and her ex-husband Doug Roberts were likely responsible for Gary's mother's murder. Records show that he was interviewed by the lead detective and the lead prosecutor (ADA January) the day after the murder. But what transpired during these interviews remains a mystery. AppX57.

There is also the issue of interviews that must have taken place and yielded *something*—but also expose the absence of any information inculpating Charlie Flores; but since no interview notes were produced, this critical vacuum was obscured. Between the time when Jackie returned home the morning of January 29, 1998, until the time when, after eluding arrest for several days, she was taken into police custody, Jackie interacted with multiple people. Aside from Ric himself, she had interactions, at the very least, with Doug Roberts, Alan Weaver, Jason Clark,

[182] Bob Barganier would testify at the Flores trial that he recognized the Volkswagen seen outside of the Blacks' house the morning Betty Black was murdered because he had previously seen that car outside of Jackie's house. No record indicates that investigators sought to find out how and why Bob Barganier knew Jackie, knew where she lived, and knew someone who might be hiding her after the murder.

Terry Plunk, Judy Haney, and her mother Helen Ramirez.[183] There is no contemporaneous evidence, however, that Jackie told any of her intimates that she was afraid of a Hispanic male named "Charlie" or believed he had been involved in the death of her mother-in-law. This absence of evidence—during the five days when Jackie was on the lam—is exceedingly significant. *See* AppX57.

The State also suppressed the fact that law enforcement did not learn of Charlie Flores's identity through an investigation of the facts of the crime. The State suppressed the fact that narcotics investigators (FBPD SID) obtained his name from Ric Childs's brother "Roy" soon after the murder. To date, no information has been disclosed to explain how the SID investigators in Farmers Branch knew Ric or his brother. Likewise, no information has been disclosed as to why SID thought to turn to "Roy," in Irving, Texas, the day after Mrs. Black was murdered. Nor was any information disclosed that "Roy" was the first person to point FBPD in Charlie's direction. That "Roy" played this role is only discernible because of information in a record obtained from a police department in yet another municipality (Arlington). This record also shows that Farmers Branch investigators, not any witness, gave Arlington PD information, between January 31 and Jordan's February 4th identification, that Charlie Flores should be considered responsible for attempting to

[183] Doug Roberts, Terry Plunk, and Judy Haney were State's witnesses at trial. Alan Weaver, Jason Clark, and Helen Ramirez did *not* testify and most information obtained from them was suppressed.

destroy Ric's Volkswagen Beetle and that his photograph should be used to help a witness (James Jordan) make an identification, despite the fact that the description Jordan had given to the police that night was inconsistent, in significant ways, with Charlie's appearance. SXR100.

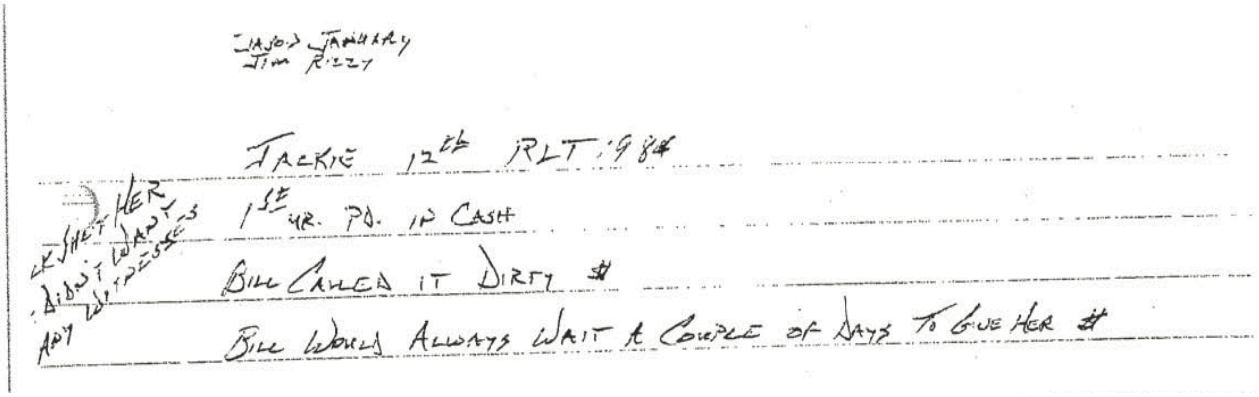
iii. Some of the suppressed information about Jackie's relationship with ADA January

In addition to suppressing a significant volume of evidence about alternative suspects and police misconduct and bias, the State suppressed evidence of the extraordinary leniency Jackie was shown and the extensive coaching she received. After being arrested for "Criminal Conspiracy (Capital Murder)," the State did not endeavor to indict her. Instead, after her arrest, she was held briefly and only for violations of the terms of her probation. 34 RR 106-107. Although she was indisputably on the run for nearly five days after the murder, knowing that the police wanted to talk to her, the evidence of flight was never held up as an indication of her guilt.

The State also suppressed evidence that ADA January had gotten involved in the Betty Black murder case almost immediately, before anyone was arrested, let alone indicted: on January 30, 1998, when he had some undisclosed communications with Gary Black. AppX57. The State then suppressed the handwritten notes taken by Detective Callaway of the first known interview he and ADA January had with Jackie Roberts: on February 12, 1998, about three weeks after the murder. The State

suppressed that, on the day of that initial interview with Jackie in the Dallas County Sheriff's Office, the State filed a motion to revoke Jackie's probation for her previous drug possession conviction. Ex. 11. The motion does not mention her recent arrest for Conspiracy to Commit Capital Murder, but only refers to relatively minor probation violations, including several failed drug tests. *Id.*

The State also suppressed statements made by Jackie during her February 12th interview that implicated her and Ric—which were subsequently ***purged from the record***. *See* Ex. 9. Detective Callaway's handwritten notes further reflect that Jackie told law enforcement (and ADA January) that ***"Rick shot her"*** because he "didn't want any witnesses." *Id.* Those same notes also reveal that Jackie had reported that she "didn't think Gary's Dad would tell if they did get $," he would "feel bad" about telling "police about the $." *Id.*



The key details—that (1) ***Ric*** had shot Betty Black because he did not want any witnesses; and (2) Jackie had admitted to believing that the Blacks would not "tell"

if they stole Gary's "dirty money" because he would "feel bad" about involving the police—were excised from the typed report of this same interview.[184]

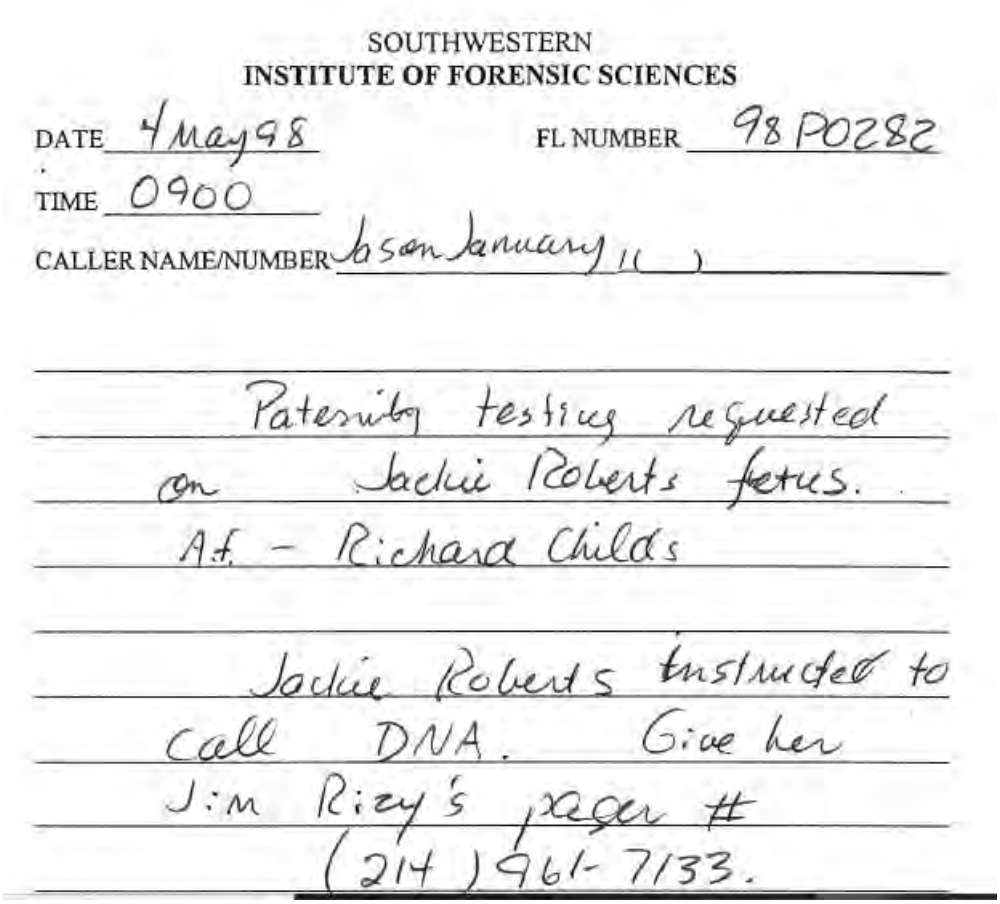
Right after the February 12th interview, the State, via ADA January, moved to withdraw the motion to revoke Jackie's probation that had been filed right before the interview. Ex. 11.

The State suppressed the fact that, despite *knowing* that Jackie had shared that Ric had shot Mrs. Black, the prosecution worked with Jackie to craft a story that would support the false supposition that Charlie was likely present and had shot Mrs. Black. The State suppressed that Jackie was required to meet ***weekly*** with ADA January so that her probation would not be revoked, ***every Friday at 9:30 a.m***. during the months leading up to the Flores trial. Ex. 17.

The State suppressed evidence that, within a few weeks, Jackie felt so close to ADA January that she turned to him when she feared that Ric had impregnated her. Ex. 18. She contacted January; he then used his authority to contact SWIFS, the

[184] Subsequently, a typed document styled "Supplementary Report" and "Supplement Report" was created, which was ultimately produced to the defense during the Flores trial. This document supposedly captured the fruits of the February 12th interview with Jackie but left out the incriminating information she had provided per the handwritten notes. 46 RR 75; Ex. 16. The typed version also shows that, during this interview, Jackie shared her understanding that Gary Black had "hidden $80,000.00 in his parent's [sic] home prior to reporting to Tx. Dept. Of Corrections" and that the Blacks were aware of what they called Gary's "dirty money." The typed version, like the handwritten notes, shows that Jackie also shared her understanding that "***the money was hidden in the walls, behind the medicine cabinet***," which is why it always took a few days before she got money when she requested it from the Blacks. *Id.* (emphasis added). At trial, Jackie denied having this perception of where the money was hidden or sharing this information with Ric.

Dallas County crime lab, and asked for the DNA department to do testing to determine paternity:



SOUTHWESTERN
INSTITUTE OF FORENSIC SCIENCES

DATE 4 May 98 FL NUMBER 98 P0282

TIME 0900

CALLER NAME/NUMBER Jason January ( )

Paternity testing requested on Jackie Roberts fetus.

A.F. - Richard Childs

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

Ex. 19.

The State suppressed evidence of actions ADA January took using judicial process to maintain control over Jackie after she had a relapse while awaiting trial. Ex. 17. Likewise, the State did not disclose how ADA January kept Jackie on a tight leash during the 90 days leading up to the Flores trial—again using his power as a state actor. *Id.*

The State did not disclose that ADA January acted "like a mentor," to Jackie as she "met with Jason January a lot to prepare [her] testimony and go over the case." Ex. 18.

The materiality of all of the suppressed evidence described above must be assessed cumulatively with the additional suppression described in the Factual Background above and in sub-sections b-d below.

b. The State suppressed evidence regarding the circumstances of Jill Barganier's initial attempts (and failure) to identify the Volkswagen's passenger.

The State suppressed evidence about Mrs. Barganier's initial descriptions of her observation on the day her next-door neighbor was murdered. The State likewise suppressed information about the circumstances of her initial, failed attempt to identify Charlie Flores several days after the murder. Mrs. Barganier did not decide that she could identify Mr. Flores until thirteen months after her initial observation.

The State suppressed evidence that Mrs. Barganier had initially described the passenger she had observed getting out of Ric's Volkswagen to police in very vague terms. She had been able to offer little more than that the second "white male" also had "long hair" and was "dirty" like the Volkswagen's driver. AppX57.

The State has suppressed yet more evidence relevant to Mrs. Barganier's initial memory of her observation the day of the murder. Specifically, the FBPD file contains a police memo that refers to a witness "Affidavit" from Mrs. Barganier that

has never been produced—whereas FBPD Affidavits from the other neighbors canvassed the day of the murder are in the file. AppX57. (None of the neighbors said anything about seeing a large, Hispanic male with short, shaved hair.)

The State suppressed that Mrs. Barganier's initial, vague description matched the vague description she gave a few days later during a hypnosis session conducted by a police officer on the team investigating the murder. The State suppressed evidence as to how this hypnosis session was arranged and of the fact that the police officer who performed the hypnosis had no experience with such endeavors. The State suppressed evidence that a second officer who sat in on the hypnosis session (the second-in-command on the Black murder investigation) knew at the time that Charlie Flores was considered a suspect and knew exactly what he looked like. Moreover, the following facts about the hypnosis session were obscured: during the hypnosis session, Mrs. Barganier described the passenger's hair as having "looked a lot like his friend's"—the driver's—which she again described as "dirty, long and wavy." AppX26; 4 EHRR 220. Yet the police-hypnotist repeatedly asked Mrs. Barganier if either man she had seen had "short, shaved" or "neatly trimmed hair"—a description matching Charlie Flores's appearance but contrary to the descriptions Mrs. Barganier had previously provided. AppX26.

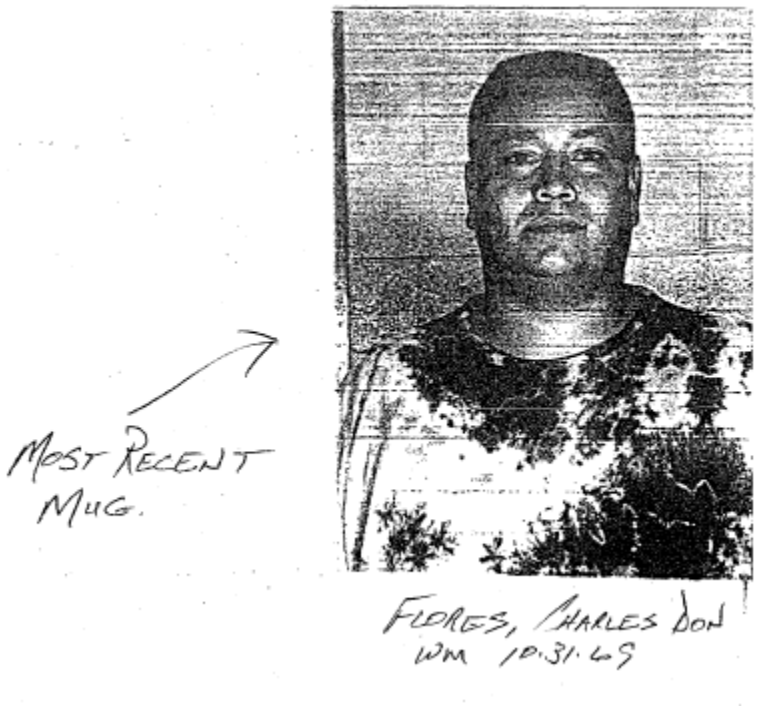
At trial and during the previous habeas proceeding, the State denied that the lead investigators knew Charlie's name or appearance when the hypnosis session

was conducted on Jill Barganier on February 4, 1998. But suppressed evidence indicates that law enforcement likely had obtained Charlie's name and at least the information that he lived in Irving from Ric's brother "Roy" ***by January 30th***. Law enforcement seems to have obtained photographs of Charlie by ***January 31st***. Law enforcement had obtained Charlie's most recent mugshot (taken by the Irving PD) by at least the morning of February 4th, *before* Mrs. Barganier came to the police station for the hypnosis session and before she created a second composite sketch of the second perpetrator (which looked nothing like Flores). SXR100; AppX57.

At trial, Mrs. Barganier testified only that at "a point in time" (she didn't "remember the date"), she "did see a little -- a photo lineup" and did not make an identification. The State suppressed evidence that she had been shown multiple photo line-ups over the course of several days. At the trial, she only mentioned one photo lineup—and only elliptically. Then, after ADA January asked: "Do you have any idea whether [Flores] was in there or not?", Mrs. Barganier answer: "I don't know." 36 RR 293. The State did not disclose (until nearly two decades later) that Mrs. Barganier had been shown a ***recognizable, recent photo*** of Charlie Flores by at least February 4, 1998, when she failed to make any identification. That recent photo of Charlie had been included in a six-person photo lineup that had been put together by the lead investigator Callaway. Nor did the State disclose that this six-person photo lineup was shown to Mrs. Barganier immediately after she had

submitted to the hypnosis session there at the police station and then created a composite sketch—which did not look like Flores.

Not until a 2017 evidentiary hearing, held to develop the facts surrounding the hypnosis session, was it established for the first time that Mrs. Barganier had been shown a recognizable photo of Charlie Flores by at least February 4, 1998—the same day as the hypnosis session. It was also established for the first time that Mrs. Barganier was shown Mr. Flores's photograph in a six-person photo lineup that had been put together by lead detective Callaway using Flores's most recent mugshot (which he had acquired from the Irving PD, after FBPD had already gathered some older photos of Flores by at least January 31, 1998):



AppX57 (containing Callaway's handwriting).

c. The State did not disclose significant impeachment evidence that would have undermined the credibility of Homero Garcia's and Jonathan Wait Sr.'s reputed "confession" testimony.

The State did not disclose the contexts that gave rise to the facially suspect "confession" evidence, contexts that render the trial contributions of Homero Garcia and Jonathan Wait Sr. completely untrustworthy.

i. <u>The State's machinations to assert control over and then reward Homero Garcia were not disclosed.</u>

Homero Garcia, a.k.a. "Medal," was one of two witnesses at trial to testify that Charlie had supposedly said he had been present at the Blacks' house. Homero also claimed that Charlie had said that he "had shot the dog."

Homero signed a statement with this representation about the dog months after-the-fact while FBI agents and local law enforcement were interrogating him. This interrogation took place after Homero had been awake for days, 36 RR 228-229, while he was strung out on drugs, and when he was quite aware that the State was seeking the death penalty against Charlie, then in custody. Homero, as a felon on

probation who had been caught with drugs and a firearm, was looking at some serious prison time himself. He, a young man who was only about 5'4" and 140 pounds, had not yet been to prison at that point—and he would do just about anything to avoid that prospect. Ex. 57; Ex. 34 ¶5; Ex. 58.

The State had leverage over Homero because, on January 30, 1998, close to midnight, Homero had been riding around with Jonathan Wait Jr. in Irving, Texas. The two were stopped by police off of 183 and Belt Line Road at a poolhall parking lot for an expired registration. According to a police report made the next day, Homero was caught in possession of a Browning .380 caliber semi-automatic, a magazine of ammunition, and a container with Xtacy pills. Ex. 58. He had tried to fling the contraband out of the window. The police, however, had not been fooled. *Id.*

Once caught, Homero confessed that these items belonged to him. Homero was then booked into jail by the Irving PD, but he bonded out later the next day. At that time, Homero said nothing suggesting he knew of a connection between Charlie Flores and Mrs. Black's murder.

About a week after Homero and Jonathan Wait Jr. had been pulled over, a warrant was issued for Homero. *Id*. By that point, Ric Childs and Jackie Roberts had been taken into custody in conjunction with the Betty Black murder investigation, and Charlie Flores had fled to Mexico. Homero had *still said nothing* about having

received a confession of some kind from Charlie on or around January 29, 1998. By February 16, 1998, Homero was indicted for the drug possession case, but was not indicted for having been a probationer in possession of a firearm. *Id*. Thereafter, Homero bonded out of jail again.

About three months later, a couple of weeks after Charlie Flores had been apprehended, Homero was again taken into custody on a bond forfeiture. This was on or before May 18, 1998. At this point, he was interrogated by FBI agents who had been working with Detective Callaway on the Flores case. Homero was likely informed that Betty Black had been shot using a .380 pistol—the same caliber weapon as the one he had been caught with on January 30th, soon before midnight; he was likely told he was facing serious consequences—perhaps even a conspiracy charge related to the murder—if it turned out that his .380 was the murder weapon. He was certainly told on this occasion that law enforcement wanted in information inculpating Charlie.

The interrogation was conducted at the Irving police station. The interrogation was not, however, recorded. At 12:50 p.m., a typed "Affidavit" was witnessed by FBI agent Paul Shannon and Irving police officer C.R. Bates. The Affidavit had been typed-up by law enforcement, and Homero signed by the last paragraph in barely legible script:

Irving Police Detective Carl Bates and FBI Special Agent Paul Shannon have shown me the black Browning 380 pistol that Irving Police had in evidence from the night I was arrested. I have identified the gun to them as the one I was arrested with and the one that Charles Flores gave to me earlier on the day of my arrest. Homero Gonzalez

Ex. 45. This Affidavit, which had been typed-up for Homero, stated that:

- Charles "always carries a gun" including "a black 380 caliber pistol" but "Rick also had a black 380"
- "Charles was driving a multi-colored Volkswagon [sic]" (although everyone else understood that it was Ric who was driving this car).
- The "Browning 380 pistol" that had been found on Homero on January 30, 1998 "Charles Flores gave to [him]."

Id. The Affidavit does not mention the drugs with which Homero had been caught (and which formed the basis for the case for which he had been indicted).

Critically, well before May 18, 1998, investigators had established that a .380 pistol had been used to kill Mrs. Black, and a bullet and casing of a precise kind of ammunition for a .380 pistol had been recovered from the crime scene. Also, an opened box of the exact brand of ammunition matching the recovered bullet and casing had been found in Ric Childs' backpack when he was arrested. But no .380 pistol had yet been linked to the bullet. So, as of May 18, 1998, Homero, who had been caught with a Browning .380 pistol, was in custody—likely being told that Mrs. Black had been killed with a bullet from a .380 pistol and that police wanted information that would link Homero's friend Charlie Flores to Mrs. Black's murder.

The focal point of the Affidavit produced following that custodial interview was a description of how Homero had obtained the Browning .380. According to the Affidavit, Charlie had given Homero the Browning .380 in a trade earlier the same day that Homero had been pulled over by Irving police officers—*i.e.*, on January 30, 1998. The Affidavit states that Charlie made this trade while confessing that he had "gone to a house to get some money" with Ric, but things had gone wrong: Charlie had "shot the dog" and Ric had "shot an old lady." *Id*. The Affidavit further states that Charlie had told Homero "that [Charlie], Myra and Johnny Wait spray painted the VW and then went out and burned it." *Id.* The fact that Ric had been arrested in connection with Mrs. Black's murder, that Charlie had been involved in trying to destroy Ric's Volkswagen, that Charlie had fled, and that he had recently been apprehended, were all widely reported in the local news before Homero was picked up around May 18, 1998 and held by law enforcement until the Affidavit was signed. *See* Ex. 38.

At some point after signing this Affidavit, Homero was again released from jail. That same day—May 18, 1998—Irving PD sent the .380 Browning found on Homero to SWIFS. Over two months later, a SWIFS report shows that Homero's .380 Browning was ***excluded*** as the murder weapon. DX10. But by then, Homero had already signed the typed-up Affidavit. There is no record suggesting that Homero was told about these test results.

The State did not even disclose the test results to the jury; that information only came out when the defense later put on the SWIFS ballistic analyst who had produced the report. 38 RR 82-110.

The State never disclosed to the defense how it had obtained Homero's cooperation and then rewarded him both before and after trial. But court records reveal that, soon after Homero had signed that Affidavit, he was in trouble again. On September 30, 1998, Homero was pulled over by Dallas police officers and attempted to flee on foot. He was arrested again. Ex. 58. By January of 1999, while voir dire was underway in the Flores case, Homero signed a Judicial Confession in his meth possession case. *Id.* He also signed an "Agreement to Forfeit" the weapon he had been unlawfully carrying and that had been taken from him in January. *Id.* That weapon—the same Browning .380—was later admitted into evidence during the Flores trial. 36 RR 223; SX 64. It was admitted into evidence although it had, months before, ***been categorically excluded as the murder weapon***—and the State did not disclose this fact. DX10. It seemed that the State hoped that the jury would be more inclined to believe that Charlie had been at the Blacks' house armed with *some* .380 pistol if they were staring at a *different* .380 pistol that, according to Homero, Charlie had given him in a trade on January 30th (the same day when Homero was arrested and the gun was confiscated) *See* 39 RR 66-67.

The State subpoenaed Homero Garcia to testify at the Flores trial. Homero was asked about the substance of his Affidavit, including the representation that Charlie had told Homero that he had "shot the dog." 36 RR 220, 222. Homero also described how he had been arrested and been caught in possession of that .380 pistol. 26 RR 222. But when he was asked about his Affidavit, he said: "I don't recall telling the FBI half of this stuff." 36 RR 228. ADA January implied that he was a reluctant witness because Charlie was his "friend." 36 RR 231.[185]

The jury did not learn of the circumstances that had prompted Homero to sign the Affidavit other than an oblique reference to him being "up for about four days" before he signed. 36 RR 228-229. More critically, the State suppressed evidence in the form of handwritten notes law enforcement made of the custodial interview of Homero on May 18, 1998—at the end of which he signed the typed-up Affidavit. AppX57. These handwritten notes say nothing about Charlie confessing to Homero, the key inculpatory statement in the typed Affidavit that Homero was induced to sign before he was released from custody.

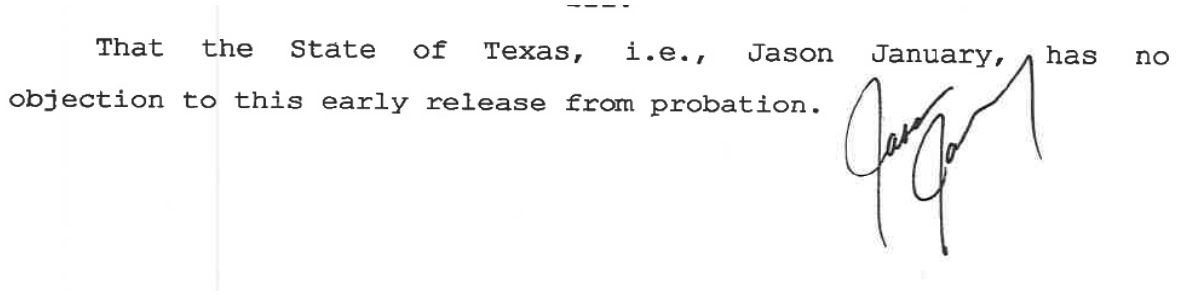
The State also did not disclose the agreement ADA January had made with Homero to arrange for him to receive exceedingly favorable treatment *after* he testified. That evidence, never disclosed, has only been ascertained by digging into

[185] In his guilt-phase closing argument, ADA January seemed to admit that Homero was a liar, but nevertheless urged the jury to give credence to the statements in Homero's highly suspect "Affidavit" that were helpful to the State. 39 RR 98.

district court filings unrelated to the Flores case. That evidence shows first that, although Homero had been on probation at the time of his arrest on January 30, 1998, he was only charged with possession of a controlled substance, not for the unlawful possession of a firearm too. Second, he was able to plead guilty and accept a sentence of no more than the probation he was already serving. Third, a few months after his trial testimony, although he had been arrested for probation violations in the interim, the State sponsored a motion generously modifying the conditions of his probation, in the form of a referral to a drug treatment center, instead of *revoking* his probation, as the circumstances warranted. Ex. 58. He received no additional punishment.

A short time after that, when Homero was again caught violating virtually all of the conditions of his probation, a motion was finally filed to revoke his probation. *Id*. **But** ADA January intervened *yet again* on Homero's behalf: filing a motion to *withdraw* the State's motion to revoke Homero's probation. *Id*. Even better for Homero, a "Motion for Early Release and Dismissal" was filed. *Id*.

One must dig deep into the clerk's records to see how Homero's fate unfolded—and to see who was responsible. But the Motion for Early Release and Dismissal is explicit: Homero was being given this extraordinary gift because he had been "**a witness for the State in the State of Texas vs. Charles Don Flores**." *Id.* And the person who had approved giving Homero this special gift was Jason January:


That the State of Texas, i.e., Jason January, has no objection to this early release from probation.

Id.

ii. The State did not disclose facts about its treatment of witnesses (which show a pattern of manipulation) or its revealing pre-trial interactions with Jonathan Wait Sr.

The special lengths that ADA January went to ease the burden on Homero Garcia in exchange for his testimony and the exceptional leniency January orchestrated for Jackie in exchange for the months she spent working with him to prepare her trial testimony are part of a larger pattern. *See* Factual Background, Section V; *see also* Ex. 37. No information about these kinds of arrangements with witnesses was disclosed by the DA's Office.

The defense is not even required to ask for *Brady* material for the duty to produce it to arise. *See Agurs*, 427 U.S. at 110-111. Therefore, the following pre-trial, on-the-record exchange among defense counsel, ADA January, and the trial court is noteworthy. This exchange occurred ***months after*** ADA January's secret meetings with Jackie began and ***months after*** the exertion of control over Homero had begun:

> MR. LOLLAR: (explaining contents of defense motion to compel disclosure) Well, "D" requests that the State

determine whether or not any law enforcement agency or any other individual has made any promises or inducements or benefits to any of the State's prospective witnesses.

MR. JANUARY: We'll agree with regard to any law enforcement. As to any other individual, I can't promise that.

MR. LOLLAR: You can ask the witness.

THE COURT: You can ask any witness that you have —

MR. JANUARY: If I become aware of any threat or promise or if the Defendant's -- or a witness's mother told him he needed to tell the truth or whatever, something like that, if I learn of any inducement or pressure on a witness to testify, I'll certainly let the Court and the Defense know.

THE COURT: Well, you might ask the witnesses that you speak to.

MR. JANUARY: Okay.

MR. LOLLAR: Then "E" merely asks whether any individual has coerced, forced, or threatened the witness in any way in order to procure the witness's testimony. You can satisfy that by asking the witness.

MR. JANUARY: If we become aware of any of that information, we'll certainly let the Defense know.

THE COURT: All right.

MR. LOLLAR: To make my point clear, I think it's incumbent upon the State to inquire of the witness.

THE COURT: Any witness that the State interviews, make that inquiry.

MR. JANUARY: Okay.

3 RR 6-7. ADA January's flippant tone is noteworthy. The constitutional duty to make these disclosures should not have been negotiable. Worse still, as ADA was voicing resistance, he *knew* that he was actively involved in pursuing an array of coercive tactics to procure testimony to help make a case against Mr. Flores.

Likewise, the State did not disclose the pattern of coercion brought to bear on potential witnesses who did *not* testify, such as Myra Wait and Waylon Dunaway. That conduct further evidences a corrupt pattern and further diminishes the credibility of the criminally compromised witnesses who *did* testify, including Jackie Roberts, Terry Plunk, Judy Haney, Vanessa Stovall, Jamie Dodge, Jonathan Wait Jr., Jonathan Wait Sr., and, most critically, Homero Garcia, who several years later, acknowledged the aggressive approach that ADA January took with him. *See* Ex. 34; Ex. 58; Ex. 13. What Homero did not disclose—and the State has suppressed—was the amazing leniency that ADA January orchestrated to reward Homero for his testimony.

Aside from Homero, the only other witness who testified that Charlie had reputedly "confessed" to being present at the crime scene was a person who barely knew Charlie: Myra's estranged father, Jonathan Wait Sr. No pre-trial disclosure suggests that Wait Sr. was prepared to testify about having received a confession of

this nature. Evidence that was kept from the defense supports the inference that this confession story was invented for trial.

Wait Sr. testified that he had only met Charlie Flores in January 1998 (the month that Mrs. Black was murdered), and that yet, for some reason, Charlie supposedly confided in this virtual stranger, admitting that he had been involved in this crime but had "only shot the dog." 37 RR 76, 83, 85, 93, 94. Wait Sr. described Charlie, whom he barely knew, coming over to his house in far east Dallas for no apparent reason a few days after Betty Black's murder and asking Wait Sr. to drive Charlie to an auto parts store. 37 RR 82-83, 85. Wait Sr. claimed that he then confronted Charlie with an article about Betty Black's death because Wait Sr.'s son Jonathan[186] had told Wait Sr. that Charlie had been involved. 37 RR 82. Aside from this unlikely "confession," Wait Sr. also claimed that, during one of the few other occasions when he had met Charlie, Charlie had "just volunteered" to show him "a little gym bag with several weapons in it." 37 RR 78, 77.

Wait Sr. also claimed that he called the Farmers Branch police immediately after Charlie left his house and gave them information about Charlie's vehicle, the license plate number, and which direction he had gone. 37 RR 86. Wait Sr. stated that he called Farmers Branch "[b]ecause they were the people that I had been in

[186] Jonathan Wait Jr. also testified for the State but said nothing about Charlie confessing to being present or to shooting the dog. 37 RR 75-97.

contact with that were looking for him quite actively." *Id*. Indeed, if this exchange with Charlie, which Wait Sr. described at trial, had really happened, it seems perplexing that Charlie was not apprehended and instead succeeded in driving out of the country. In any case, there is no record that Wait Sr. made a call stating that Charlie had made a confession of any kind before fleeing the country—although there are records, produced long after trial, that Wait Sr. had been very energetic about trying to cooperate with law enforcement, hoping to collect the reward being offered for information leading to Charlie's arrest. AppX57.

The jury was told, by Wait Sr. himself, that he had begun "to cooperate with the Farmers Branch Police … extensively" early on—perhaps even before Betty Black's murder. 37 RR 87. But the jury did not hear that, although police and FBI records indicate that Wait Sr. was indeed making calls trying to volunteer helpful information, nothing in those records suggests that Wait Sr. had gotten a "confession" from Charles Flores. For instance, an FBI report, which was not produced before trial, states only that lead investigator Callaway had reported to FBI agents that "MYRA WAIT's father, JOHNNY WAIT, is periodically providing information to him ***regarding the possible whereabouts*** of the subject, CHARLES FLORES." Ex. 60 (capitalization retained, emphasis added). The FBI report shows that the FBI was familiar with Wait Sr.; he was described as "a drug abuser" who "probably in the past has bought drugs from the subject, CHARLES FLORES." *Id.*

The report also notes that Wait Sr. had "been a Drug Enforcement Agency (DEA) informant in the past." *Id.*

Wait Sr. acknowledged at trial that he started trying to inform as soon as he realized that Charlie Flores was a suspect. 37 RR 87. As such, it is not credible that, during the year between Wait Sr.'s attempts to help law enforcement apprehend Charlie and Wait Sr.'s appearance at trial, he never shared the story of Charlie having supposedly "confessed" to shooting the dog.

d. The State did not disclose the circumstances whereby Mr. Linch's testimony, which Linch has now disavowed, was obtained.

The State insisted at trial that Charlie Flores had not only been present at the crime scene but had been armed with the .380 pistol that had been used to shoot Mrs. Black, although the murder weapon was never recovered. To try to prove this hypothesis, the prosecutors, before trial, had concocted the idea that they would argue that a .44 magnum revolver found in a closet at Ric's grandmother's house must have been Ric's gun. And since it could be assumed that it was Ric's gun, it could also be assumed that he had used it when breaking into the Blacks' house—although numerous witnesses had told law enforcement that Ric routinely carried a small handgun, likely a .380. AppX57.

The State had no evidence to link the .44 magnum to the crime scene when trial began—as discussed at length in Claim II above. Apropos to *this* claim is the

fact that the State did not disclose the role the DA's Office played in creating evidence to link the .44 magnum to the crime scene. The State likewise did not disclose that the chain of custody for the weapon was broken when this weapon was transported, at some point, by someone, from the FBPD evidence locker to the DA's Office.

Additionally, the State did not disclose that ADA January expressly asked SWIFS's trace-evidence section, in the middle of the Flores trial, to look for the presence of "potatoes" inside this particular weapon. Ex. 19.

Finally, the State did not disclose that the inference it was seeking, to link the .44 magnum to the crime scene through potato starch, was scientifically baseless and had not been vetted by anyone possessing basic scientific competence. Not even Mr. Linch was asked whether the inference the prosecutors were looking to create could be supported by science; Mr. Linch was simply asked to look for signs of potatoes. The suppressed facts support a very different inference: that Linch was able to find traces of potato starch in the .44 magnum's barrel because someone in the DA's office had planted it there. *See* Ex. 74.

3. This **suppressed information was material and thus prejudiced Charlie Flores.**

To establish prejudice, Mr. Flores must show that the suppressed information was material. Again, the test for materiality is whether "there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280. "[T]he materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks*, 540 U.S. at 698 (quoting *Kyles*, 514 U.S. at 435). "[M]ateriality must be assessed collectively, not point by point." *Banks v. Thaler*, 583 F.3d 295, 328 (5th Cir. 2009) (citing *Kyles*, 514 U.S. at 436).

The cumulative effect of the suppressed evidence in this case is such that it "reasonably … put[s] the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 419. This analysis involves, as a starting point, considering the strength of the case taken to trial; then the court must see if the suppressed evidence would have allowed the defense to undermine confidence in the State's key witnesses. *See Banks*, 540 U.S. 668.

The confused and confusing circumstantial case that the State took to trial was utterly flimsy. It was only "saved" by mid-trial developments that were themselves the product of prosecutorial misconduct. Had the suppressed evidence been disclosed to the defense, it would have undercut all of the core components of the prosecution's case: (1) that Charlie Flores was the person with Ric Childs when Ric entered the Blacks' house through the garage on the morning of the murder; (2) that Mrs. Barganier's identification was reliable; (3) that Charlie had admitted to "his

own friends" that he had been present and shot the dog, 39 RR 88; and (4) that Ric had actually shot the dog with the .44 magnum revolver, and thus it was fair to assume that Charlie had shot Mrs. Black with a .380 pistol (never recovered).

a. Suppressed evidence was prejudicial because it would have undercut the proposition that Charlie Flores was with Ric Childs during the hour before two males were seen entering the Blacks' garage.

In the Flores trial, the State suppressed evidence so that co-defendant Ric Childs was a virtual cipher. The State suppressed evidence to refashion Jackie, plainly an accomplice, into a victim of Charlie's inexplicable "greed." 39 RR 109. The State suppressed evidence of the intimate relationship that developed between Jackie and ADA January as he coached her for trial (and the privileged treatment she received as a reward). Because the State did not disclose what it knew about both Jackie and Ric; the State then argued that Jackie and Ric were mere pawns of the "big dog drug dealer" Charlie Flores. 39 RR 89, 91.

During the guilt-phase of trial, Jackie Roberts spent more time on the stand than any other witness for the State. *See* 34 RR 99-169; 38 RR 110-172. As described at length in the Factual Background, her principal role was to provide the State's view of what had happened between approximately 3:00 a.m. and 7:00 a.m. on January 29, 1998, the hours right before Betty Black was murdered. It is uncontested that, during the first 30 minutes or so of that time period, a drug deal took place,

orchestrated by Ric, through Jackie, and involving Charlie, Terry Plunk, and Judy Haney. To describe the drug deal, the State also put on Judy Haney (34 RR 169-201), the woman whose apartment had been used for the drug deal, and Terry Plunk (34 RR 201-223), Jackie's friend and drug supplier. Jackie's version of the drug deal differed from Haney's and Plunk's in one notable way: Jackie took multiple opportunities to attribute aggressive actions to Charlie that neither Haney nor Plunk described.

But, crucially, Jackie was the *only* witness at trial who purported to describe what happened between approximately 3:30 a.m., after the quick, awkward drug deal, and the time when Jackie and her El Camino returned to her mother's house on Emeline Street in Farmers Branch. Her dramatic tale of Charlie waving a gun around at her head and then her attempted get-away at a gas station was uncorroborated (and absurd).

Most importantly, Jackie's claim that she was dropped off by Ric *and* Charlie around 7:00-7:15 a.m. was not corroborated by anyone either. In fact, testimony from her close friend and ex-husband Doug Roberts contradicted her testimony that two people had gotten out of the El Camino with her and into Ric's Volkswagen. And her timeline was also contradicted by both Vanessa Stovall's testimony and Jill Barganier's testimony.

Numerous pieces of suppressed evidence undercut the proposition that no one else could have been the second male perpetrator. Significant evidence points to a second perpetrator who actually matched the initial description that neighbors had given to police: a white male with long, dirty hair who looked similar to Ric Childs. These key facts were inconvenient to the State's trial theory, though. The State urged the notion that Jackie and Ric were mere pawns of Charlie Flores the "big dog" or "bad cat" drug dealer, as he was referred to, respectively, by ADA January and a SID investigator. 39 RR 89, 91; SXR101. This theory was pushed all the way through trial by the State, largely through Jackie. Yet Jackie had likely been Ric's source with respect to where the Blacks' lived, where money may have been hidden within the house, what the Blacks' schedules were, and how to get into their house through the garage using a garage door opener that she likely supplied. Therefore, Callaway, with ADA January's knowledge, seems to have made inconvenient facts inculpating Jackie disappear. *See* Ex. 9.

The suppressed evidence gives reason to doubt virtually all of the testimony provided by accomplice Jackie Roberts, including her denial of any role in planning the burglary and her uncorroborated testimony about what transpired after the drug deal with her "connect" Terry Plunk, and, most critically, her uncorroborated testimony that Charlie was with her and Ric when she and her El Camino were

deposited at Emeline Drive in Farmers Branch, around the same time Ric's Volkswagen was seen a mile away outside of the Blacks' house.

New evidence shows both the cover-up and months of intensive coaching sessions with ADA January. These facts, illuminating the troubling relationship between the State's star witness and the State's lead prosecutor, on their own more than satisfy the *Brady* materiality standard. *See Banks*, 540 U.S. at 675 (emphasizing the materiality of an undisclosed pretrial transcript showing that one of the State's trial witnesses "had been intensively coach by prosecutors and law enforcement officers").

Having put all of his eggs in the "Jackie basket," ADA January vociferously defended her, even after she was caught in multiple, patent lies at trial. January supported her as she lied about having drawn a map of how to get to the Blacks' house for Ric, a map which was found in Ric's backpack and was then discarded by Doug Roberts. January supported Jackie when she lied about having brought Ric's backpack to him—which he had left in her El Camino the morning of the murder. January deflected as Jackie lied about having given Ric the Blacks' garage door opener and lied about her belief that Gary's "dirty money" was hidden in the Blacks' bathroom walls—which was precisely where Ric and his compatriot had looked for the money. January actively coached her to lie about having seen Ric with a "bigger gun" the night before the murder, and when she failed to follow the script, ADA

January arranged to have a rush transcript prepared for her so that she could review her testimony and then directed her to "correct" it during her cross-examination. 38 RR 111-113.

Although Jackie had been caught in multiple lies, ADA January devoted most of the State's final Closing Argument to defending her and his decision to present "the truth" through her. The audacity of all this is hard to capture. He defended her even as he knew that he had worked with her to craft a fiction about key events: what guns she had seen Ric and Charlie carrying, what the three of them had done together after the drug deal she and Ric had set up, how Charlie had treated her, and, most importantly, who had dropped her and her El Camino back in Farmers Branch when her ex-husband Doug observed her return and then observed *Ric alone* leave in his Volkswagen.

At trial, ADA January tied himself in rhetorical knots trying to defend Jackie's credibility. He speculated, for instance, that it was wrong-headed to imagine that she had been involved in planning to rob the Blacks because, if she had wanted to steal Gary Black's money, she could have just "tricked" Betty, gotten into the Blacks' house on her own, stolen the money, and then kept it all for herself. 39 RR 90. This argument would be laughable if it were not so offensive. Soon after Mrs. Black's death, ADA January had interviewed Jackie with Detective Callaway; during that interview, she had *admitted* to believing that the money was hidden beyond the

bathroom walls and that Mr. Black would have been loathed to report the crime if they had stolen it—planning that suggested *mens rea*. Ex. 9. But thereafter, January spent the next year shielding Jackie from prosecution and coaching her in private meetings, a condition of maintaining probation, so that they could tell the jury that she had had nothing to do with the attempted theft that resulted in her mother-in-law's death. Ex. 17.[187]

Given the weakness of the State's case against Charlie, the suppression of devastating impeachment evidence against Jackie Roberts is itself dispositive. *See Banks*, 540 U.S. at 675 (finding the State's failure to disclose that one witness had been a paid police informant was a material *Brady* violation). *See also Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (en banc) (vacating the conviction and harshly condemning the prosecutor's scheme as a "covert subornation of perjury."); *see also People v. Steadman*, 623 N.E.2d 509, 511 (N.Y. 1993) ("scheme employed by the District Attorney's office undermines Brady" and "cannot be condoned."); *accord with Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942).

[187] In the punishment phase, January went so far as to falsely declare that he had had no ability to prosecute Jackie even if he had wanted to: "We presented you with the truth in this case, good, bad, and indifferent. These witnesses took the stand and told you, yeah, you know, Jackie told you she was involved in a delivery of methamphetamine, which by the way, I couldn't prosecute her for if I wanted to because I don't have the drugs. But again, who's playing tricks here?" 41 RR 88-89.

b. Suppressed evidence related to the circumstances of Mrs. Barganier's in-court identification was prejudicial because it would have transformed inculpatory testimony into exculpatory testimony.

As noted above, the State's evidence at trial to support the inference that Charlie Flores had been the person who had entered the Blacks' garage on January 29, 1998 with Ric was based on Jackie's testimony and Jill Barganier's eleventh-hour identification. Had Mrs. Barganier not come through with that identification, the State's confusing, inconsistent case would have unraveled completely. Without Mrs. Barganier's identification, all the State had was Jackie's internally inconsistent, self-serving testimony, which was also inconsistent with the testimony of other State's witnesses—notably, Vanessa Stovall, Ric's girlfriend since high school.

Vanessa Stovall had been recruited early in the investigation to help implicate Charlie, a fact that was not disclosed.[188] That is, the State did not disclose evidence that Vanessa Stovall had been permitted to meet with Ric alone, on the first night he was in police custody, and that she was then induced to cooperate. Her cooperation involved propagating a false story about how the crime, about which she had no

[188] Vanessa's story was born of Ric's initial attempt to create an alibi himself. During the first partially recorded custodial interview with him, he claimed that, right after dropping Jackie off, he went to "wake up" his girlfriend (Vanessa) and get her to work. Ric had said nothing about Charlie being with him. SXR101. But at trial, both Jackie and Doug testified that Ric had dropped Jackie off at 13412 Emeline Street in Farmers Branch around 7:00-7:15 a.m. 34 RR 153, 277. Ric (with or without Charlie) could not also have been several miles away with Vanessa, at 11807 High Meadow in North Dallas, before and during the same window of time.

personal knowledge, had occurred. It was not disclosed that Vanessa was enlisted by ADA January to go before the Grand Jury that was ***convened in Ric's case*** and tell a false narrative to minimize Ric's culpability. Vanessa told the grand jurors that Ric "was outside with the dog. The dog was chasing him" and indeed "chased him out into the backyard." Ex. 56. And "he had shot the dog" only after "he had heard gunfire coming from the house[.]" *Id.* ADA January solicited this testimony although he knew that Vanessa's hearsay story contradicted the basic physical evidence that had been obtained from the crime scene, which showed that the dog, as well as Mrs. Black, had been shot and died in the living room. *Id*.

Vanessa's testimony in the Flores trial focused only on her claim that she had seen Charlie with Ric on the morning of January 29, 1998. However, her story *undermined* Jackie's (and Mrs. Barganier's), and thus did not actually corroborate Jackie's testimony about Ric and Charlie leaving Jackie's house together in Ric's Volkswagen at about the same time the Volkswagen was seen at the Blacks' house.

Vanessa told the jury that she had known Ric for eleven years, dating him off and on since she was a teenager. 35 RR 59-60. She had lived with him for 4-5 years—up until January 1998 (the month that Mrs. Black was murdered).[189] 35 RR 61. In the preceding six months before that, she had met Charlie a few times. She

[189] Another witness, Deborah Howard, also claimed that Ric had been living with her up until January 1998. 38 RR 174.

could recall no specifics. 35 RR 62, 65. But somehow, at trial, she had very specific recall about the morning of January 29, 1998. She claimed that at "6:30" in the morning, the following happened: She was sleeping in a back bedroom at Ric's grandmother's house on High Meadow; Ric crawled into bed with her and woke her up; they then went out to the kitchen/dining room, where Charlie was waiting; they all sat there "just talking, talking about the person that I was staying with at the time. Talking about me going to work;" next, they "did some drugs"—smoking some meth using "either a straw or a dollar bill," Vanessa couldn't "remember exactly"—but she felt like they wrapped up in about fifteen minutes, until "about 6:45 or 7:00" when she left for work. 35 RR 71-75. Putting aside the difficulty of seeing how all of these things, plus her getting dressed for work, supposedly happened in the span of 30 minutes, that was her story at trial. 35 RR 71-76. She also insisted that, even without a watch, she knew this all started at 6:30[190] because Ric had told her the time when he crawled into bed with her and she then "verified it" by looking at a clock when they went into the kitchen. 35 RR 89. This facially strained testimony only served to undercut Jackie, however.

But the State had needed *someone* to corroborate Jackie's timeline, because Jackie was an accomplice to the underlying crime. *See* TEX. CODE CRIM. PROC. art.

[190] By contrast, according to the SID memo prepared not long after she was first interviewed, she supposedly "advised" that she had "observed" Ric and Charlie arrive at 11807 High Meadow at "approximately 6:45 A.M. . . . in a purple Volkswagen Beetle." AppX8.

38.14 ("A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.").

When the trial began, ***Vanessa was all the State had***—until Mrs. Barganier suddenly announced, mid-trial, upon seeing Charlie Flores in the courtroom, that she could identify him. (Vanessa testified in the morning on March 23, 1999; later that day, Mrs. Barganier told prosecutors for the first time that she could make the identification; her testimony was then put off until a "Zani hearing" could be held the next morning to address the fact that she had been "hypnotized" by law enforcement during the investigation. *See* 35 RR 59, 153; 36 RR 12. The court's decision to allow Mrs. Barganier to testify about the identification was only made the day *after* Vanessa's awkward attempt to buttress the State's case.)

In short, the materiality of Mrs. Barganier's identification testimony cannot be overstated. The State had two of Ric's girlfriends trying to put Charlie with Ric in Ric's Volkswagen, but at two different places at the same time. And unlike Vanessa, Jackie, and the State's other motley collection of drug-addicted witnesses, Mrs. Barganier seemed to be a very credible, highly confident witness for the State. She testified to being "over 100 percent sure" of herself. 36 RR 109, 294. But the

suppressed facts as to how she came to be so sure would have totally undermined the perception that her identification was reliable.

Knowing how Mrs. Barganier was manipulated—so that, over time, she became "more than 100 percent" sure that Hispanic Charlie Flores, with his shaved hair, was the person she had seen—transforms Mrs. Barganier's identification into evidence of witness tampering, not evidence of Charlie's guilt.

How so?

The day of the murder, Mrs. Barganier offered only a vague description of the passenger as a "white male" with "long, dirty hair." AppX57.

In the hypnosis session, Mrs. Barganier again described the passenger as she had on the day of the murder: as a white male with long, dirty hair who looked a lot like "his friend," *i.e.*, Ric Childs. Appx26. Yet Charlie Flores did *not* have long hair and was *not* a white male who looked like Ric Childs, and the FBPD well knew that:

AppX57.

After the hypnosis session, Mrs. Barganier created this composite sketch of her memory of the Volkswagen's passenger:

AppX57. This drawing looked nothing like Charlie Flores, as FBPD well knew. But this sketch *did* look generically like many of the suspects (whose identities have not

been disclosed) whose photos are in the heavily redacted police file produced twenty years after-the-fact:

AppX57.

Yet right after Mrs. Barganier's hypnosis session and her creation of the composite sketch, Detective Callaway showed her a six-person photo lineup of Hispanic males with short, shaved hair. The State suppressed evidence of this entire

sequence of events. And, most critically, they suppressed the fact that, when the following six-person photo lineup was shown to Mrs. Barganier, she *failed* to pick Charlie Flores (No. 2) out:

AppX30. By this point, at the very least, whatever limited memory Mrs. Barganier had was now ***contaminated***. In presenting her with the photo lineup, law enforcement had implicitly, but clearly, told her that they believed the perpetrator was a Hispanic male with short, shaved hair. Within a few days, Charlie Flores's name and photo—including the same photo that had been used in the six-person photo line-up shown to Mrs. Barganier—began appearing in the paper and on the

news. Ex. 38. Then, when Mrs. Barganier appeared in court to testify for the State, she felt she recognized the man whose photo she had seen repeatedly during the preceding months.

The suppressed information regarding the circumstances whereby Mrs. Barganier was first exposed to Charlie Flores's photo and, even then, failed to identify him is *exculpatory*. Standing alone, this evidence is material. *See Wearry v. Cain*, 136 S. Ct. 1002 (2016) (per curiam) (holding state post-conviction court erred in denying habeas applicant's request for post-conviction relief, because the prosecution's failure to disclose material evidence supporting Wearry's innocence violated his due process rights). However, the suppressed information nullifying Mrs. Barganier's identification is just one more component that needs to be considered in assessing materiality under *Brady*.

c. Suppressed evidence was prejudicial because it would have undercut the testimony that Charlie had "confessed" to shooting the dog.

A great deal of the suppressed evidence could have been used to impugn the motives and credibility of the State's witnesses—particularly Homero Garcia and Jonathan Wait Sr. The "confession" evidence from these two witnesses would have been rendered totally unbelievable if the context whereby this testimony had been obtained had been disclosed.

Homero's story about the confession emerged months after the fact. He was taken into custody and led to believe that the .380 pistol he had been caught carrying back on January 30, 1998, along with drugs, meant he was likely facing the prospect of serious prison time. It was also likely insinuated that the gun he had been caught with might well be the murder weapon because it was the same caliber as the one that had been used to shoot Mrs. Black. This was a lie—which ballistics evidence introduced at the trial ultimately showed—but the jury did not hear the conditions of the custodial interview that prompted a terrified Homero to sign a statement that he later disavowed. Ex. 58.

More critically, the jury did not hear how ADA January had threatened Homero, a small, effeminate-looking young man, with prison time and then promised exceptional leniency in exchange for his cooperation. The jury did not hear how January had ensured that charges against Homero were reduced and that his probation was maintained even after multiple violations of its terms. *See id*. The jurors would have had a very different perception of Homero and the Affidavit he signed if they had known that ADA January had intervened to end his probation entirely. Indeed, it would be reasonable to interpret these actions as January having sought to maintain Homero's *silence* going forward.

As noted above, professional snitch Wait Sr. was no "friend" of Charlie Flores, as the State insisted. 39 RR 47. Wait Sr. was a drug addict and alcoholic who

only saw Charlie's situation as a means to ingratiate himself with law enforcement and, perhaps, obtain the reward that was being offered for information leading to his arrest. The story that Wait Sr. told at trial about how Flores confessed to him, a virtual stranger, is facially absurd. *See* 37 RR 82-83, 85. But what was not disclosed is how nothing of this nature appeared in the suppressed FBPD or FBI files discussing Wait Sr., although there is documentation of Wait Sr.'s attempt to be "helpful" to law enforcement. This absence was decidedly material.

If Wait Sr., who had been so eager to prove helpful, had been privy to something as significant as a confession, it is unthinkable that he would not have run to the police, with whom he had a history, and gleefully shared that information from the outset. He did not—because, seemingly, he did not think up such a story until he was called to testify at trial. That is, the suppressed records of Wait Sr.'s interactions with FBPD and the FBI support the inference that his outlandish (and false) testimony about receiving a "confession" seems to have been invented to bolster Homero's testimony along the same lines. Indeed, if Homero had not waffled while on the stand,[191] it is hard to conceive of any sound reason for putting the unsavory Wait Sr. on the stand. It could not have looked good that the State was so desperate that it was relying on the word of a man, Wait Sr., who admitted to using three

[191] When confronted with the typed statement he had signed while in custody, Homero had awkwardly revealed: "I don't recall telling the FBI half of this stuff." 36 RR 228.

different aliases ("Jason Edward Kessler," "Christopher John Whitney," and "Jason Edward Richards"); who boasted of spending time in the Federal Witness Protection Program "in exchange for [his] testimony" in a litany of cases that he described as "homicides, arsons, extortions, drug dealing, et cetera, et cetera;" and who admitted "possibly" using cocaine, marijuana, alcohol, and amphetamines at the time when he was claiming Charlie had come to Wait Sr.'s house on his way out of the country and "confessed" to shooting the dog. 37 RR 88, 89, 90-91.

The State, however, relied *considerably* on Homero's and Wait Sr.'s "confession" testimony. The prosecutors referred to it repeatedly in their guilt-phase Closing Arguments as if it were rock-solid evidence. 39 RR 47, 62, 63, 88, 96, 97-98, 99. Yet this testimony would have been given *no* credence had the significant impeachment evidence been disclosed. *See Banks*, 540 U.S. at 675 (noting materiality of failure to disclose evidence "that would have allowed [the defendant] to discredit two essential prosecution witnesses"). ADA January did not disclose how he had arranged to reduce the charges against Homero, to prevent revocation of his probation, and then, post-trial, to secure his release from probation altogether. Nor was it disclosed that the favorable treatment orchestrated for Homero was part of a pattern of such machinations. *See*, *e.g.*, Ex. 37 (Judy Haney admitting that she too had been promised leniency in exchange for testifying for the State); Ex. 61

(court documents showing how Haney was in fact shown leniency after she testified).

Special incentives given to witnesses are classic impeachment evidence whose withholding is not to be tolerated. To allow concealment of this type of charade, perpetrated here with several witnesses, merely encourages further unprincipled gamesmanship.

d. Suppressed evidence was prejudicial because it would have undercut the testimony meant to support the "Ric-used-the-bigger-gun" story.

Suppressed evidence of the role that the DA's Office played in manufacturing evidence, mid-trial, to support the "Ric-used-the-bigger-gun" story would have completely undermined the State's claim that Charlie should be viewed as the shooter. The State had pushed this narrative from Opening Statements onward—even before Linch's "testing" was solicited. Linch's testimony about finding potato starch inside the .44 magnum revolver was, however, all that the State had to link that particular firearm to the crime scene. Similarly, jurors exposed to the suppressed evidence would have rejected the prosecutors' repeated insistence in Closing Argument that they should embrace the "Ric-had-the-bigger-gun" story as a basis for concluding that Charlie had shot Betty Black. *See* 39 RR 51-53. This ruse only worked because Linch himself was not even apprised of the ludicrous inferences he was being asked to support. The suppressed evidence of the subterfuge would also

have exposed the lead prosecutors as dishonest brokers engaged in a "pattern of deceptive behavior and active concealment." *Prible v. Davis*, 4:09-cv-01896, 2020 WL 2563544, *35 (S.D. Tex. May 20, 2020) (granting federal habeas relief under *Brady* based on evidence that the prosecution had engaged in a "pattern of deceptive behavior and active concealment," including soliciting inculpatory evidence).

Because there was no DNA, fingerprint, fiber, or ballistics evidence (or any other physical evidence) linking Charlie Flores to the crime scene, the suppressed evidence regarding the State's gamesmanship in introducing into evidence two weapons—a bigger and a smaller gun, neither of which was the murder weapon—was deceptive. But there was no reliable evidence linking either of these guns to the crime scene—not the bigger gun found in a closet at Ric's grandmother's house or the smaller gun found on Homero Garcia. And, certainly, no evidence linked either of these guns to Mrs. Black's death. The State's use of these two guns as props served as a significant smokescreen. And the prosecutors worked overtime to argue that, where there was smoke (that they had created), there must be fire. Their insistence on the truth of this baseless "bigger" gun story was a dominant theme in their guilt-phase Closing Arguments. ADA Davis, who had played a significant role in developing the junk-science testimony through Mr. Linch, argued:

> [Jackie] says that this person down here had a handgun and Richard Childs had a handgun, and of the two, the bigger handgun that day belonged to Richard Childs.

> I'll submit to you it's a reasonable deduction from the evidence that actually what those two people went in and got was a .44 caliber Magnum, and a .380 auto. Richard Lynn Childs had that .44 Magnum in his possession, and this man right down here, Charles Don Flores, had that .380 semi-automatic pistol in his possession.

39 RR 51 (ADA Davis).

ADA January then followed up, hammering over and over again the fiction that, because a bigger gun, found in a closet at Ric's grandmother's house, had potato in it, this proved that Charlie Flores was not only present but was the person who had shot Mrs. Black using a smaller gun (that had never been found):

- "Now, the Defense lawyer said that it's probably Rick Childs that threw that [smaller] gun away. Let's look at that. If he threw that gun away, how come he didn't throw the .44 away that's sitting right in his own house with the potato inside of it? I mean, I know Rick Childs is a doper, but it's a reasonable deduction that he's not that stupid. Why throw away the murder weapon -- why not throw away the -- both guns in this case? It doesn't even make any sense." 39 RR 95-96.[192]

- "The Defendant — the Defense lawyer said that Rick Childs is more likely the shooter because both have .380s, that Rick Childs threw away the .380. How come he didn't throw away the .44?" 39 RR 100.

- "Now, if for some reason you think that Richard Childs was the shooter of -- even though he would have a .44 in his own house, that for whatever reason, if you believe that, the Defendant is still guilty." 39 RR 101.

- "Jackie did say that Richard Childs had the larger gun, which we know was in his possession afterwards, this 44." 39 RR 102.

[192] Most likely, Ric did not throw away the .44 magnum because, as he himself admitted and as January well knew, "it had not been used" at the Blacks' house. SXR101.

- "Again, I feel the evidence with a reasonable deduction shows that [Flores is] the shooter." 39 RR 103.

- "I suggest to you the true theory in this case is that [Flores] is the shooter of Elizabeth Black, a 64-year-old grandmother." 39 RR 106.

The prosecutors could not make these arguments but for the facts (1) that the State had suppressed Jackie's acknowledgment that Ric had shot Mrs. Black and (2) that Mr. Linch had been manipulated into giving them junk science in the form of potato-starch testimony. This zealous commitment to a narrative that State's counsel ***knew to be false*** reflects an obsession with winning completely divorced from fundamental concepts of justice.

C. Conclusion

Charlie Flores has now identified multiple instances of long-suppressed evidence that was favorable to the defense because: it was exculpatory, it was fodder for impeachment, and/or it would have enabled the defense to "attack[] the reliability of the investigation[.]" *Kyles*, 514 U.S. at 446. He has also shown how this tidal wave of suppressed evidence was material. As a result, under *Brady* he should receive a new trial.

V. LONG-SUPPRESSED EVIDENCE, IN VIOLATION OF *BRADY V. MARYLAND*, REVEALS A PATTERN OF RAMPANT MISCONDUCT THAT WAS MATERIAL TO OBTAINING A DEATH SENTENCE.

Charlie Flores's constitutional rights to a fair trial, to due process, and to be free from cruel and unusual punishment were also violated by rampant misconduct material to obtaining a death sentence. Claims I-IV above each demonstrate why Mr. Flores is entitled to a whole new trial. In the alternative, he is, at the very least, entitled to relief under *Brady* in the form of a new punishment-phase trial. *See Brady v. Maryland*, 373 U.S. 83 (1963) (involving State's suppression of evidence showing that co-defendant had admitted to the actual homicide, which was material to whether defendant Brady would have received a death sentence). The State engaged in misconduct affecting punishment including the following: (1) the State knowingly pushed a false theory of Charlie Flores's culpability relative to co-defendant Ric Childs; and (2) the State abused its powers to sabotage Mr. Flores's ability to put on a mitigation case.

A. Legal Standard

The legal standard that applies to this punishment-phase *Brady* claim is essentially the same as outlined in Claim IV at Section A above. That briefing is incorporated here by reference. Importantly, *Brady* applies to evidence that is material either to guilt *or* to punishment. In death-penalty cases like this one, *Brady* evidence includes a broad range of evidence relevant to assessing mitigation and

aggravation. *See Banks*, 540 U.S. at 691; *see also Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part) (explaining that "because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense") and *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (holding it is "desirable for the jury to have as much information as possible when it makes the sentencing decision.").

B. Application of Law to Facts

The State was not content to manufacture circumstantial evidence to place Charlie Flores at the crime scene and then argue his guilt under the law of parties. The State also wanted the jury to believe that *he*, not Ric Childs, had shot Mrs. Black with its baseless "bigger gun" story. On the surface, this overreach makes no practical sense. Contrary to the misconception that Charlie's appointed counsel shared with him and his parents, under Texas law, the State did not need to prove who had been the shooter to obtain a capital murder conviction. But the prosecutors wanted more than a conviction; they wanted a ***death sentence***. They struck two types of "foul" blows to better ensure Charlie was condemned. *Berger*, 295 U.S. at 88.

First, the prosecutors pursued the convoluted and baseless Ric-used-the-bigger-gun-to-shoot-the-dog story at trial, knowing it was inconsistent with the truth, and otherwise concealed evidence of Ric's culpability (as well as Jackie's).

Second, the prosecutors abused their power to sabotage Charlie's ability to put on mitigating evidence through three of his loved ones: Myra Wait and his parents Lily and Carter Flores.

1. The State struck foul blows that violated Charlie Flores's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by depriving him of the right to a non-arbitrary, fair punishment determination.

a. The State pushed a theory of relative culpable that they knew was false.

The State presented false testimony and argument on the single most critical fact issue at Flores's trial: who shot Mrs. Black. Prosecutors told Charlie Flores's jury that he was not only present but that he should be viewed as the person who shot Mrs. Black using a .380 caliber pistol that was never recovered. *See* Claim II above. The prosecutors made this baseless argument knowing it was based on manufactured evidence: the potato starch testimony obtained from Mr. Linch after he "tested" material found in the .44 magnum revolver that had been brought over from the DA's Office after the chain of custody was broken. The prosecutors made this baseless argument also knowing that they had suppressed Jackie's admission that Ric had told her that *he* had shot Mrs. Black. And the prosecutors made this argument knowing that Jason Clark had testified before the Grand Jury revealing

evidence of how and when the idea of using a potato as a silencer had come *to Ric Childs*. Ex. 9; Ex. 12.

The State also actively whitewashed Ric's history. For instance, the State did not disclose that he was out on bond for a drug possession-with-intent-to-deliver case and had failed to appear per the terms of his bond soon before he shot Mrs. Black. Materials in the belatedly produced FBPD file refer cryptically to a "history" that Ric Childs had with both the Farmers Branch SID investigators and the Irving PD. But that history has never been disclosed and documents that describe it seemed to have been removed from the file. *See* AppX57. Likewise, it was not disclosed that Ric's father had been a police officer with the Irving PD and was, at the time of the Flores trial, employed by DPS at Parkland Hospital where one of the extraneous offenses introduced against Flores during the guilt-phase had occurred. This suppressed information illuminates an improper motive for the arbitrary difference between the treatment that Ric and Charlie received—particularly in light of the absence of evidence that Ric ever expressed any remorse, took any responsibility, or volunteered to testify truthfully. *If* Ric had been able to credibly testify that Charlie had entered the Blacks' house with Ric on January 29, 1998, that would have made convicting Charlie rather easy. But Ric did not and could not testify (honestly) to that effect.

Instead of Ric testifying, ADA January took the unusual actions of arranging for one of Ric's girlfriends, Vanessa Stovall, to testify before the Grand Jury convened in Ric's case to create some support for the false Ric-shot-the-dog story. Ex. 56. This abuse of the Grand Jury was not disclosed.

Similarly, the State did not disclose ADA January's efforts to orchestrate a plea deal for Ric, a process that began *before* the Flores trial. That is, it was not disclosed that Ric was promised a highly favorable plea deal in exchange for *not* testifying in the Flores trial. Ex. 22. Nor were the parameters of deal he was ultimately given disclosed. The details can only be gleaned by culling pieces of information from the clerk's records for Ric's various cases, including the drug offense for which he had bonded out and then failed to appear soon before shooting Betty Black. The State ultimately dismissed the capital murder charge against Ric, reindicted him for regular murder, and recommended a sentence of 35 years for the murder charge plus an outstanding drug offense; Ric, in exchange, signed a Judicial Confession admitting that he had shot Mrs. Black. Ex. 3. Nor was it disclosed that this deal was negotiated for Ric by ADA January with an attorney, Karo Johnson, who had mysteriously agreed to put up a bond for Ric in the Betty Black case even after a previous bond this same lawyer had posted for Ric had been forfeited. Nor was it disclosed that this exceptional plea deal was obtained for Ric without his attorney doing virtually any work and was obtained for Ric while his attorney was

sharing an office with one of Charlie Flores's court-appointed lawyers (Doug Parks) who later participated in linking arms with the State to thwart Charlie's attempts to obtain post-conviction relief. *Id*.

Most importantly, the State suppressed all of the evidence outlined in Claim IV above demonstrating that Ric had planned the burglary with Jackie and then likely perpetrated it with another white male with long hair whose identify has never been disclosed.

b. The State abused its power to sabotage Charlie Flores's ability to rely on key mitigation witnesses.

ADA January also exploited his power as a prosecutor to obtain indictments against Charlie Flores's elderly parents and his common-law wife Myra Wait to cripple their ability to testify on Charlie's behalf. Neither Lily nor Carter Flores had ever been in trouble with the law before. Yet they were treated like hardened criminals, arrested when Detective Callaway, joining forces with the FBI and the Irving PD, descended upon their home en masse. After being detained and questioned by the authorities for several days, they were then indicted. The Floreses, two people in their 60s, were held in jail cells in Farmers Branch and threatened with either taking a deal that would require pleading guilty to abetting Charlie's escape or face the prospect of many years in prison. They were told that bond would be set at $30,000 each unless they agreed to cooperate and sign statements inculpating their

son. They felt they had no choice because the income from Carter's roofing business was essential to supporting their extended family. Only after they signed statements were they transferred to the Dallas County jail where bond was lowered to $1,500. Ex. 43; Ex. 29; Ex 32.

It is noteworthy that the State made no attempt to indict Jackie or any of the individuals who had helped Jackie Roberts hide from police for several days, who had helped her and Ric destroy evidence, and who had helped Ric try to orchestrate a ludicrous escape by driving away in someone else's truck and wearing someone else's clothes while carrying an open box of the same ammunition that had been used to shoot Betty Black. Instead, several of the witnesses who enabled Jackie were recruited to testify for the State, including Doug Roberts and Terry Plunk. State actors wielded their powers, not in pursuit of the truth or true justice, but only to impair Charlie's ability to defend himself.

The State also repeatedly attempted to indict his common-law wife Myra for "Hindering Apprehension of a Fugitive," but the efforts were unsuccessful. Yet ADA January subpoenaed her pretrial and then, on information and believe, arranged to meet with her outside of the presence of counsel through a subterfuge. When Myra arrived at the DA's Office at the appointed time, another prosecutor in the DA's office came out to meet her. She told him that her lawyer was going to be meeting her there. But the prosecutor told her to come into the office and they would

have her attorney sent up when he arrived. Later, Myra learned that her lawyer, when he had arrived, had been told that she had not shown up. Ex. 13.

On information and belief, two prosecutors, one of whom was Jason January, interrogated Myra outside of the presence of counsel about her relationship with Charlie. They wanted to know how long they had been together and were they really married. They also wanted to know about Charlie's relationship with Ric Childs. They wanted to know how long Ric and Charlie had known each other and what kind of dealings they had had with each other. Myra reported that she did not like Ric, and so Charlie had not brought him around except for very brief intervals. *Id.*

ADA January insisted that she knew more about the situation and that they would see to it that she testified. She was reportedly told that, if she did not cooperate, they would file charges on her for other crimes surrounding Charlie's case. They also told her they would become involved in the custody case between her and her mother over her children. They said that they would recommend to the courts that her mother gain full custody and that Myra's rights be taken away. The distinct impression was created that she was expected to come up with something to help the State convict Charlie for Betty Black's murder. *Id*.

According to Myra, ADA January did not stop there. He repeatedly threatened her thereafter—saying he would have her arrested again for destroying evidence or hindering Charlie's arrest. He said he would pursue those charges after the trial was

over if she did not testify for the State. He said he would make sure that she did not get probation and that she had to serve the entire seven years in prison for helping hide Charlie. She was terrified by all of this, and called Charlie, then incarcerated in the jail, hysterical that she was going to lose her children permanently and be sent to prison. *Id.*

The interrogation at the DA's Office occurred after Myra had previously been held for several days in the Farmers Branch drunk tank and then transferred to the Dallas County facility. She was released only because ADA January was unable to obtain an indictment on his first try. But he continued to try—and the experience spending several days in jail worrying about her children's fate suggested that January's threats were not idle. *See id.*

Myra claimed that ADA January threatened to bring charges against her after the trial was over if she did not testify for the State. Then he also promised that she would merely get probation if she testified, versus seven years in prison if she refused. *See id.* Myra's reports of ADA January's coercive behavior, originally gathered years ago, are corroborated by recently uncovered evidence showing that ADA January employed similar tactics with several other witnesses (including Judy Haney, Homero Garcia, and Waylon Dunaway). *See* Factual Background, Section IV; *see also* Ex. 37; Ex. 58; Ex. 34.

2. The State's foul blows were material to the sentence that Charlie Flores received.

Charlie Flores's death sentence is unconstitutional because it was obtained based on a false theory of his culpability relative to his absent co-defendant Ric Childs who received wildly disparate treatment reflecting arbitrariness and bias; and the sentence was obtained by the State's abuse of its powers to sabotage the defense's ability to put on key mitigation witnesses.

a. The Supreme Court has long held that the Fourteenth and Eighth Amendments require heightened reliability in death-penalty cases.

In its multi-decade, post-*Furman* effort to constitutionalize the death penalty, the Supreme Court of the United States has required heightened reliability in the decisions that factfinders make during a capital trial—particularly when it comes to imposition of the sentence itself. *See Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); *see also Furman v. Georgia*, 408 U.S. 238 (1972) (holding the death penalty, as applied, violated the Eighth and Fourteenth Amendments because of the absence of procedures to guide and channel sentencing discretion). This heightened-reliability requirement is a corollary of the truism that "death is

different." *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (finding "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

The Supreme Court's concerns about the need for heightened reliability arose from observing the arbitrary nature whereby death sentences were sought and imposed. It is difficult to conceive of a more arbitrary imposition of a death sentence then is presented here. The prosecution aggressively argued for death, characterizing Charlie Flores as if he were some remorseless serial killer—all the while knowing that they were suppressing and misrepresenting Ric Childs' role in the crime, were arranging for Ric, the absent co-defendant and the actual shooter, to receive an exceptionally light sentence, and were abusing their office to tank Charlie Flores's ability to put on mitigation witnesses.

b. The false theory of relative culpability and the disparate treatment that Charlie Flores and Ric Childs received was material.

The State *knew* that Ric Childs (1) had set up the drug deal involving Charlie and Jackie, (2) had planned the burglary with Jackie, and (3) had admitted to Jackie that *he* had shot Betty Black. Yet in the guilt-phase of the case, the State argued that Ric and Jackie were essentially Charlie's pawns. The prosecutors repeatedly referred

to Charlie as a "big dog" drug dealer, "the driving force" behind the crime, contrary to the record evidence. 39 RR 47, 89, 91. Then, at the end of the punishment phase, the State doubled-down on its insistence that Charlie, not Ric, had shot Mrs. Black. A central theme of the State's punishment-phase Closing Arguments involved pushing the false theory that Charlie had been the shooter, relying on their "bigger gun" fiction:

- "the evidence in this case shows that that man [Charlie Flores] is the trigger man and not Ricky Childs." 41 RR 53.

- "if you wanted to give him [Charlie Flores] every benefit of every possible doubt in the world and ignore some of the evidence in the case, for example, the larger caliber weapon being in Ricky Child's [sic] possession in his[193] house with the potato in it, well, we know that's the gun that shot the dog." 41 RR 87.

- "We showed you that the larger weapon was on the possession of Richard Childs. The Defense lawyer didn't mention that. I guess he was asleep and didn't hear that part." 41 RR 92.

The entire purpose of revisiting this line of argument in the punishment phase was to convince the jury that, relying on the State's Ric-had-the-bigger-gun falsehood, was a basis for sentencing Charlie Flores to death. The argument was that a death sentence was appropriate because Charlie was *more* culpable than his absent co-defendant Ric Childs.

[193] There was no evidence that the house on High Meadow was Ric's house; he dropped by there at will, as he dropped by the homes of various girlfriends and other locales.

The suppressed evidence described above would have completely undercut the narrative that Ric and Jackie were pawns of Charlie. The suppressed evidence suggests the contrary, establishing as it does that: Ric Childs had set up the drug deal involving Charlie and Terry Plunk through Jackie; the timing of the drug deal was exploited to implicate Charlie in a far more serious crime that *Ric* had committed; Ric committed the capital offense while the State knew that Ric was out on bond and had failed to appear and had already committed other crimes; Ric had enter the Blacks' house on January 29, 1998, with some other white male with long hair whose identity has intentionally been suppressed; Ric and Jackie had been planning the burglary, perhaps since the outset of their relationship, and Jackie had provided Ric with crucial information about, and the means to get into, the Blacks' house; and *Ric* had shot Betty Black, a fact that he confessed to Jackie soon afterwards. This admission was then knowingly suppressed by the investigators and prosecutors working on the case. Even assuming that Charlie Flores was present when Mrs. Black was shot, ***which Charlie Flores adamantly denies***, Ric Childs was patently more culpable. And it was material that the jury did not hear the evidence to that effect.

Significantly, in *Brady* itself, the Supreme Court held that suppressed evidence concerning relative culpability—even if not entirely exculpatory—requires a new trial. *Brady*, 373 U.S. at 87. If the suppressed evidence of relative culpability

were only material to punishment (not the case here), then at least a new punishment-phase trial would be required. A recent example is instructive: *see United States v. Tsarnaev*, 968 F.3d 24, 73-74 (1st Cir. 2020) (vacating death sentence based on evidence suppressed that would have shown that the defendant, Dzhokhar, was less culpable than his brother, Tamerlan, in perpetrating the Boston Marathon bombing). The suppressed evidence in *Tsarnaev* related to a crime in which the defendant, Dzhokhar, had no involvement. Dzhokhar alleged a *Brady* violation based on the government's suppression of the report and recordings of a confession by a man named Todashev who claimed to have participated in an unrelated murder with Dzhokhar's older brother Tamerlan. The defense argued that the suppressed confession demonstrated Tamerlan's leadership role and ability to control others, which was relevant to the defense's mitigation theory. *See Tsarnaev*, 968 F.3d at 66 ("'[I]f not for Tamerlan,' said his lawyer to the penalty-phase jury, 'this wouldn't have happened.'"). The government, in turn,

> called Todashev's statements about Tamerlan's role "unreliable" since he had an obvious motive to pin the murders on someone else . . . . And the government claimed that "[t]here's no evidence that the defense can point to anywhere, including . . . Todashev's own statement, that Tamerlan . . . controlled him in any way."

Id. The trial court had agreed with the government and denied the defense's request to present the suppressed evidence to the jury based on the conclusion that "'there simply is insufficient evidence to describe what participation Tamerlan may have

had'" in the Waltham murders and, additionally, "'it [was] as plausible . . . that Todashev was the bad guy and Tamerlan was the minor actor.'" *Id*.

The First Circuit reversed the trial court's ruling, emphasizing that the undisclosed evidence, which corroborated the defendant's mitigation theory of relative culpability "probably more than any other evidence," should be viewed in terms of how the defense could have employed it:

> [T]hat material had information that the defense never saw below, including: that Tamerlan planned the Waltham crime, got Todashev to join in, and brought the key materials (gun, knives, duct tape, and cleaning supplies) to the apartment; that Tamerlan thought up the idea of killing the three men to cover up the robbery; and that Todashev felt "he did not have a way out" from doing what Tamerlan wanted. Todashev's confession showed—probably more than any other evidence—how and why Tamerlan inspired fear and influenced another to commit unspeakable crimes and thus strongly supported the defense's arguments about relative culpability. And armed with these withheld details, the defense could have investigated further and developed additional mitigating evidence. To us, this means there is a reasonable probability that the material's disclosure would have produced a different penalty-phase result.

Tsarnaev, 968 F.3d at 74. Further, the First Circuit rejected the government's arguments that the suppressed evidence was not material:

> Material evidence includes information that creates a "reasonable probability" of a different outcome, *see Kyles*, 514 U.S. at 433 — and in a capital case that encompasses data that "play[s] a mitigating, though not exculpating, role," *see Cone v. Bell*, 556 U.S. 449, 475, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009). But make no mistake: "A reasonable probability does not mean that the defendant 'would more likely than not have [gotten] a different [result] with the evidence,' only

> that the likelihood of a different result is great enough to 'undermine[ ] confidence'" in the proceeding's outcome. *See Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 627, 181 L. Ed. 2d 571 (2012) (last alteration in original) (quoting *Kyles*, 514 U.S. at 434). To find the withheld evidence not material, the judge must conclude that the other evidence is so overwhelming that, even if the undisclosed evidence had gotten in, there would be no "reasonable probability" of a different result. And this standard is not met just because the government "offers a reason that the jury *could* have disbelieved [the withheld evidence], but gives us no confidence that it *would* have done so." *Id*. at 76.

Id.

Here, the evidence showing Ric's greater culpability, as the shooter and as instigator of the burglary, was kept entirely from the defense. The suppression was accomplished by hiding: most of the fruits of the police investigation, the evidence of the corruption that permeated the investigation, and the evidence of highly personal motives on the part of law enforcement to want to shield Ric Childs from paying for his crimes.[194] The suppression was also accomplished by deleting critical information about how Ric had admitted to being the shooter from a typed interview of the first known interview with Ric's co-conspirator Jackie Roberts. The

[194] Ric's undisclosed "history" with both the Farmers Branch SID and the Irving PD, his status as the son of a local police officer, his status as the brother of someone who was consulted quickly after the murder for leads, and his long history of receiving minimal punishment despite a criminal record dating back to his teen years shows that Ric had friends in high places. There was, however, no way to insulate Ric entirely from liability for Mrs. Black's murder because his flamboyant Volkswagen Beetle was observed by neighbors the morning of the crime and immediately linked to him. Also, almost immediately, one of those neighbors picked him out of two different photo lineups. Although Ric's friends-in-high-places could not insulate him entirely, they did everything they could to push responsibility away from him. He then went on to serve only 15 years of his 35-year sentence before being paroled—thanks again to the intervention of his connections. Ex. 14.

suppression was also accomplished by waiting to finalize a remarkable plea deal with Ric, in which he confessed to being the shooter, until after Charlie had already been sentenced to death. Ex. 9; Ex. 3.

Although Ric Childs never went to trial, long suppressed evidence now shows that the plan to show him leniency was in motion well before the Flores trial. Ex. 22; Ex. 56. The disparate treatment Ric ultimately received is legally significant because of prosecutors' obligation, not just to seek the truth, but to tell the truth about the relative culpability of co-defendants. *See Brady*, 373 U.S. 83; *see also Bradshaw v. Stumpf*, 545 U.S. 175, 187 (2005) (noting that use of inconsistent theories may violate a capital defendant's due process rights if the theory in question may have been "material to [the] sentencing determination" and if the inconsistent theories speak to who played the "principal role in the offense."), *rev'd on remand on other grounds*, *Stumpf v. Robinson*, 722 F.3d 739 (6th Cir. 2013) (en banc); *State v. Mills*, 788 So.2d 249 (Fla. 2001) (granting habeas relief in light of newly discovered evidence claim that co-defendant was triggerman, not Mills).

The Due Process Clause prohibits pursuing a theory of the crime that is inconsistent with the truth. Indeed, many courts have held that, whatever the truth may be, "the Due Process Clause prohibits the government from presenting mutually inconsistent theories of the same case against different defendants"—because at least one of those theories must be false. *United States v. Higgs*, 353 F.3d 281, 326 (4th

Cir. 2003). *See also Smith v. Groose*, 205 F.3d 1045, 1049, 1051 (8th Cir. 2000) (holding the "Due Process Clause forbids a state from using inconsistent, irreconcilable theories to secure convictions against two or more defendants in prosecutions for the same offenses arising out of the same event."); *United States v. Collins*, 799 F.3d 554, 581-82 (6th Cir. 2015) (acknowledging that inconsistent theories can violate due process) (quoting *Smith*, 205 F.3d at 1052); *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc) (plurality opinion), *rev'd on other grounds*, 523 U.S. 538 (1998); *In re Sakarias*, 106 P.3d 931, 944 (Cal. 2005) ("[W]e hold that the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair.").

Numerous courts have concluded that "the Due Process Clause prohibits the government from presenting mutually inconsistent theories of the same case against different defendants." *Higgs*, 353 F.3d at 326. *A fortiori*, the State's conscious deceptions in the instant case, calculated to shift culpability to one defendant (Charlie Flores) away from his socially connected co-defendant (Ric Childs) so that the former would be sentenced to death and the latter would be positioned to receive an exceedingly light sentence, offend the Constitution. The State's efforts to characterize Charlie Flores as the shooter to obtain a death sentence, where Ric would ultimately sign a Judicial Confession to being the shooter to obtain a thirty-

five-year sentence exposes an irreconcilable inconsistency at the core of the State's two cases arising from the same underlying crime. *Hall v. State*, 283 S.W.3d 137, 156 (Tex. App.—Austin, 2009) ("To violate due process, an irreconcilable inconsistency must exist at the core of the State's cases."). This process also resulted in utterly arbitrary sentencing, forbidden by the Eighth Amendment. *See Gregg*, 428 U.S. at 189 (requiring that the procedures for imposing a death sentence must be structured to reduce arbitrariness and capriciousness as much as possible).

Former ADAs January and Davis were intent on convincing the jury that Charlie Flores, not Ric Childs, had shot Mrs. Black—although, under Texas's law of parties, the State did not need to prove who had pulled the trigger. But it is indisputable that seeing one of two co-defendants as more culpable is material—particularly in assessing punishment. The State wanted, not merely a conviction, but a death sentence. And those representing the State in this case plainly peddled false evidence to make Mr. Flores seem more culpable relative to the absent Ric Childs who was ultimately shown remarkable leniency. *See Thompson*, 120 F.3d at 1059, *rev'd on other grounds*, 523 U.S. 538 (1998) (finding prejudice in a multiple-defendant case where the State argued inconsistently at defendant's trial that the defendant "was alone in the apartment and killed [the decedent]" and where the State called jailhouse witnesses "who were known to law enforcement officers to be wholly unreliable").

What the State did in prosecuting the two cases against co-defendants Charlie Flores and Ric Childs resulted in fundamental unfairness. Such deceitful and misleading conduct "reduce[s] criminal trials to mere gamesmanship and rob[s] them of their supposed search for truth." *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring).

c. The State's abuse of its powers to sabotage the defense's ability to present mitigating evidence was material.

On top of the Big Lie concerning the relative culpability of the two co-defendants, the State took actions to sandbag the defense's ability to put on mitigating evidence in the punishment phase. The State then exploited this vacuum that it had helped create to strike yet another foul blow.

When the punishment phase began, the prosecution knew, for instance, that Charlie's elderly parents, Lily and Carter Flores, were still under indictments—which ADA January had pursued. January had also gone to the Grand Jury multiple times trying to indict Myra Wait. January knew that he had put all three of these individuals on the State's witness list and subpoenaed them so that they believed that the State would call them to testify against Charlie. January also knew that subpoenaing the Floreses and Myra Wait as witnesses kept them out of the courtroom throughout the trial, creating the impression that Charlie had no supporters. Charlie directly beseeched the trial court about how court security "told

me that I couldn't even turn around to see my family here." 40 RR 159. But he was powerless to do anything about the way his family was treated by state actors before and during the trial in which his life was on the line.

The prosecution knew that Charlie's loved ones had been terrorized into thinking that they had no option, if called to the stand, to invoke their Fifth Amendment right to remain silent. Then the State exploited this situation to argue that no mitigation against a death sentence existed.

The youngest prosecutor on the team first took up the theme, arguing in Closing Arguments: "not one witness that was presented in this Courtroom had a good thing to say about that man sitting over there. Not one shred of mitigating evidence was brought to you by those witnesses, let alone a sufficient mitigating circumstance to change a death sentence to one of life." 41 RR 53. This argument implies that no witnesses existed who had anything good to say about Charlie; yet in a hearing outside of the jury's presence, it had been made clear that Charlie's parents and his wife had been led to believe that, because of the indictments hanging over them, they could not testify. 40 RR 140-41.

Then, when it was his turn, ADA Davis revisited the same deceptive argument:

> I mean, we talk about mitigation. If mitigation were drops of water to be poured out on the floor of this Courtroom, this Courtroom floor is bone dry, ladies and gentlemen. . . . where is that one, just one piece of paper? Where is one person, just one

> person, neighbor, friend, family member, just one person to tell you that there is just one thing redeeming about this man where he ought to escape justice? Where is it? Not to be found, is it? Because he's literally a man without an excuse over here. No mitigation whatsoever as you look at Charles Don Flores.

41 RR 58.

ADA January then followed suit, arguing to the jury about the complete absence of anyone willing to testify in support of Charles Flores: "what is mitigating in this case? … his common-law wife. Where is she? … Bring her on. It's a reasonable deduction from the evidence they don't have anything good to say about the Defendant, his parents, his brothers." 41 RR 92.

Because of the State's actions, the jury did not learn the most basic facts about Charlie's life. The jury did not learn that Charlie's father was a deeply religious man, a deacon in his church, a hard worker who had built up a roofing business from scratch twice. The jury did not hear about the deep love both of Charlie's parents had for him that was obviously reciprocated. The jury heard nothing about the hardships the family had endured and how Charlie had been introduced to drugs at a young age by his much-older half-brothers who felt significant guilt about these influences. Nor did the jury hear how Charlie had stepped up to help Myra raise her three daughters, who had no father. Likewise, the jury heard nothing of the love they had expressed to each other and the commitments they had made—captured in letters seized by the State. The jury likewise did not hear how the State had targeted Myra,

Lily, and Carter precisely because of their obvious devotion to Charlie and the concerns he had voiced about the way they were being treated because of trying to help him. *See* Ex. 13; Ex. 29; Ex. 32; Ex. 4.

The complete absence of any mitigation presentation—where ample evidence was available—certainly speaks to defense counsel's grossly deficient performance. *See Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam); *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam). But the State should not have been complicitous in this deficiency. The prosecutors here were not simply capitalizing on an incompetent defense. The prosecutors had used threatens of prosecution and their power to seek indictments and issue subpoenas to terrorize the most obvious mitigation witnesses. Then the State demonized Charlie by falsely proclaiming that no mitigation existed.

Indeed, the rhetoric the prosecutors employed in entreating the jury to impose death is extreme, highly objectionable, and wholly untethered from reality. The audacity of this rhetoric is maddening when viewed in light of the massive misconduct in which these same state actors had engaged to obtain what they must have known was a wrongful conviction:

- "Charles Don Flores doesn't care who or what he hurts." 41 RR 47;
- "no one is safe from that man right there." 41 RR 50;

- "no matter where this Defendant is, no matter who he is around, no matter what part of society the Defendant is placed in, there can be no doubt whatsoever that he will continue to commit criminal acts of violence." 41 RR 52;

- "Back on January 29th of 1998, Elizabeth Black looked, and as you do now, upon the face of evil. And it has a name, and it's [sic] name is Charles Don Flores." 41 RR 53;

- Arguing the death penalty exists "to protect us against predators such as Charles Don Flores, so we can live in a civilized society" 41 RR 55;

- "We have the death penalty today because Charles Don Flores exists." 41 RR 55;

- "Because we know now from the evidence this man right over here is always looking for a victim. It really doesn't matter who it is, who they are, where they are, what they are doing either. He's always looking for a victim." 41 RR 56;

- "He's always going to show an absolute disregard for human life. It means absolutely nothing to him." 41 RR 56;

- "literally a criminal Chameleon …. he will attempt to lull you into sleep into believing that he poses no danger at all." 41 RR 57;

- "Is this case about anything but the evil of Charles Don Flores?" 41 RR 86;

- "Does anyone on that Jury believe for one second that the personnel in the penitentiary is safe from Charles Don Flores; that every day he's alive, that somebody's daughter, or brother, or mother, or father that has decided to dedicate their lives to law enforcement, to the protection of even fellow inmates as they are in the penitentiary guarding him, do you think for a second that they are safe when Charles Don Flores is there? Fellow inmates? Other guards? Nurses? Doctors? I wonder which county hospital they go to when they get an injury in the penitentiary? Because, ladies and gentlemen, that's the bottom line in this case, and that is that society is not safe from Charles Don Flores until he's dead. It's that simple, and you know it is." 41 RR 93;

- "And if he has to kill whoever is in his way, he's going to do it." 41 RR 96;

- "He's going to go laughing onto death row. For the safety of everyone in the State of Texas, everyone in this room, and everyone in our country, I implore you to follow the law and answer the questions so this Judge has to sentence him to where people like him need to go, and that is to death row to await the day where he can finally -- we can finally sleep and know that his long arms can't reach anymore. The crime from the hand and mouth of Charles Don Flores is over." 41 RR 97.

This wholly improper argument alone should merit a new punishment trial. *See Drake*, 762 F.2d at 1460-61 (finding a reasonable probability that the prosecutor's improper argument about the status of the law "changed the jury's exercise of discretion in choosing between life imprisonment and death").

The prosecutors' extreme rhetoric conjures up the likes of Charles Manson, not a man who was the beloved son of two hard-working, deeply religious members of the community. Charlie had certainly strayed from the lessons of the Sundays spent going to the Cherry Lane Church of Christ in Midland with his family and then hunkering down to watch Cowboys games together. After a painful move in his teenage years that had disrupted his whole life, he had dropped out of school and fallen in with a bad crowd. But he had always remained true to his family and worked in the family business. After one brief stint in prison, he had worked to get his life together. But he had succumbed to the allure of the same street drug that had turned Ric Childs into an intravenous drug user whose every waking moment was spent trying to score more drugs. This same drug had driven Jackie Roberts to take up with

Ric while her common-law husband Gary Black, a drug dealer, was in prison; and it was Ric and Jackie who had schemed to get their hands on the "dirty" drug money that Gary had left behind. Charlie, who had used the discipline he had to pay for his own habit by selling a small quantity of drugs to his circle of friends, got hit by the same runaway train—driven by Ric and Jackie—that resulted in the horrible, pointless death of Betty Black. There is no evidence, however, that he was driving that train—and indeed no legitimate evidence that he had anything to do with Betty Black's murder. *See* Claims I-V above; *see also* Ex. 4; Ex. 27; Ex. 28; Ex. 29; Ex. 30; Ex. 31; Ex. 32; Ex. 33; Ex. 34.

In short, Charlie is not some irredeemable defiant who had callously taken a life—ever. Yet that is the portrait the State, having indulged in multiple deceptive maneuvers, painted—which had a material effect on the punishment that Charlie Flores received. *See Brady,* 373 U.S. at 87.

Even putting aside defense counsel's abject failure in pursuing *any* of the readily available mitigating evidence, the State's manipulation of the truth about Ric's greater culpability and its abuse of the Grand Jury to tarnish Charlie Flores's most obvious mitigation witnesses had a material effect on the punishment phase of trial.

C. Conclusion

Unlike a civil attorney representing a client, there is a "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281. A prosecutor may litigate with zeal, but the Constitution ensures that, "though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall be done. He is the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Agurs*, 427 U.S. at 110–11 (quotation omitted).

"Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.'" *Banks*, 540 U.S. at 696 (quoting *Berger*, 295 U.S. at 88). Here, it plainly was not. Without question, the prosecution in this case engaged in a pattern of deceptive behavior and active concealment. And the evidence suppressed controverts the basis for Charlie Flores's conviction and the sentence imposed. The Constitution requires far more, especially in the case of a man sentenced to death. At the very least, Charlie Flores is entitled under *Brady* to a new punishment-phase trial.

VI. CHARLIE FLORES'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS WERE VIOLATED BY THE STATE'S KNOWING USE OF FALSE TESTIMONY AT THE GUILT-PHASE OF HIS TRIAL.

Charlie Flores' constitutional rights under the Fifth, Sixth, and Fourteenth Amendments were violated by the State's knowing reliance on false testimony in the guilt-phase of trial.

When the trial began, the State's strategy was to convict Charlie by relying on the testimony of a heavily coached accomplice to the burglary (that resulted in Betty Black's death) and by demonizing him through the presentation in the guilt phase of extraneous offenses. The State's heavily coached star witness, Jackie Roberts, was caught in multiple material lies during trial. (Other significant lies were impossible to expose at trial because of suppressed evidence.) Even so, the State relied primarily on Jackie to tell its guilt-phase story. The State also knowingly relied on a host of false testimony from other witnesses, some of which was manufactured on the fly during trial.

A. Legal Standard

A conviction obtained by the prosecution's knowing use of false testimony violates the Sixth Amendment right to a fair trial and the Fifth and Fourteenth Amendment guarantees of due process, because "[s]uch a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

Mooney v. Holohan, 294 U.S. 103, 112 (1935). This is true whether the prosecution solicits the false testimony or simply allows unsolicited false testimony to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citations omitted); *see also Canales v. Stephens*, 765 F.3d 551, 573 (5th Cir. 2014). The knowing use of false testimony renders the result of a proceeding "fundamentally unfair, and [the verdict] must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Bagley*, 473 U.S. at 679.

A false-testimony claim under federal constitutional law requires proof of three elements: (1) the falsity of a witness statement; (2) the State's culpable elicitation or failure to correct it; and (3) materiality. *See United States v. Dvorin*, 817 F.3d 438, 452-53 (5th Cir. 2016). The second prong has been read broadly and is satisfied when anyone on the government's team knew, or the prosecution should have known, the testimony was false. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The standard for determining whether false testimony was material under *Napue*'s third prong is ***more lenient*** than the *Brady* materiality standard, because "the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves a corruption of the truth-seeking function of the trial process." *Bagley*, 473 U.S. at 680 (internal quotation marks omitted). Even if sufficient evidence exists to support the guilty verdict without the perjured

testimony, "the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence with all its ramifications." *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979). Accordingly, the *Napue* standard is equivalent to the harmless error standard of *Chapman v. California*, which requires the State to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Bagley*, 473 U.S. at 679 n.9 (quoting 386 U.S. 18, 24 (1967)); *Barham*, 595 F.2d at 242.

Finally, as the Supreme Court has reminded, false and misleading testimony must be evaluated for materiality cumulatively, not piecemeal. *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam) (overturning a conviction because "the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively").

B. Application of Law to Facts

1. The State knowingly presented and failed to correct false and misleading evidence in the guilt phase of trial.

The guilt phase of the Flores trial was replete with instances of the State presenting evidence that it knew to be false and/or misleading, leaving the fact-finder with the false impression that a great deal of circumstantial evidence supported a guilty verdict.

a. Numerous witnesses, induced or enabled by the State, gave false testimony.

i. Jackie Roberts gave false testimony.

Jackie Roberts, the State's star witness, gave testimony fraught with lies. Some of those lies simply speak to her credibility: that she lied about having been off drugs for two years before she met Ric (34 RR 110); lied about being in some "antennae repair" business with Jason Clark (34 RR 108; 38 RR 115); lied about being unconcerned that Gary Black had told his parents to cut her "allowance" from his hidden drug money in half (38 RR 150); lied about whether she had told Ric to look for the money hidden at the Blacks' house behind the bathroom walls (38 RR 119); lied about having drawn a map for a babysitter, not for Ric, although, after the murder, such a map was found in Ric's backpack, which Jackie's ex-husband Doug admitted throwing away to protect Jackie (38 RR 121-131); lied about knowing that Ric's backpack, which had been left in her car the morning of the murder, was brought from her car to Ric by Ric's uncle while Jackie and Ric met privately, for hours, knowing they were suspects in Betty Black's murder (38 RR 148); lied about how long she had spent holed up with Ric (she said it was "45 minutes," 34 RR 165, whereas police records show it was over three hours). These lies are relevant to exposing the State's knowledge of Jackie's credibility problems. The State knew that its star witness was not credible; but far worse, state actors worked hard to insulate

her from being cross-examined about the truth and prepared her to give *false* testimony. *See, e.g.*, 38 RR 121-133.

Jackie's compendium of lies was the foundation of the State's case. Specifically, the State relied on Jackie to paint a picture of Charlie as a raging maniac hours before the murder, who was irrationally demanding money following a drug deal Ric and Jackie had set up that had left Charlie feeling he had been shorted. The State relied on Jackie's testimony that he had pointed a gun at her to make his point and then traveled around with Jackie and Ric thereafter until around 7:00 a.m. before depositing her and her El Camino back home in Farmers Branch. Jackie also testified a fair amount about guns. She volunteered that, the night of the drug deal, she had seen Ric with "a very small gun, silver" but she also "noticed that [she] thought he [Charlie] had a gun" although she did not claim to see a gun until later that night. 34 RR 133. But as explained further below, later in her testimony, she tried to provide support for the State's false insistence that Ric had "the bigger gun," meant to support the State's baseless argument that Ric shot the dog, not Mrs. Black, and thus was less culpable.

Jackie was the only person to testify extensively about what supposedly happened after she, Ric, and Charlie had finished the awkward drug deal with Jackie's friend Terry Plunk and Judy Haney. This long sequence in her testimony was carefully scripted. It did not, however, match the information in a "Voluntary

Statement" she had given a few days after her arrest on February 4, 1998. That two-and-a-half-page statement, derived from a custodial interview that spanned many hours, also did not match some key facts in the police's possession. The truth is not reflected in that pre-trail statement or her trial testimony; but the telling difference shows a chronic problem she had with the straight-up truth.

Again, at trial, the jury heard only from Jackie, a very interested party, about what had allegedly transpired during that critical timeframe, *after* the drug deal, from around 4:00 to around 7:00 a.m. She began by explaining: "I was assuming we were going to my house on Emeline, whereas we took a few wrong turns and ended up at the Defendant's trailer park, where we went in." 34 RR 135. In truth, instead of "a few wrong turns," Ric had driven directly from Judy Haney's apartment to Irving, where Charlie lived, but made two stops on the way: (1) at an apartment complex in Irving where Ric tried, but failed, to steal a Camaro Z28; then (2) at a house on Glenwick right by Charlie's trailer in the Big Tex trailer park in Irving.

But Jackie skipped over that part and described only going into the trailer, where Charlie's girlfriend Myra and her three girls, whom Jackie did not know, were all sleeping. She also described a mystery man with "long hair, a moustache, real thin, didn't look like he worked with his hands. I mean, he wasn't greasy. He was clean cut. He didn't say a word the whole time." 34 RR 136-137. (No one seems to have been interested in who this man was—if he existed. Quite possibly, he was

another product of Jackie's overheated imagination.) Jackie then described going into the back bedroom where Myra was sleeping and watching Charlie weigh the drugs. Jackie testified that, after weighing the drugs, Charlie "jumped up and said, we've been ripped off. And I came across the room and he held the gun to my head. He told me that he had been ripped off." 34 RR 138.

Whatever gun supposedly materialized at this moment she did not describe. But she and ADA January worked together to otherwise paint a vivid picture:

> Q. So what exactly did the Defendant tell you when he had a gun on you?
>
> A. And asked me how much he thought my [drug] connection would give me for my head.
>
> Q. What did you take that to mean?
>
> A. I took that to mean that I needed to call my connection and find out what I could get from him.
>
> Q. Well, how much for your head. What does that mean?
>
> A. That means —— it's a threat, I guess you would call it.
>
> Q. Did you take it as a threat?
>
> A. No, not personally. I took it as a — I thought he was joking. I really...

34 RR 139.

ADA January did not like that answer, so he moved on. Jackie then described getting concern because "the Defendant" kept ranting and raving and accusing her

and Terry Plunk of ripping them off. 34 RR 141. Meanwhile, all the people in the trailer, including Myra in the room with them, supposedly slept through this. Jackie claimed they spent "45 minutes to an hour" in the trailer, a patent exaggeration. 39 RR 143. But she needed to account for all of that critical time, from about 4:00 to 7:00 a.m., somehow.

Her rehearsed testimony then described events that supposedly happened up to 7:00 a.m.—a chronology that was entirely false:

Jackie described them driving about "a block away" where she says Ric and Charlie "picked up weapons at this house" "a couple blocks away." 39 RR 143. Jackie's position was that she stayed in the car but saw Ric and Charlie come out about five minutes later carrying guns (although she had already testified that they both had guns: she had described Ric as having "a very small gun" and then Charlie waving around some gun and pointing it in the direction of her head). This part of the script was very important to the prosecution, though, as the State needed support for its "Ric-had-the-bigger-gun" story. Jackie, however, had difficulty keeping the false story straight:

> A. . . . I stayed in the car, and they went into the house. And they both carried out — the Defendant carried out two guns, and Rick carried out one.
>
> Q. Can you describe them for us, the weapons.
>
> A. One was a long, blue gun.

Q. Okay. Who had that weapon?

A. Rick did – the Defendant, excuse me.

Q. Charles Flores had the long, blue gun?

A. Yes, he did.

Q. What was the second gun the Defendant had?

A. A handgun.

Q. Okay. What about Rick Childs, what kind did he have?

A. A bigger handgun.

Q. Between the two handguns, then, who had the largest handgun that came out of that house?

A. The Defendant.

34 RR 144.

ADA January got frustrated about her inability to keep his story straight: "Do you know anything about weapons, like what's a .38, what's a .9, what's a .357, all that stuff?" *Id.*

In response to this question, Jackie was at last candid: "No, sir, I don't." *Id.*

Jackie then claimed that they went on to "an apartment complex, which was in Irving. And the Defendant told me to stay in the car, that they could see where I was." 34 RR 145-146. This stop at the apartment complex had actually happened on the way *to* Irving from Judy Haney's apartment. In retrospect, law enforcement

likely knew this because they had been ***monitoring Ric's movements*** and knew more about what Ric had done in that parking lot than Jackie did. (He had tried to steal a Camaro Z28). Investigators knowledge is revealed in a partially recorded custodial interview with Ric on February 5, 1998. But again, Jackie was trying to put Charlie with her and Ric at a time when Charlie had actually stayed behind at his trailer and gone to bed. Ex. 4. So, Jackie transposed events that had happened earlier that night to fill in that time.

She claimed that she sat in her El Camino in this apartment complex parking lot for "Twenty, 25 minutes," but had no clue what Ric and Charlie did during this time. She testified that they eventually came back "sweating, sweating and really mad." 39 RR 146. Thus, she supposedly sat idly by, in her own car, for 20-25 minutes while they were out of sight.

Next, Jackie had them go to a nearby gas station. She says "Defendant went in to pay for the gas." 39 RR 147. Perhaps realizing that it did not make sense that she had not tried to get away if she really found Charlie so frightening, she offered this scene:

> A. I pushed on the gas pedal. I wasn't in the driver's side, and I had no time to get away.
>
> Q. Did the car move?
>
> A. The car moved. The car moved. He – the – he was pumping gas. The gas went flying everywhere, and then –

Q. Who was pumping the gas?

A. Rick Childs.

Q. Okay.

A. The Defendant came running from the store.

Q. Okay. What happened next?

A. That's when he grabbed me by the back of my hair and said, bitch, where do you think you're going?

34 RR 147-148.

Apparently, after this dramatic episode, with gas flying everywhere and Charlie bounding from inside to grab her by the hair, they all just got back in the car and drove off.[195] Jackie says they then went back to talking about "the money situation or the drug situation." *Id.*

Supposedly, the next stop after this was Jackie's house, and, according to Jackie, it was, by then 7:00-7:15 a.m. 34 RR 149, 153. Indeed, she was adamant about that time. *See id.*; *see also* 38 RR 142.

[195] The State adduced no evidence to corroborate any of Jackie's testimony about what had happened at the trailer and then the supposed itinerary upon leaving Charlie's trailer. The State, that is, adduced nothing from Myra or the mystery man Jackie said was in the trailer, no one from the house a block or so away where guns were reportedly acquired, nothing about the episode in the Irving apartment complex, and nothing about the wild, gas-went-flying episode at the gas station. Aside from not having any such evidence, in retrospect, the State did not likely want to prompt the jury to consider that Jackie, even with this fictional sequence, had not come close to accounting for how she had spent about three hours (4:00-7:00 am).

Perhaps, to obscure that, even with her false chronology, the timing did not add up, ADA January led her back to the discussion over the money and how Jackie had volunteered that she "had money at [her] in-law's house" that she could pay them with. 34 RR 150. But ADA January also wanted it to be clear that Charlie, not Ric, was the one demanding money. January asked: "How did Rick intervene in this argument?" 34 RR 151. Jackie claimed that Ric "confirmed" she had access to this money; that is, Ric supposedly vouched for the concept that Jackie had money stashed at some house that she could use to pay Charlie back for being shorted—although she denied that he had been shorted. *Id*. According to both Jackie and her connect, Terry Plunk, the drug deal that she set up for Ric was supposed to be for a ¼ pound of meth and was supposed to be just between the two of them (at Judy Haney's apartment). 34 RR 117-118, 204-205. But even Jackie and Terry did not testify consistently about what the terms of the deal had been. Jackie said that the price was supposed to be $3,900; Plunk was adamant that the deal was for $3,600. Judy Haney provided some helpful context: (1) $3,900 for a ¼ pound of meth would have been "expensive;" and (2) you cannot tell how much meth you are getting from looking at it; you have to weigh it. 34 RR 188-190. Thus, even the trial testimony provides some support for Charlie's perception that they had been shorted if he believed he was buying ½ pound and Plunk believed he was selling ¼ pound. In any event, there seems to have been no clear "meeting of the minds" on the parameters

of this deal. But Jackie had been coached to describe Charlie as changing, inexplicably, from a pleasant person into a raging lunatic, demanding money and terrorizing her with a gun for no reason. *See, e.g.*:

> Q. Prior to getting over — prior to the drug deal going down and occurring, how would you describe the personality of the Defendant before that happened?
>
> A. Very kind.
>
> Q. What were you-all discussing prior to that?
>
> A. He was raising three children that weren't his. He was trying to be a father to –
>
> Q. Did he seem pleasant to you at that time?
>
> A. Oh very pleasant.
>
> Q. Even though you knew he was the connect, the big drug dealer?[196]
>
> A. Yes, sir. Yes.
>
> Q. Can you tell the Members of the Jury how his personality changed from that state?
>
> A. It was like split personality, two separate totally two different people, from one extreme to another.
>
> Q. What was the last extreme? How did you see him?
>
> A. Very skittish, real wiry.

[196] Again, the State adduced no evidence that Charlie as some "big dog" drug dealer; only Terry Plunk, who was not prosecuted, seems to have ready access to large quantities of "product."

38 RR 164-165.

The State's next mission was to try to preemptively rebut some of the things that did not make sense about Jackie's story that the defense would likely raise. For instance, ADA January asked her if she had told her trusted friend and ex-husband Doug, who was there waiting at her house when she returned home after being out all night, "about the predicament" that she was in. Jackie admitted that she did not tell him anything. 34 RR 154. As for what Jackie did over the next few hours, she claimed that she left the house on Emeline to go visit her friend Alan Weaver "who had a hotel room." 34 RR 155. Later, during cross-examination, she suggested that she did this because "[t]he tags on his motorcycle were not good, so he wanted me to make sure he made it to his hotel room without getting pulled over." 38 RR 142. (Funny that a phone call would not have done the trick.) She suggested that she told Weaver at this time that there was something "really strange" about Ric and his friend. *Id.* Alan Weaver, however, made no mention of such a conversation when he went to speak with the police the day after the murder, at Doug's suggestion, upon hearing he might be a suspect. AppX57.

Jackie also described meeting up with Terry Plunk later that day (January 29, 1998). She claimed that they had been planning to go into "business" together, a business that would involve "repairing" car antennas—just like she did with Jason Clark. 34 RR 156-158. According to Jackie, only after she came back from shopping

around for this business, did she learn that Terry had "gone through the bag" that Ric had left in her car. 34 RR 158. Inside the bag, Terry had found a hand-drawn map to the Blacks' house—which Jackie, at trial, insisted that she had drawn for a babysitter; she identified that babysitter as "Doug's girlfriend" Elaine, although Doug was then living with a woman named Kimberly Cole. 34 RR 159-160. (Kimberly Cole, whom the jury did not hear from, had told the police, the night of the murder, that "Gary Black was 'known' to have kept large sums of cash at his mother's home and that Jackie had likely passed this knowledge on to Rick" and that "she has been known to say she wants to get hold of some of that cash." AppX57.

To try to prepare for the inevitable cross-examination on this point about a map, ADA January walked Jackie through the following sequence, to invite her to obscure the truth:

> Q. All right. At some point did you tell the police that you had drawn the map for them, for Rick Childs?
>
> A. Yes, I did.
>
> Q. Was that true?
>
> A. No, sir, it wasn't.
>
> Q. Okay. Now, why would you tell them that?
>
> A. After hours and hours of…
>
> Q. Were they asking a lot of questions?
>
> ….

A. Yes, sir.

34 RR 161. This airbrushing of the truth happened out in the open because her "Voluntary Statement," containing this admission about the map, had been produced to the defense. By contrast, the State had suppressed that Jackie had admitted, during a different interview with Callaway and January, (1) that she had believed that, if Gary's "dirty money," hidden in the bathroom walls, had been stolen, his parents would not have alerted the police; and (2) that Ric had confessed to her that he had shot Mrs. Black. Ex. 9.

Jackie then tried to obscure that, after learning of Mrs. Black's murder, she had spent days avoiding the police—while knowing they wanted to talk to her. In scrubbing the truth, she suggested that she was fine with Doug going to the police: "I wanted him to go and tell what I know, and he went and he told them"—she said. 34 RR 164. Interestingly, Doug, during two extended conversations at the police station, said nothing about Jackie fearing a Hispanic male named Charlie or suspecting his involvement in Mrs. Black's death. Instead, Doug told law enforcement only about seeing Ric and his Volkswagen and otherwise emphasizing Ric's likely involvement. *See* AppX57.

Next, Jackie was permitted to lie about how long she had spent holed up with Ric after they both knew they were suspects. She claimed it was only for 45 minutes, 34 RR 165, when the truth, as captured in police surveillance records, was that they

spent over three hours together in Ric's grandmother's house at High Meadow. 38 RR 147. Those same records also show that, at some point during that time, Ric's uncle Max Salmon left the house, went to Jackie's El Camino, took out a backpack, brought the backpack into the house, and that backpack was thereafter found on Ric when he was arrested soon after midnight on January 31, 1998. AppX8. Indeed, at least five people seemed to gotten their hands on this backpack soon after Betty Black's murder—Jackie, Doug, Terry Plunk, Mack Salmon, and Ric—*before* it was confiscated nearly two days after the murder. At trial, Jackie denied any knowledge of the backpack, let alone its mysterious movements. 38 RR 148.

She was not asked about the opened box of ammunition found in that backpack that had been in *her* car for several days and that both Terry Plunk and Doug Roberts had rifled through. Also, she was not asked about whether she knew that the brand and style of ammunition found in Ric's backpack proved to be an exact match for the bullet that had killed Mrs. Black.

Nor was Jackie asked why her husband Gary Black had told police that he believed Jackie and Doug should be investigated—because records about Gary's contributions to the investigation were not disclosed.

Nor was Jackie asked about who Ric may have been referring to when he had told police that "***he*** had my bag up until I don't know, man. **He had my bag up till that night when you all picked me up**, and we were in the El Camino." SXR101.

In the context of the custodial interview, back on February 5, 1998, it is now clear that the "he" to which Ric was referring was ***not*** Charlie. The context also makes clear that law enforcement already knew who the "he" was whom Ric had in mind. During this exchange, law enforcement was also told that the .44 magnum revolver, central to the State's "Ric-had-the-bigger-gun" story, had *not* been used in the crime:

> Baker: Did you already have a gun?
>
> Childs: I had my .44, but I didn't use – ***but my .44 was never used.***
>
> Stanton: We've had a lot of people tell us you had a .380
>
> Childs: No, sir. I had a .25 and I gave it back. Jackie got my .38 and the .380.
>
> (Laughing)
>
> Childs: She got mad at me and, uh…
>
> Koehlar: Tell me something. (Laughing) That .380 ammunition that's in your bag, that's the ammunition that was used in the [Blacks'] house. How did that get in your bag?
>
> Childs: I don't know, man. **He had my bag up till that night when you all picked me up**, and we were in the El Camino. And then, Charlie was in the El Camino, too.

Id. (emphasis added).

Whoever that other male was—who Ric said had been "in the El Camino" with Ric and Jackie—is, to put it mildly, highly relevant. This other, unidentified

male was likely the other "white male" with "long, dirty hair" who had been seen entering the Blacks' house with Ric the morning of the murder. But for whatever reason, the police, with Ric and Jackie's help, wanted to conceal this person's identity; and in exchange for their assistance in the subterfuge, Ric and Jackie were ultimately rewarded handsomely. But the trace evidence of the subterfuge exposes that the State was knowingly involved in soliciting false testimony from Jackie about what she and Ric did after leaving Charlie's trailer around 4:00 a.m. when he went to bed. Ex. 4; Ex. 13.

But on the stand, Jackie did make one small, but significant, and likely inadvertent admission about how she had been induced to cooperate. She admitted that, after she was in custody, police had brought up Charlie and told her "he was still on the loose." 34 RR 167. And in exchange, she "took them to the trailer park" where he lived and to the "house where they picked up the guns, the apartment where they took me to, the gas station, everywhere." 34 RR 168. What the trial transcript does not reveal is that someone—either Ric or law enforcement—had convinced her that it was appropriate for Charlie to take the fall for this crime because he was mixed up in the "Mexican Mafia" who would have people come after her and her kids. At least that is what her "Voluntary Statement," taken on February 4, 1998, says. Ex. 8. The suggestion that Charlie was in the "Mexican Mafia" or any other prison gang was a lie. But that lie had served its purpose of inducing Jackie to act, seemingly, in

her own self-interest, to spin whatever story needed to be spun to place Charlie in Ric's Volkswagen with Ric until around 7:00 a.m. on January 29, 1998.

After establishing just how helpful she had been to police (without noting that she had spent nearly five days evading arrest), the State then solicited one of the biggest lies of all:

> Q. Has Farmers Branch Police Department, any police department, the DA's office, or anybody promised you anything to give this testimony?
>
> A. No, sir.

34 RR 168. Jackie's answer, of course, cannot be squared with the fact that a condition of her probation not being revoked had been that she would meet *weekly* with ADA January, during which time, as she herself subsequently admitted, they worked together on her testimony. Ex. 18. In exchange for this mentorship from ADA January, he also agreed not to indict her for conspiracy to commit capital murder, the crime for which she had been arrested. Refraining from doing so was also exceeding helpful to the State's case. Having a star witness who was also being pursued as a co-conspirator would have further undermined the credibility of the case against Charlie Flores, the State's preferred "bad guy" who did not have the special connections that Ric, Jackie, and, especially, the unidentified co-conspirator had.

Conveniently for the State and its star witness, defense counsel inexplicably opted to defer cross-examining Jackie until it was time for the defense's case-in-chief. In the interim, ADA January had arranged for Jackie to receive a rush copy of the transcript of her testimony. 38 RR 111. Having studied that transcript, when she was recalled to the stand several days after her initial testimony, she stated that she wanted to make several corrections. 38 RR 111-112. The main correction she wanted to make was to try to mend the damage she had inadvertently done to the State's "Ric-had-the-bigger-gun" story. Jackie said: "when I stated the fact that the Defendant had the largest gun he had the largest gun, but not the largest handgun. Rick Childs had the largest handgun. The Defendant had the smaller one." 38 RR 113. This testimony was also false.

During the multi-day interval between Jackie's direct- and cross-examination, she and ADA January also had time to develop another story. On re-direct, Jackie offered an alternative explanation as to how Ric could have learned the Blacks' address—aside from the map she had drawn, found in his backpack. She claimed to have shown him the check that Betty Black had given her on January 28th, upon breaking the news that her "allowance" from Gary's drug money was going to be cut in half. ADA January also suggested rhetorically: "the Black's [sic] on Bergen Lane, were they also listed in the phone book?" 38 RR 155-56. The latter, however,

implies that Ric already knew they lived on Bergen Lane and those could easily have sifted through all of the "Blacks" in the phonebook on his own if he had wanted to.

ADA January also invited Jackie, on re-direct, to elaborate on how she had really made the map, found in Ric's backpack, for a babysitter. As for her admission that she had told the police that she had drawn the map ***for Ric***, she testified that what she really meant was that the map just showed "where I had to go to get the money." 38 RR 158, 159. That testimony, facially ridiculous, begs the question: why would she need to illustrate for others where *she* had to go to "get money"? The State knew the falsity of all this—especially in light of evidence that several people had informed police that Jackie had been obsessed with that money and, as long as she and Ric had been palling around, she had been talking about wanting to get that money. These conversations about wanting Gary's money had occurred well before Jackie's one brief encounter with Charlie, whom Ric had conveniently convinced to put up the money to buy drugs from a "connect" in the hours before Ric and some other white male entered the Blacks' house in search of hidden drug money.

ii. Vanessa Stovall gave false testimony.

Vanessa Stovall, Ric's girlfriend dating back to her high school years, was recruited to give testimony about the key fact issue: who was with Ric Childs in his Volkswagen right before that car was seen outside of the Blacks' house on January 29, 1998. 35 RR 59-61. Vanessa's testimony, that Charlie was with Ric, could not

possibly have been true—unless the testimony of other key witnesses for the State (Doug Roberts, Jackie Roberts, and Jill Barganier) was false.

Vanessa told the jury that she and Ric had been living together up until January 1998 (the month that Mrs. Black was murdered).[197] 35 RR 61. In the six months before that, Vanessa had met Charlie a few times. She could recall no specifics. 35 RR 62, 65. But at trial, she was very specific about having seen him the morning of January 29, 1998. She claimed that at "6:30" in the morning, the following happened: She was sleeping in a back bedroom at Ric's grandmother's house on High Meadow; Ric crawled into bed with her and woke her up; they then went out to the kitchen/dining room, where Charlie was waiting; they all sat there "just talking, talking about the person that I was staying with at the time. Talking about me going to work;" next, they "did some drugs"—smoking some meth using "either a straw or a dollar bill," Vanessa couldn't "remember exactly"—but she felt like they wrapped up in about fifteen minutes, until "about 6:45 or 7:00" when she left for work. 35 RR 71-75. Putting aside the difficulty of seeing how all of these things, plus her getting dressed for work, happened in 30 minutes, that was her story at trial. 35 RR 71-76. She also insisted that, even without a watch, she knew this all

[197] Another witness, Deborah Howard also claimed that Ric had been living with her up until January 1998. 38 RR 174.

started at 6:30[198] because Ric had told her the time when he crawled into bed with her and she had then "verified it" by looking at a clock when they went into the kitchen. 35 RR 89. This facially strained testimony only served, however, to undercut testimony that Jackie and Doug Roberts had each given about Jackie being dropped off, by Ric, at 13412 Emeline Street in Farmers Branch between 7:00-7:15 a.m. 34 RR 153, 277. And as noted above, it was significant that Doug had not reported seeing a second person with Ric and Jackie when he went to the police the night of the murder; he had only reported seeing Jackie arrive home and seeing Ric leave in his Volkswagen.

It was physically impossible for Ric (with or without Charlie) to have been several miles away with Vanessa, at 11807 High Meadow in North Dallas, both before and during the same window when he was supposedly at 13412 Emeline Street in Farmers Branch. Additionally, Mrs. Barganier had insisted that she had seen the Volkswagen pull up at the Blacks' house in Farmers Branch and then two men get out at 6:45 a.m., thereby also contradicting Vanessa's testimony. 36 RR 279-282 (Mrs. Barganier testifying that she was certain about this time because of her "real strict schedule").

[198] By contrast, according to the SID memo prepared not long after Vanessa was first interviewed at the police station, she supposedly "advised" Officer Baker and the others that she had "observed" Ric and Charlie arrive at 11807 High Meadow at "approximately 6:45 A.M. . . . in a purple Volkswagen Beetle." AppX8.

The State needed Vanessa to corroborate Jackie's accomplice-testimony because no one could confirm Jackie's (false) story that Ric *and* Charlie had dropped her off at around 7:00 a.m. Before trial—indeed, the very night of the murder—Doug Roberts, after consulting with the Blacks' adult daughter Shelia and Jackie—had gone to the Farmers Branch police station and told them that he had seen *Ric* (and only Ric) get in his Volkswagen in Farmers Branch right around the time the car was spotted outside of the Blacks' house. (Notably, Jackie had said nothing to Doug about a second person. She had said nothing about Charlie or a Hispanic male, and made no suggestion that she feared such a person or that he might have been involved in the events at the Blacks' house.) Moreover, Doug could not help on this front. He had signed a statement the night of the murder and otherwise tried to "create a record," and that statement only mentioned Ric:

STATE OF TEXAS
COUNTY OF DALLAS

AFFIANT: Douglas Warren Roberts (NAME) PHONE: 214-363-5430

ADDRESS: 7031 Hollow Hill

LOCATION AFFIDAVIT GIVEN: _____

DATE GIVEN: _____ TIME GIVEN: _____

on about 1/29/98 I saw Richards Driving
The volkswagen away from my sons house.
I asked Jackie Roberts where is he
going. Jackie Roberts said. I Don't Know.

Doug then went back to the police station the next day. That second time, his discussion with lead detective Callaway was at least partially transcribed; and he did not suggest that he had seen a second male or heard anything about some scary Hispanic guy named "Charlie" from Jackie. But soon after *Ric* was taken into custody—and not because of any accurate information emanating from Ric himself—the police employed Vanessa Stovall in a calculated plan to reduce Ric's culpability and implicate Charlie Flores. AppX8.

Yet Vanessa's trial testimony, meant to corroborate Jackie's, just made a mess of the State's timeline—particularly when factoring in the neighbors' testimony. Therefore, to try to make it all hang together, in their guilt-phase Closing Arguments, the prosecutors suddenly offered the absurd proposition that the two men in Ric's flamboyant Volkswagen had come to the Black's house *twice* the same morning:

- "Is there any doubt whatsoever that Richard Childs and the Defendant knew that Betty Black was there? Absolutely no doubt. Why else would they — first of all they went there *twice*." 39 RR 93 (emphasis added).

- "Now, I believe its [sic] a reasonable deduction from the evidence, all the evidence you've heard, that the Defendant went in that house at his direction, and he wasn't taking tomorrow for an answer. He wanted the money right then. That he directed Rick Childs to get on over there. They checked it out first, looked inside, went around the corner, got ready, and as soon as they got their [sic] that *second* time, they went in." 39 RR 101 (emphasis added).

It was false that Ric and his cohort went to the Blacks' house twice; but more importantly, it was false that Charlie went there even once—just as it is false that he and Ric went on a little junket to visit Vanessa at 6:30 a.m. without Jackie at the very

same time they were supposedly dropping Jackie off in another part of town and then appearing at the Blacks' house in time to be observed by Jill Barganier and other neighbors.

iii. Officer Jerry Baker gave false testimony.

Officer Jerry Baker of the Farmers Branch PD was the second-in-command on the Betty Black murder investigation. He sat in on the hypnosis session conducted on witness Jill Barganier on February 4, 1998. During the mid-trial "Zani hearing" about that hypnosis session, Officer Baker testified before the court. His testimony was presented to induce the court to permit Mrs. Barganier to testify about her belated, in-court identification of Charlie Flores. Prompted by ADA January, Officer Jerry Baker testified, falsely, that he knew nothing about Charlie Flores when he had sat in on the hypnosis session:

> Q. At this point in time in the investigation, to your knowledge, before going into this hypnosis session, did you -- have you ever even heard the name Charles Don Flores before?
>
> A. Not that I remember.
>
> Q. Certainly had you ever even seen any pictures of him to that time?
>
> A. No, sir.
>
> Q. So for the sake of argument, **if you were a bad police officer, some kind of -- trying to conspire to convict**

> **someone that was innocent and you knew Charles Don Flores at the time well, let me strike that**.
>
> Did you have any knowledge about what the man looked like at all?
>
> A. No, sir.
>
> Q. Did you have any knowledge of what his name was at that time?
>
> A. No, sir.
>
> …
>
> Q. Did you inform Officer Serna [the police-hypnotist] of any information as it relates to Charles Don Flores —
>
> A. No, sir.
>
> Q. – prior to the hypnosis session?
>
> A. No, sir, ***I had no information***.

36 RR 20-21 (emphasis added).

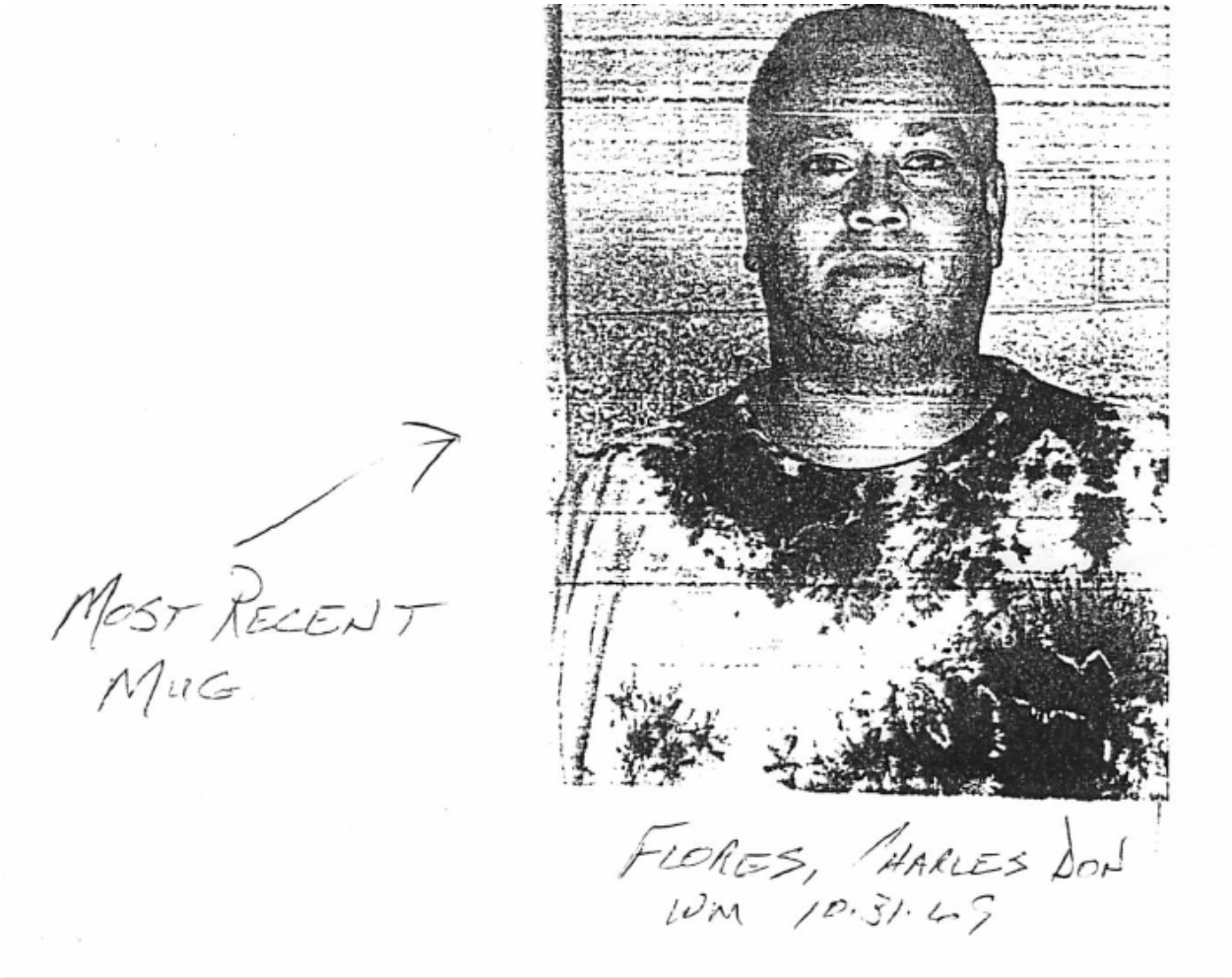
The unconscious admission ADA January made in this line of questioning is noteworthy: "for the sake of argument, if you were a bad police officer, some kind of -- trying to conspire to convict someone that was innocent and you knew Charles Don Flores at the time well, strike that." *Id.*

Officer Baker's testimony was false because he knew Charlie's name *and* his description *and* had likely seen a recent photo of him by January 31, 1998 because of Farmers Branch PD's coordination with other local police departments arising from the Volkswagen arson. But at least by late that night, according to FBPD

records, Officer Baker took part in interrogating Ric's girlfriend Vanessa Stovall on January 31, 1998, at the Farmers Branch police station. AppX57. The police had contacted Vanessa and induced her to cooperate after Ric had brought her name up during a custodial interview earlier that day. He had told Officer Callaway that he went to "wake up" his girlfriend Vanessa and "get her to work" right after dropping Jackie off in Farmers Branch. Ric made this assertion when denying that he had had anything to do with Mrs. Black's murder (and denying that he owned a multi-colored Volkswagen). SXR101. When Ric made this assertion, he also said nothing about Charlie being with him at that time. Other officers easily obtained Vanessa's telephone number from Ric Childs' uncle, Mack Salmon. Vanessa was then summoned to the police station. The police interrogation of Vanessa was not recorded. But according to FBPD's own records, Officer Baker, second in command on the Betty Black murder investigation, was in the room and participated in that interrogation. FBPD records show that Vanessa was questioned and reportedly described Ric's friend "Charlie" as a large Hispanic male with short hair who wore glasses and "lived in the Big Tex trailer park, that is somewhere in the city of Irving." AppX8.

Since Officer Baker was the second lead in the murder investigation, he had likely been informed before January 31st that his colleagues in the Farmers Branch SID unit had previously obtained Charlie's name from Ric Childs' brother Roy ***by***

January 30, 1998. Additionally, it was suppressed, but is now known that Farmers Branch investigators had already obtained photos of Charlie and had obtained his "most recent mugshot" from Irving PD *before* the hypnosis session:



See AppX57 (featuring lead investigator Callaway's handwritten notes). It is also now known that this "most recent mugshot" was included in a six-person photo lineup that was presented to Mrs. Barganier ***right after the hypnosis session***. *See also* AppX30.

Therefore, Officer Baker's testimony that he "had no information" about Charlie Flores by February 4, 1998, the day of the hypnosis session, was false.

iv. Officer Serna gave false testimony.

Officer Serna was the Farmers Branch police officer who worked at the crime scene collecting evidence and was then recruited to perform "investigative hypnosis" on Mrs. Barganier. He had a certificate from attending a police training course. But in a 2017 evidentiary hearing, it was ascertained that the hypnotism performed on Mrs. Barganier was Officer Serna's first—and *only*—such experience. 4 EHRR 187. During the mid-trial Zani hearing, ADA January proffered Officer Serna as an expert qualified to opine about hypnosis. Officer Serna, most likely due to his complete lack of legitimate experience, gave false testimony about the integrity of the hypnosis session and the "technique" that he had used.

He described using "the movie theater technique," whereby Mrs. Barganier was invited to treat her mind like a movie theater where she could play back her memories from the morning of the murder as if she were watching a "documentary film." AppX26. Serna told the court that this technique was "designed" to limit the opportunities for confabulation. 36 RR 36, 49. He claimed that the movie theater technique was "the best technique" to avoid hyper-suggestibility—although it is a technique that invites the hypnosis subject to pretend that their memories exist on a videotape and can thus be paused, fast-forwarded, rewound using an "imaginary

remote control." 36 RR 40.[199] Officer Serna agreed with the prosecutor that he had not suggested "one single thing to her at all"—although he did in fact suggest several things. 36 RR 41. For instance, he repeatedly suggested that one of the two men she had described as having "long, wavy hair" might have "short, shaved hair;" most importantly, he suggested: "You will also remember everything that you've said in this session and you might find yourself being able to recall other things as time moves on." AppX26.

Officer Serna admitted to the trial judge that, before being called late at night to come in for a hypnosis session the next morning, he had been involved as a crime scene technician at the crime scene; but he claimed that he had not spoken to any witnesses. 36 RR 37-38. He had, however, conferred with the second-in-command on the murder investigation, Jerry Baker, who had set up the video camera and was in the room with them throughout the hypnosis session, but off-camera.

Officer Serna testified that he had not heard the name "Charles Don Flores" and had no idea what he looked like before the hypnosis session. 36 RR 38. Yet for some reason, during the hypnosis session, he started asking leading questions about whether either man had "neatly cut" or "shaved" hair when Mrs. Barganier had

[199] The trial court did not hear about the empirical research that has shown that Serna's "movie theater technique" can actually "produce a *greater* frequency of inaccurate memories." 6 EHRR 60 (emphasis added).

repeatedly stated that both men had long, dirty hair. He then denied that he had asked any leading questions. 36 RR 47.

Officer Serna claimed that he had not "noticed" any confabulation during the hypnosis session because "the safeguards" prevented this—although confabulation is something that takes place inside a person's head and thus cannot be "seen" by anybody. 36 RR 39.

Officer Serna testified that Mrs. Barganier was a suitable subject for hypnosis because she did not "appear" "overly fatigued or depressed," intoxicated, or addicted to drugs but appeared instead to be in good mental health—yet there is no indication that he asked any questions to ascertain her state of mind or health in advance of the session. 36 RR 48. (Later, before the jury, Mrs. Barganier testify that, at the time of the hypnosis, she was "just a wreck," "very nervous," scared for "the safety of [her] children." 36 RR 290, 291. She also admitted to being "kind of a nervous type person" generally. 36 RR 90.)

After asking leading questions to imply that Officer Serna had played only a minor role in investigating Betty Black's murder, ADA January then asked leading questions about how the hypnosis session was just fine. ADA January then cut Officer Serna off before he could accidentally reveal facts the State did not wish to disclose, thereby further inducing Serna to testify falsely:

> Q. You said you used the movie theater [hypnosis] technique. At what point did you decide to use that particular technique?
>
> A. After talking with Ms. Bargainer, there seemed to be some tension or some trauma associated with the fact that she felt that the suspects had seen her or that their eyes had crossed, and so she felt —
>
> Q. Again, let me stop you there. The conversation you're discussing is all on the videotape, beginning before the hypnosis; is that correct?
>
> A. I believe so.

36 RR 39. The videotape of the hypnosis session plainly does ***not*** show Mrs. Barganier and Officer Serna having a conversation of this nature.

The significance here is that ADA January had represented to the court that all interactions between Serna and Barganier had been videotaped. Yet if one watches the videotape, AppX26, there is no discussion of any kind about Mrs. Barganier expressing "trauma" or describing a feeling "that the suspects had seen her or that their eyes had crossed[.] *Id.* Yet this detail about "eyes crossing" ended up being a big part of Mrs. Barganier's testimony before the jury later that day. Officer Serna's testimony reveals that the State's proffered testimony about Serna having had no conversation with Mrs. Barganier that was not videotaped was false—because it was not true that she had said anything about eyes crossing in the videotaped hypnosis session. ADA January's abrupt move to redirect Officer Serna

on this precise point suggests that ADA January was knowingly trying to conceal material facts.[200]

Officer Serna informed the trial judge that he believed that memory worked "like a video recorder"—something that the State's own expert (Dr. Mount) would disavow when he testified. 36 RR 57. But the trial judge was content to accept Officer Serna's insistence that he had not "planted any seeds that would flower or bloom 13 months later." 36 RR 59.

Officer Serna's testimony created a false record as to the extent and nature of the interactions that Officer Serna had had with Mrs. Barganier before the hypnosis session. His testimony was also false regarding what had happened during the hypnosis session itself. And his testimony was misleading with respect to the reliability of the "movie-theater technique" he had used, which invited Mrs. Bargainer to treat her memories like videotapes that could be pulled up and played back on a "screen" inside her mind; that technique presumes that memory works like a videorecorder, which even the State's other trial expert acknowledged was incorrect.

[200] It also suggests that January was cynically relying on the prospect that the judge had not carefully reviewed the poorly recorded hypnosis video, which the judge had only received the night before or in the early morning before the Zani hearing.

v. Jill Barganier gave false testimony.

On March 23, 1998, mid-trial, Jill Barganier announced to the prosecutors off the record that, having seen Charlie Flores in court at the defense table, she could now positively identify him as the passenger she had seen getting out of Ric Childs' Volkswagen the morning her neighbor was killed. At the Zani hearing the next morning, the court denied the defense's motion to preclude her from testifying about her thirteen-months-after-the-fact identification. Once on the stand before the jury, Mrs. Barganier provided testimony that the State knew was false about whether she had previously been given the opportunity to identify Charles Flores. ADA January not only failed to correct the false testimony, he implicitly encouraged her to hide the truth:

> Q. And to that point Flores was unknown or you hadn't seen pictures of Flores up to February 4th. What was your state of mind wanting to be a 100 percent sure before you made any identification?
>
> A. I remember a point in time -- and I don't remember the date, but I did see a little -- a photo lineup. And there was one picture in there, but I was hesitant. And one of the officers said, if you're not 100 percent, don't bother. And I wanted to make sure I was 100 percent. So I didn't go right to that photo.
>
> Q. Did you have any idea whether or not a photograph of the Defendant was in the lineup that you saw? Do you have any idea whether he was in there or not?
>
> A. I was -- I never asked them or –

Q. Okay. So you don't know?

A. No, I don't know.

Q. Okay. Do you have any idea as to how old any pictures were, whether or not the Defendant had been apprehended on February 4th or not?

A. No, I don't know that.

36 RR 293. Several things are problematic about this line of testimony in light of what is now known:

- The belatedly disclosed, partial police file includes forms showing that Mrs. Barganier was shown several photo lineups starting on January 29, 1998. But the forms are not matched to photo arrays. Therefore, there is no record of whether or not she was shown Flores photo *before* February 4th.

- It is now an established fact that Mrs. Barganier was shown his photo on February 4th, right after the hypnosis session—and failed to pick him out.

- ADA January, who by trial, knew more about what Mrs. Barganier had previously been shown, was trying to inject, through her testimony, the false notion that, if she had been shown his photo, it might have been an old one. Yet the State, not Barganier, knew for a fact that she had been shown Charlie's "most recent mugshot," which Farmers Branch PD had acquired from Irving PD. The photo was not "old," but had been taken only a few months before it was shown to Mrs. Barganier.

The State made a calculated decision to create the false impression that, ***if*** Mrs. Barganier had previously seen any photo of Charlie Flores, then she did not pick him out because she had probably been looking at an old photo and thus was not "100 percent sure." What made this testimony particularly misleading is that the State had suppressed records showing that Mrs. Barganier's initial description, the

day of the murder, was of a "white male" with "long, dirty hair." And she had repeated that description in the hypnosis session, whose content the jury did not hear.

Not until a 2017 evidentiary hearing, held to develop the record surrounding the hypnosis session, was it established for the first time that Mrs. Barganier had been shown a recognizable photo of Charlie Flores by at least February 4, 1998—the same day as the hypnosis session. It was also established for the first time that Mrs. Barganier was shown Mr. Flores's photograph in a six-person photo lineup that had been put together by lead detective Callaway using Flores's most recent mugshot (which he had acquired from the Irving PD, after FBPD had already gathered some older photos of Flores). The State relied on Mrs. Barganier's lack of a memory about these events to keep out of the record the truth as to how law enforcement had *planted* the idea that the perpetrator might be a Hispanic male with short, shaved hair when her descriptions, before being shown Charlie's photo on February 4th, suggested that she had seen someone who looked quite different, more like the composite sketch she had used a computer to create the very day of the hypnosis session:

Her subsequent certainty about her in-court identification thirteen months later was itself false testimony—***as new science in the field of eyewitness identifications shows***. *See* Claim I above. On the morning of the murder, and up until the highly suggestive hypnosis session at the police station a few days later, Mrs. Barganier had *no* certainty about the appearance of the passenger. She could only describe the second person as a "white male" with "long, dirty hair." She was also in a highly volatile mental state—"just a wreck," "very nervous," scared for "the safety of [her] children." 36 RR 290, 291. She "couldn't stop shaking." 36 RR 290. But she was repeatedly told during the hypnosis session that she could "remember more" as time passed:

- You will also remember everything that you've said in this session and *you might find yourself being able to recall other things as time moves on.*"
- "You'll remember everything that was said in this interview. *And as I said, you'll be able to recall more of these events as time goes on.*"

- "Ok, oftentimes, like I told you before I brought you out, that hypnosis, uh, you might find yourself recalling things, things that might not have to do with the accident itself. You might be at home doing an everyday chore and something might come to you about that incident or anything else. It's almost a phenomenon the way that it happens, so *it's not uncommon to just remember something after the fact, after the session*."

AppX26.

Immediately after the police-hypnotist planted these false ideas about how she might come up with a clearer memory later, the police showed her a photo lineup featuring six Hispanic males with short, shaved hair—including Charlie Flores. That presentation sent a clear signature. *See* Claim I. The fruits of this strategy to contaminate Mrs. Barganier's memory—whether intentional or not—finally bore fruit thirteen months later. It bore fruit only *after* Mrs. Barganier had been instilled with false confidence that her vague initial observation could somehow transform into a true "memory" later. Only much later, after she was repeatedly exposed to Charlie's picture in the news, learned his name from both the news and the court case, and then showed up at the courthouse and saw him sitting at the defense table did she become "certain" that he was the man she had seen. This false memory was the product of intentional and/or unintentional witness-tampering by law enforcement.

vi. Michelle Babler gave false testimony.

Michelle Babler lived across the street from the Blacks. She and her two young sons saw the Volkswagen pull up and two men get out and go into the Blacks' house through the garage. But at trial, Ms. Babler was induced to make a significant departure from her initial description of the two men she had observed. That is, her trial testimony was quite different from what she had reported to police the day of the crime. And although she did not identify Charlie at trial, her trial description had changed significantly so as to conform to Charlie's appearance as he sat before her in the courtroom.

Ms. Babler testified that, during her morning routine, she noticed that the Blacks' garage door was partially raised, she then described seeing a Volkswagen pull up that caught her eye: "I thought it was kind of funky looking. It was purple, and pink, and yellow. It was all different colors." 35 RR 104. She testified that she saw "two guys get out." 35 RR 108. But then ADA January invited her to get more specific about the "physical description" of the two men:

> Q. Okay. Let's stop there on the passenger for a second. As best you can, if you didn't see his face, how would you describe his physical description?
>
> A. Dark hair, kind of big.
>
> Q. Had dark hair and he was a big person; is that correct?
>
> A. Kind of big, yeah.

Q. Do you recall what he was wearing?

A. Dark clothes.

Q. The driver of the vehicle, how you would describe that individual?

A. How would I describe him? Kind of long hair, smaller than the other guy. They just seemed to act like they belonged there.

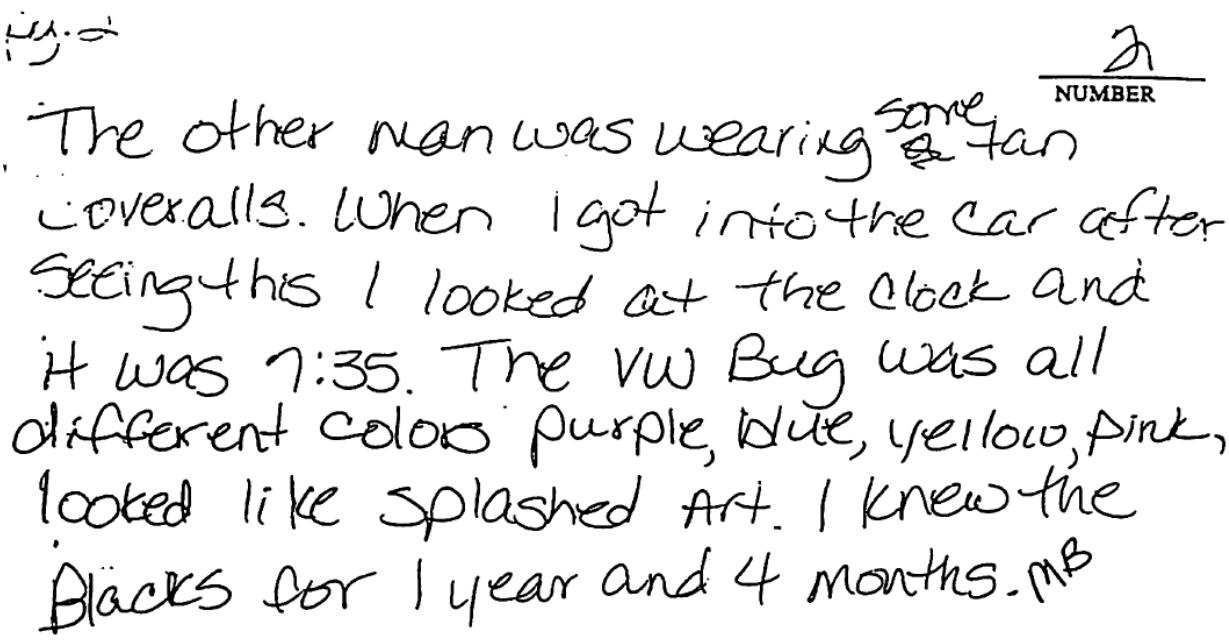
35 RR 109.

What the jury did not hear was that, Ms. Babler had signed a sworn Affidavit the day of the murder capturing her memory of what she had seen that morning:

I saw a VW Bug pull into the Black's driveway. One white male about 25-30 yrs old rolled under the garage door while opening it. The other white male about the same age went into the garage. I thought it looked suspicious. One man was wearing black pant and a tan coat. Michele Babler

AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS 23 DAY OF January, 1998 A.D.



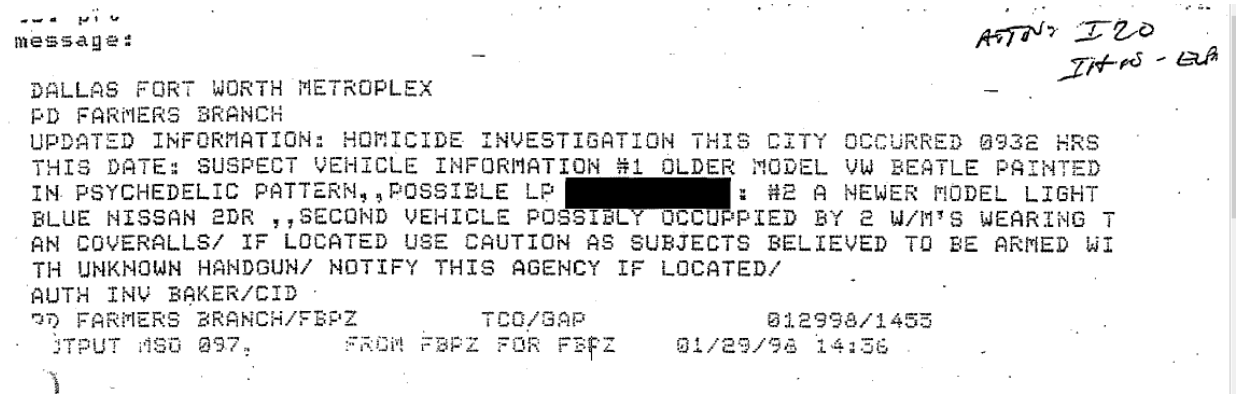
AppX57.

Notably, Ms. Babler's *initial* description—provided to the police when her memory was fresh and uncontaminated—did ***not*** include any of the following details:

- Passenger's hair color being "dark"
- Passenger being "kind of big"
- Passenger wearing "dark clothes"
- Driver having "long hair" and being "smaller."

Her *initial* description the day of the crime had been that she had seen two "white males" "about the same age," one wearing "black pants and a tan coat" and the other wearing "tan coveralls."

Indeed, Ms. Babler's *initial* observation that one man was "wearing a tan coat" and the other was wearing "tan coveralls" must have seemed credible at the time or perhaps was even corroborated by some other (undisclosed) witness or witnesses because a document in the partial police file suggests that, the very day of the murder, the police sent out a bulletin, authorized by Officer Baker, stating that the police were looking for two vehicles (including a "VW BEETLE PAINTED IN PSYCHEDELIC PATTERN") and " 2 W/M'S WEARING TAN COVERALLS":


message:

ATTN: I 20
INTOS - GLA

DALLAS FORT WORTH METROPLEX
PD FARMERS BRANCH
UPDATED INFORMATION: HOMICIDE INVESTIGATION THIS CITY OCCURRED 0932 HRS
THIS DATE: SUSPECT VEHICLE INFORMATION #1 OLDER MODEL VW BEATLE PAINTED
IN PSYCHEDELIC PATTERN,,POSSIBLE LP [redacted]: #2 A NEWER MODEL LIGHT
BLUE NISSAN 2DR ,,SECOND VEHICLE POSSIBLY OCCUPPIED BY 2 W/M'S WEARING T
AN COVERALLS/ IF LOCATED USE CAUTION AS SUBJECTS BELIEVED TO BE ARMED WI
TH UNKNOWN HANDGUN/ NOTIFY THIS AGENCY IF LOCATED/
AUTH INV BAKER/CID
PD FARMERS BRANCH/FBPZ TCO/GAP 012998/1453
OUTPUT MSG 097, FROM FBPZ FOR FBPZ 01/29/98 14:56

AppX57.[201] But by trial—perhaps after seeing pictures of Ric Childs and Charlie Flores side by side in the newspaper (or in the DA's Office)—Ms. Babler had moved far afield from her initial report when her memory was fresh and uncontaminated by subsequent experiences. This noteworthy drift was false testimony, solicited by the State.[202] The purpose was to support the false inference that Charlie was the second

[201] No information has ever been disclosed as to why police believed a second blue car might have been involved, although the partial police file does show that Jackie's friend and neighbor, Jason Clark, owned a car matching that description. AppX57.

[202] The record supports an inference that the State orchestrated this drift because (1) the prosecutor knew or should have known the contents of Michelle Babler's sworn Affidavit signed

person who had been seen with Ric, getting out of Ric's Volkswagen, and entering the Blacks' garage before Mrs. Black's murder.

The new science regarding eyewitness identifications, described in Claim I, shows the falsity of Ms. Babler's testimony. The police records show that she was presented some photo arrays soon after the murder but could *not* identify anyone. It is unclear based on the current state of the record, whether, among the photos Ms. Babler was shown, was a photo of Mr. Flores. That is likely the case. Therefore, for the same reasons that Mrs. Barganier's in-court identification of Mr. Flores, thirteen months after-the-fact, was false, Ms. Babler trial description, a far cry from her initial description, was false. The vague memories of both women had been contaminated by intermeddling by state actors and intervening events (such as exposure to Charlie's face and name in the media). There is no scientific basis for a conclusion that Ms. Babler's trial description, significantly different from what she had shared with police the day of her observation, was reliable. In fact, the nature of the changes in Ms. Babler's description of the perpetrator (and the State's role in suppressing evidence of how far she had drifted from her initial description) further expose the falsity of her testimony.

---

on January 29, 1998; (2) the State knew that other witnesses had said that Charlie was wearing all black that night; and (3) during the Zani hearing, ADA January held up Ms. Babler's testimony as "corroborating," emphasizing the very elements of her testimony that had ***deviated*** from her initial sworn report. *See* 36 RR 112.

vii. Homero Garcia gave false testimony.

Homero Garcia lived with his mother down the road from the trailer park where Charlie, Myra, and her daughters were living in January 1998. Homero had introduced Charlie to Myra and her younger brother Jonathan Wait Jr. They were all then doing drugs—and also working, going to concerts, watching sports. Ex. 4. Perhaps because of Homero's size and effeminate appearance, he was willing to do almost anything to avoid prison—except abide by the law. After his own legal problems landed him in custody yet again, he became an easy pawn for the State seeking evidence to inculpate Charlie. After being subjected to a coercive interrogation on or around May 18, 1998, Homero signed an "Affidavit," typed-up by an FBI agent, inculpating Charlie. Yet law enforcement's notes from the interrogation say nothing about Homero reporting that Charlie had said he had been involved in breaking into the Blacks' house, let alone that he had "shot the dog"—as the Affidavit states. Ex. 45; AppX57.

Homero reluctantly testified in accordance with the contents of that Affidavit at trial:

> Q (ADA January). Can you tell the Members of the Jury what the Defendant told you?
>
> A (Homero). He just told me, you know, he didn't kill anybody, you know, that —

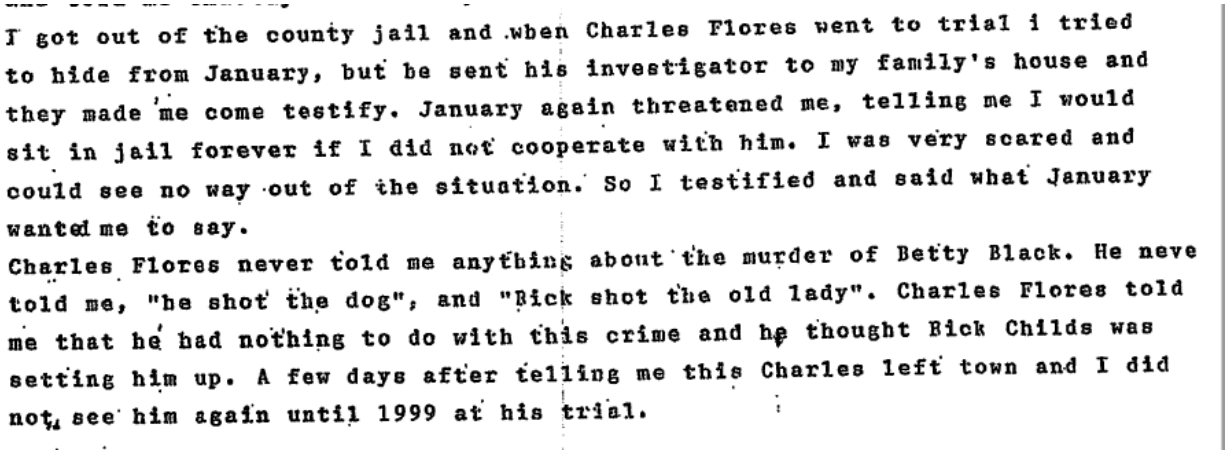
> Q. What did he say about that?
>
> A. Just said he shot a dog, and that the other guy killed an old lady, and that was it.
>
> Q. Had you been aware about the lady that had been killed the day before?
>
> A. No.
>
> Q. Was it the first time you knew about the killing and the dog being killed when the Defendant told you about it?
>
> A. Yes, sir, I think.

36 RR 220. Homero also mentioned that he had been arrested and been caught in possession of a Browning .380 pistol that he had acquired from Charlie—which the state then introduced into evidence to create the false impression that it might have been the murder weapon.[203] 26 RR 222. But when Homero was asked about his Affidavit, he admitted: "I don't recall telling the FBI half of this stuff." 36 RR 228. He also admitted that, when he signed it, he had "been up for about four days." 36 RR 229.

The process by which Homero was induced to provide, and was rewarded for, his signature on the Affidavit and his testimony at trial is explained at length in Claim

[203] Before trial, ballistics testing had categorically excluded the Browning .380 pistol as the murder weapon. But it was left to the defense, in its case in chief, to introduce that evidence and thus correct this one bit of misleading evidence. 38 RR 82-110.

IV above. But importantly, Homero ultimately recanted the substance of his testimony:



I got out of the county jail and when Charles Flores went to trial i tried to hide from January, but be sent his investigator to my family's house and they made me come testify. January again threatened me, telling me I would sit in jail forever if I did not cooperate with him. I was very scared and could see no way out of the situation. So I testified and said what January wanted me to say.

Charles Flores never told me anything about the murder of Betty Black. He neve told me, "he shot the dog", and "Bick shot the old lady". Charles Flores told me that he had nothing to do with this crime and he thought Bick Childs was setting him up. A few days after telling me this Charles left town and I did not see him again until 1999 at his trial.

Ex. 59. Homero's testimony about Charlie confessing to shooting the dog was not just suspect, in light of the context, it was false—as ADA January well knew. Otherwise, ADA January's exceptionally generous treatment to intervene, post-trial, on Homero's behalf, is difficult to fathom. After the Flores trial, after other members of the DA's Office had moved to have Homero's probation *revoked* due to yet more violations of its terms, ADA January intervened to have him *released* from court supervision entirely. Ex. 58.

viii. Jonathan Wait Sr. gave false testimony.

Jonathan Wait Sr., estranged father of Myra and Jonathan Wait Jr., testified falsely about Charlie confessing to Wait Sr. about shooting the dog. The State called prolific snitch Wait Sr. to the stand the day after Homero's tenuous performance. 37 RR 75. Wait Sr. testified that Charlie, whom he had only met a few times,

unburdened himself to Wait Sr. before Charlie left town. Wait Sr. testified that Charlie appeared at his house unannounced, Wait Sr. showed him "the article that I had on the table there laying out about the Black murder," then, according to Wait Sr., Charlie "looked at it, just laid it down —— glanced at it, laid it down, and said, I only shot the dog." 37 RR 84-85.

On cross-examination, Wait Sr. repeated the same rehearsed lines:

> Q. And he told you exactly what about his relationship and involvement in that?
>
> A. He laid the article down after just looking at it, just glanced, laid the article down, and said I just shot the dog.

37 RR 93.

After Charlie reputedly made this confession to Wait Sr., they went "riding around" in search of an auto parts store. 37 RR 85, 94. Wait Sr. also testified that he called the police as soon as Charlie took off. 37 RR 95.

As noted in Claim IV above, the suppressed police file includes phone records of multiple calls from Wait Sr., notes from discussions with Wait Sr., and an FBI report about Wait Sr.—yet nothing in the file suggests that Wait Sr. ever suggested, before trial, that he had received this peculiar confession. The State knew this.

The State also knew that they had no concrete evidence of whether Mrs. Black and her dog had been shot by two different people or the same person; they also knew there was no evidence of what kind of gun had been used to shoot the dog. As

already developed at length, the "Ric-used-a-bigger-gun-to-shoot-the-dog" story was a fiction concocted by members of the prosecution team, the only support for which was potato starch seemingly planted in the barrel of a gun over a year after the crime. *See* Claim II.

That is, all that the shoddy investigation of Betty Black's murder had uncovered (before the crime scene was destroyed by a construction crew) was a single bullet and casing. That single bullet and casing matched the exact type and brand of ammunition, for a .380 pistol, found in Ric Childs' backpack when he was arrested. The medical examiner opined that Mrs. Black had likely died from wounds sustained by the bullet that had been recovered from the crime scene; but that same medical examiner expressly *disavowed* an ability to opine about what kind of weapon may have been used to shoot the dog:

> Q (January). Before we look at the photographs, did you form an opinion after observing Elizabeth Black and this dog as to whether or not the shot from Elizabeth Black could potentially have come from a weapon with higher or lesser velocity than the shot from the dog? Were you able to make any conclusions based on what you saw?
>
> A (medical examiner). No, not a firm conclusion.

36 RR 147.

Despite pressure from ADA January, the medical examiner maintained that she could *not* conclude that the dog had been shot with a gun of a "higher velocity" because dogs are smaller than humans. *Id.* She also noted that the gunshot wound

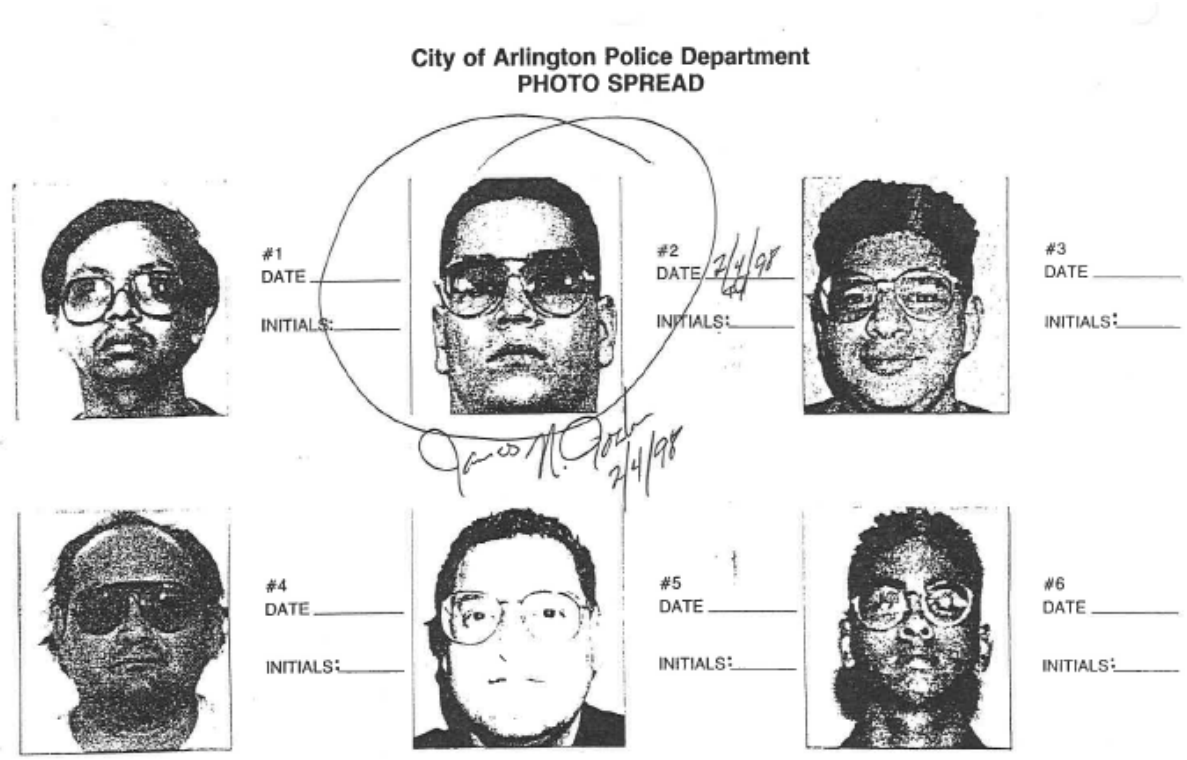
that the dog had sustained was atypical. 36 RR 148. Importantly, the medical examiner noted "let's face it, I don't routinely do dogs." 36 RR 146. Aside from noting a lack of experience performing autopsies on dogs, the medical examiner emphasized that, while she could analogize to humans such as herself, "I hope it's obvious I'm not a Doberman." *Id.* And she reminded the prosecutor that she really could reach no conclusions because "the gunshot wound of probable entrance in the dog is not a typical entrance defect." 36 RR 149.

But whoever may have shot the dog and whatever gun he may have used, that person was not Charlie Flores—and thus Wait Sr.'s report of a reputed confession to him along these lines was false. Critically, no pre-trial record suggests that he previously claimed to have come by this exceeding useful evidence for the State back in February 1998 although there are records of his eagerness to help by providing tips, for instance, about Charlie's potential whereabouts.

ix. James Jordan gave false testimony.

James Jordan testified about an incident that occurred on January 31, 1998, a few days after Betty Black's death and after Ric had been arrested. Jordan testified that he had seen Charlie set Ric's Volkswagen on fire on the side of I-30, speed off, and then shoot in Jordan's direction while driving at a high speed trying to evade Jordan who chased after him. Jordan's identification of Charlie as the shooter was false—and the State knew this.

The State suppressed that it was actually lead detective Callaway who, prior to Jordan's identification, communicated with cohorts in a neighboring police department in Arlington and supplied Charlie's name and photo. This information was then used to "assist" Jordan in picking Charlie out of a photo lineup. Jordan could not have done this on his own because the incident on I-30 had happened "after dark;" and Jordan had described the stranger whom he had seen as "W/M 6'0". 220. Long black hair." SXR100. A few days later, in a signed statement, Jordan described the perpetrator as having "**dark hair down to initially about his collar**, light beard and mustache as though he had not shaved in several days, **no glasses**, no hat[.] *Id.* Charlie was not white, but noticeably Hispanic; Charlie weighed closer to 270 pounds, not 220; Charlie had very short, shaved hair, not long hair; and Charlie routinely wore glasses.



The State's role in "assisting" Jordan in making a jump from his fleeting observation (most likely, of Jonathan Wait Jr.) to picking Charlie's photo out of a lineup is now obvious. There is no way the Arlington PD could have included a photo of Hispanic Charlie Flores in a photo lineup to present to Jordan if the police had no more to go on that Jordan's vague description (which also did not match Charlie's appearance). Arlington PD records now show that it was Callaway with the Farmers Branch PD who was able to give Charlie's name and photo to Arlington PD; and it was Ric's Volkswagen that made that connection possible.

Jordan, who was, seemingly, willing to go the extra mile to help the prosecution, went even further while on the stand—and the State did nothing to correct his false statements, which all seem calculated to enhance the credibility of

Jordan's claim that he was able to identify Charlie as the person who had shot at him:

Jordan testified that the incident happened "late in the afternoon" and "before the sun went down." 37 RR 14. Yet the police report for the January 31, 1998 incident shows that it had occurred around 7:35 PM (thus after sunset).

Jordan testified that he pulled over on the side of the freeway within "[t]hirty feet" of the person standing by the Volkswagen. 37 RR 17. Yet the police report from that night states that he stopped "100 yards" away from the Volkswagen.

Jordan testified that he identified Charles Flores easily because he had gotten "a good look." 37 RR 18. Yet the police report states that Jordan only claimed to have observed what "appeared to be a W/M, 6'0", 220, long black hair."

Jordan testified that the car he had seen was a "multi-colored, very old, beat up Volkswagen bug." 37 RR 18. Yet the police report states that, on the night in question, he described the Volkswagen only as "grey."

Jordan testified that the second car was a "Suzuki Samurai, one of those little stupid looking cars." 37 RR 19. Yet the police report states that he had described the second car as an "Izuzu Trooper."

Jordan testified that he slowed down because he had been raised to be a "good Samaritan." 37 RR 17-19. Yet the police report suggests he was animated as a

vigilante, telling police that he had stopped because he saw "a guy throw a bomb" and believed he was up to "no good."

Jordan testified that the lone person he saw on the side of the freeway "looked directly at" him. 37 RR 20. The police report does not include a claim of this nature.

Jordan testified that he was so close when the first shot was fired toward his car that he "felt the percussion." 37 RR 28. Yet the police report states that Jordan "stated that the suspect apparently did not aim the first shot at them, rather firing it over the front of their vehicle."

Jordan testified that, with the second shot, the perpetrator "tried to take better aim;" and Jordan claimed he was close enough to see the person shooting with his right hand over his left shoulder. 37 RR 30. Yet the police report states that he was "unsure if the second shot was aimed directly at them or over their vehicle."

The numerous material changes Jordan made between his initial statements to police and his trial testimony over thirteen months later show a clear pattern. He was either coached or took it upon himself to change numerous details to match facts learned later about, *e.g.*, the original color of the Volkswagen and the make and model of the vehicle he chased after. He also changed facts to make his insistence that he could identify Charlie **as the shooter** more plausible. The State was, pre-trial, in possession of the undisclosed circumstances that had allowed Jordan to identify Flores only with assistance from law enforcement (particularly the Farmers

Branch PD who had supplied his name and photos to the Arlington PD). And since the State knew that Jordan's trial testimony could not be squared with his initial statements to police, the State did more than passively acquiescence in a deception.

x. Jonathan Wait Jr. gave false testimony.

Jonathan Wait Jr. was Myra's younger brother. He was hanging out with Charlie at the trailer in Irving doing drugs and playing cards in the hours before Ric showed up until Ric and Charlie drove off to Farmers Branch to pick up Jackie. 36 RR 251-253. When Jonathan was called to the stand to testify, he was not asked much about the time he spent at the trailer before Charlie and Ric left after he volunteered that he had been "shooting crank" with Ric. 36 RR 252. His testimony focused on the attempt, several days later, to get rid of the Volkswagen that Ric had abandoned outside of Charlie's trailer. More specifically, Jonathan's task was to build upon Jordan's insistence that it was Charlie who had not only tried to destroy Ric's Volkswagen (which Charlie does not deny doing) but also shot at good-Samaritan Jordan as he sped after them (which Charlies does deny doing). Ex. 4.

Jonathan testified that Charlie unstrapped the Volkswagen and poured gas in it—while Jonathan had "no idea" that was going to happen. 36 RR 267. And in Jonathan's version, Charlie then went "back to [Myra's] truck to get a piece of paper, lit it, went back to the car and threw the paper in there in the bug and caught it on fire." 36 RR 268 According to Jonathan, all of this happened while Johnathan stood

by on the side of the freeway. He then described Charlie running to jump back into the Suzuki as a strange car pulled up. 36 RR 268.

Jonathan was so eager to describe all actions as emanating from Charlie, and Charlie alone, that Jonathan initially failed to account for his own movements.

> Q. Let me stop you there. Where were you located at the time the Defendant was torching the Volkswagen?
>
> A. Myra had gotten in the back seat of the Suzuki, and I was in the passenger seat.

36 RR 268.

James Jordan had said nothing about seeing three people in the car or about seeing a second man standing outside of the Volkswagen. Myra had not taken this opportunity to get "in the back seat of the Suzuki" while Jonathan got into "the passenger seat." *Id*. These details do not make sense.

Like Jordan, Jonathan testified that Charlie was the one who did the shooting—while driving at a high speed. According to Jonathan, Charlie took out something "like a .38 or something, revolver," then rolled down his window and shot "down the highway." 36 RR 269. Jordan claimed there had been two shots; Jonathan, by contrast, claimed there had been "[p]robably five or six." 36 RR 269. All that Jonathan could offer to explain how Charlie pulled off this feat was that Charlie was "just driving and shooting." 36 RR 270.

Jonathan was not cross-examined about how Charlie supposedly accomplished this action-hero multi-tasking—or about anything else. 36 RR 276. That Jonathan, not Charlie, matched the physical description that Jordan had initially given police of **the shooter**, suggests that Jonathan had a motive to push responsibility for the shooting onto Charlie. (And to induce him to do so, it seems that the State did not indict Jonathan for his role in destroying evidence although the State had no qualms about seeking to indict Jonathan's sister Myra for harboring Charlie and indicting Charlie's elderly parents who had no criminal history whatsoever.) Jonathan's testimony was false, and the State knew or should have known that it was false.

xi. Charles Linch gave false testimony.

Charles Linch was employed as a trace-evidence analyst with the SWIFS crime lab until soon after the Flores trial. The testimony he provided at trial about finding potato starch inside the barrel of a .44 magnum revolver, which had been brought to him by a member of the DA's Office mid-trial, is discussed at length in the Factual Background, Section V; and the circumstances surrounding his testimony is the subject of Claim II. As is now known, Mr. Linch was expressly told to look for "potato residue" inside the .44 magnum revolver. But importantly for the instant claim, Mr. Linch was kept in the dark as to the false inference that the State wanted to prove using his findings. Ex. 74. As Mr. Linch has now noted, "I doubt

there is anyone on the planet who can say that potato residues (starch particles) can be found in a revolver barrel if a potato is jammed on the barrel and the gun is fired. I would certainly expect potato residues to be found inside the barrel if the gun is *not* fired after the potato is jammed on and removed, (gun not fired before exam). Starch gelatinizes at about 60 degrees C (140 degrees F) and starch is soluble in boiling water, 100 degrees C (212 degrees F)." *Id.* ¶7.

In short, the entire premise that Linch's testing was meant to support is scientifically baseless. The individual prosecutors may well have been ignorant of the fact that their hypothesis was unsound as a matter of basic science. But these prosecutors knew that they had not asked Linch (or seemingly anyone with basic scientific competency) whether their hypothesis was sound. Their failure to do this basic research seems to be more than misfeasance, however. The entire hypothesis was based on a *string* of baseless assumptions exposing a disturbing overzealousness:

- The State asked the jury to assume that a revolver found in a closet at Ric's grandmother's house belonged to Ric—as opposed to anyone else occupying the house, such as the grandmother herself or Ric's uncle, Mack Salmon. The police file includes no record indicating that any investigator made an effort to ascertain who owned this gun—other than a partial transcript of a custodial interview with Ric during which he slipped up and admitted that this particular gun "had not been used" in the Black home invasion. SXR101.

- The State asked the jury to assume that a revolver was used to shoot the dog because only one bullet and casing was recovered from the scene. While it is true that revolvers do not release a casing, the second casing (like the second

lost bullet) may have been lost when the carpet was ripped out of the Blacks' house and thrown in a dumpster soon after the murder.

- The State asked the jury to assume that, because potato splatter at the crime scene suggested potatoes had been used as "silencers," if potato starch was observed in the barrel of the .44 magnum in *March of 1999*, then it was fair to conclude that that particular revolver had been fired during a crime perpetrated *14 months earlier*.

None of these assumptions is logically defensible. But it is not unconstitutional for prosecutors to be ignorant. Those on the State's team must have known, or should have known that the testimony the State was eliciting was false. *See Giglio*, 405 U.S. at 154. The State *knew* that Ric had said the .44 magnum had ***not*** been used in the underlying crime. Additionally, the State knew, or should have known, that Mr. Linch was able to find traces of potato starch inside that gun only because it had been put there after the chain of custody was broken. But it is also important to highlight specific instances of false testimony that Mr. Linch provided at the State's behest. The State should have known about these additional falsehoods because of the utterly improper way Linch was recruited, mid-trial, to: find evidence, throw together a report, and then come in to testify the next day. *See* 36 RR 215; Ex. 19.

Mr. Linch testified that "I was asked to look for any foreign residues that may be on or in the revolver." 36 RR 210. But in fact, a long-suppressed SWIFS record reveals that ADA January had expressly asked Linch to check the revolver "for Potatoes on or inside the barrel." Ex. 19.

Mr. Linch testified that

> The potato starch grains are actually shaped like potatoes with a cross through them as observed under polarized light microscopy. These starch grains did have the potato shape, and there were other smaller grains that could be from other sources, including potato. But in the atlas I referred to, they were most consistent with potato starch grains.

36 RR 213. But Linch's casefile, produced only quite recently, shows that the starch grains he observed looked more like "arrowwood" starch grains per the atlas he had consulted—and as reflected in his own notes. Ex. 73; *see also* Claim II.

Mr. Linch testified that he had seen numerous starch granules "consistent with potato starch granules"—both "large ones and the small ones." He added that "*large* granules" are "more characteristic of that that you find from a raw potato." 36 RR 213. But decades later, when his work was finally double-checked and the slide he had created was scanned using a 40X microscope, the slide revealed only *two* starch granules—both small—that appeared to be the same size, not numerous large and small ones as Linch had said. *See* Claim II.

The State knew or should have known that Mr. Linch's testimony about potato starch was false at both a general and specific level. Most importantly, the State knew or should have known (because they should have asked someone with actual knowledge) that the concept that microscopic bits of potato could survive inside the barrel of a gun for well over a year, after it had been fired, was false. And most

importantly of all, the State knew that the testimony was being used to support an argument that itself was a lie because there had likely been no potato starch grains inside the .44 magnum revolver until state actors put them there after-the-fact.

*****

In *Brady v. Maryland*, the Supreme Court held that suppression of material evidence justifies a new trial "***irrespective*** of the good faith or bad faith of the prosecution." 373 U.S. at 87 (emphasis added). When the "reliability of a given witness may well be determinative of guilt or innocence," as it was here, nondisclosure of evidence affecting credibility falls easily within this general rule. *Napue*, 360 U.S. at 269. The sheer volume of false testimony in this case strongly supports the inference that the State knew that it was putting false testimony before the fact-finder in violation of Mr. Flores's constitutional rights. *See Dvorin*, 817 F.3d at 451−52; *Giglio*, 405 U.S. at 154-55.

2. The false testimony was material.

Mr. Flores can also easily satisfy the materiality standard for a false testimony claim—a standard ***more lenient*** than the *Brady* materiality standard, because "the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves a corruption of the truth-seeking function of the trial process." *Bagley*, 473 U.S. at 680 (internal quotation marks omitted).

The materiality of much of the testimony discussed here is outlined at length in Claim IV above. That briefing is incorporated here by reference. Having demonstrated that Mr. Flores can satisfy the more onerous *Brady* material standard, it logically follows that he has satisfied the more lenient *Napue*/*Giglio* standard. *See Id*. at 679 n.9 (explaining the standard is equivalent to the harmless error standard of *Chapman v. California*, which ultimately places the burden on the State to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.).

The State cannot demonstrate, beyond a reasonable doubt, that this mass of false and misleading testimony, considered cumulatively, did not contribute to the verdict. *See Wearry*, 136 S. Ct. at 1007 (2016) (overturning a conviction because "the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively").

The Fifth Circuit has recognized that the prosecution's reliance on false testimony during closing arguments indicates its materiality. "False testimony deprives a defendant of due process when the government reinforces the falsehood by capitalizing on it in its closing argument." *United States v. Wall*, 389 F.3d 457, 472–73 (5th Cir. 2004) (citing to *United States v. O'Keefe*, 128 F.3d 885, 894–95 (5th Cir. 1997) ("*even when the defense is aware of the falsity of the testimony*," due process may be violated if "the government reinforces the falsehood by capitalizing

on it in its closing argument") (emphasis added)); *see also LaCaze v. Warden La. Corr. Inst. for Women*, 645 F.3d 728, 738 (5th Cir. 2011) (noting prosecution's discussion of material that should have been disclosed under *Brady/Napue* during closing statements indicates its materiality).

The prosecution relied on all of the false testimony outlined above in its Closing Arguments.

As a threshold matter, the prosecution relied on the false testimony of **Officer Jerry Baker** and **Officer Roen Serna** in the Closing Argument for the Zani hearing. ADA January held these witnesses up as a reason to trust the integrity of the hypnosis session and the investigation generally so that Mrs. Barganier would be permitted to testify about her in-court identification. 36 RR 114-155. Then, as described in Section VIII.A of the Factual Background above, ADA January launched into a monologue, falsely insisting that the State had adduced, or at least would adduce, a bunch of "corroborating evidence" to support Mrs. Barganier's identification. All of the evidence to which he referred either did *not* support the inference that Charlie had been present at the Blacks' house or it was false and misleading, as outlined above. In short, the false testimony of Officer Baker and Officer Serna, in conjunction with ADA January's misleading argument, was material to the court's decision to permit Mrs. Barganier to testify about her in-court identification. That identification saved the State's incoherent, dishonest case against Charlie Flores—

especially in light of Mrs. Barganier's insistence that she was suddenly "more than 100 percent" sure of herself that Charlie was the second man she had seen. 36 RR 109. Allowing her to testify and convey this degree of confidence about what was, in truth, an utterly unreliable identification assured Charlie's conviction.

During the guilt-phase Closing Arguments, the prosecution relied, not simply on Mrs. Barganier's identification,[204] but on the litany of false testimony described above. The State's Closings relied on and cited the false testimony of Jackie Roberts, Vanessa Stovall, Jill Barganier, Michelle Babler, James Jordan, Jonathan Wait Jr., Charles Linch, Homero Garcia, Jonathan Wait Sr. in asking the jury to find Charlie Flores guilty of capital murder.

Primarily, the State relied on the fallacious tale **Jackie Roberts** had spun about her experiences, purportedly with Ric *and* Charlie, from around 3:00 to 7:00 a.m. the morning of the break-in and murder. For instance, the State argued: "[W]e now know from Jackie Roberts' testimony that this man right over her is no unhappy

[204] In the first subsequent state habeas proceeding, the State argued that Mrs. Barganier's identification was not material because of all of the other evidence adduced of Mr. Flores's guilt. Similarly, in the initial state habeas proceeding, the State, relying on suspect, untested affidavits from lawyers (including the wholly unreliable ADA January), argued that Charles Linch's potato starch testimony was not material because of all of the other evidence adduced of Mr. Flores's guilt. But then, in opposing Mr. Flores's most recent efforts to obtain Supreme Court review of his case, the State again cited Linch's testimony as corroborating evidence that supported the conviction—even if Mrs. Barganier's testimony was disregarded. In short, the State has played a game of "Whac-a-Mole," changing the set of reputedly "corroborating" evidence that it relies on to argue against review of Mr. Flores's conviction. That strategy has involved both misrepresenting the evidentiary record and aggressively resisting efforts to expose the truth about that evidence. *See* Factual Background, Section VIII.D.

camper, isn't he? What's he keep saying? I've been ripped off. Goes to Jackie Roberts, threatens her and says to her, you're going to make this right for me ….. puts a gun to her head." 39 RR 50. The State relied on Jackie's false testimony about Charlie having held a gun to her head. Then, the State treated her outlandish testimony about how the next three hours were filled after they supposedly left the trailer together.

Next, the State moved on to a theme that it sounded repeatedly, as it had during Opening Statements: about how Ric had "the bigger gun" and thus should be considered the person who shot the dog. Although Jackie exhibited great difficulty keeping the story straight, in its Closing Argument, the State treated her false testimony as if it had created established facts: "she [Jackie] says that this person down here had a handgun and Richard Childs had a handgun, and of the two, the bigger handgun that day belonged to Richard Childs." 39 RR 51. The prosecution further declared: "the man with the smaller handgun that day, according to Jackie Roberts, is, in fact, the person who shot and killed Elizabeth Black that morning." 39 RR 63.

The State's Closing Argument also relied on Jackie's false chronology for the hours leading up to 7:00 a.m. The State referred back to Jackie's story about the gas station, insisting that, "[a]ll the while, this man down her is threatening Jackie Roberts." 39 RR 52. Then, as per Jackie, "they drive to Emeline drive." 39 RR 53.

For its final Closing Argument, after the defense had impugned Jackie's credibility, ADA January came to her defense—expressly defending his decision to rely on her: "I felt it's important to have the Jury hear the whole story, the whole sordid story about how this thing started, how Jackie Roberts, who was dating Richard Childs at the time, set up a deal to get the two big dogs together to get the connect to do a deal with the other connect[.]" 39 RR 89. ADA January then spent an extensive portion of his Closing championing Jackie, insisting that her story made perfect sense, and invoking her as an authoritative source on key facts. 39 RR 89-91, 95 ("pulled a gun on Jackie"), 100 (defending her credibility about drawing the map), 105 (insisting falsely "She had nothing to do with having the dope or the money" therefore she was credible).

The State also relied on the false testimony of **Vanessa Stovall** in its Closing Argument, reminding the jury of her testimony that Ric and Charlie had "drove a short distance there to High Meadow in Dallas" to wake up Vanessa and smoke some methamphetamine before, supposedly, racing back over to Farmers Branch and arriving at the Blacks' house an hour *earlier*. 39 RR 53-54, 92.

Then the State relied on Mrs. Barganier, whose false testimony was likely unwitting—but the State knew how she had been manipulated. The prosecutors argued: "they drove back to Farmers Branch" from North Dallas—"we now know that because of **Jill Barganier** that they drove" to the Blacks' house. 39 RR 54. The

State falsely insisted that Mrs. Barganier "caught a good look at his face out there. She told you beyond any doubt in her mind, a 100 percent certainty, the person that she saw get out of that Volkswagen beetle at 6:45 in the morning on January 29th is this man right down here, Charles Don Floes, and no other person." 39 RR 54; 93.

The State also invoked the false testimony of **Michelle Babler**, expressly emphasizing the very aspects of her trial description that are *not* in the physical description she had given to police the day of the murder: "And we now know that the passenger, that heavier person, the bigger person, the person with the dark hair is none other than Charles Don Flores." 39 RR 55-56, 93.

The State's Closing also referred to the testimony of **James Jordan** and **Jonathan Wait Jr.** as to who had shot at Jordan following the burning of the Volkswagen. 39 RR 58-59. The State insisted "we know from James Jordan's testimony that this person [meaning Flores] and no other person is that man who was shooting at him and tried to take his life out there on January the 31st." 39 RR 59. The State declared that their testimony demonstrated that Flores was a person that had no problem "pulling a weapon on an individual and shooting at them." 39 RR 104.

As for **Charles Linch**, the State repeatedly held up his testimony without referring to him by name in furthering the "Ric-had-the-bigger-gun" at the crime scene story. The State claimed it was a "reasonable deduction [the] .44 magnum was

Ric's." 39 RR 51. The State claimed it was a "reasonable deduction" because the .44 "that's sitting right in [Ric's] own house with the potato inside of it[.]" 39 RR 101. And the State repeated several times for good measure that the .44 magnum (which Linch had examined) was "a gun with a potato in it." 39 RR 102, 203.

The State's reliance in Closing Arguments on the false testimony about Charlie "confessing" to the two men ADA January referred to misleadingly as "his friends" was extensive. *See, e.g.,* 39 RR 88. **Homero Garcia** was discussed at length. *See* 39 RR 47, 97-98. "Homero's statement to the FBI" was defended zealously. *See* 39 RR 95-99. Likewise, the testimony of **Wait Sr.** and how he too claimed that Charlie had admitted to shooting the dog was cited repeatedly. 39 RR 47, 96. The State was insistent: "And by his own admission, Homero Garcia and to Johnny Wait Sr., he was there that day with Richard Lynn Childs…. He even admits to Homero Garcia and Johnny Wait Sr. that he used that handgun inside that house that day to shoot the dog. So there can be no issue about that we have the person who went in there with Richard Childs, can there?" 39 RR 62.

And although the State relied on Homero and Wait Sr.'s very similar (and very suspect) testimony about the confession regarding shooting the dog, the State did not want the jury to give total credence to what ADA January described as "self-serving statements" "made to Homero Garcia, that he's made to Johnny Wait Sr." 39 RR 63. The State preferred that the jury believe that Charlie had shot Mrs. Black,

not the dog. Yet ADA January conceded: "if you believe that Richard Lynn Childs actually did this killing, the facts are very, very clear that this person right down here, Charles Don Flores, is guilty as a party in this case. No doubt about it." 39 RR 63.

Because the State's *entire* case was a house of cards, the State's reliance on this collection of false testimony was indisputably material. The whole rotten edifice tumbles down if one takes the time to look at each mealy component. Then it is self-evident that this incompetent evidence was held together only by the massive hubris of the prosecutors. What is critical is that the court, on remand, assess the *cumulative* effect of this false testimony as binding federal constitutional law requires. *Wearry*, 136 S. Ct. at 1007 (applying *Brady* and finding materiality based on the cumulative effect of the false and misleading testimony).

C. Conclusion

The U.S. Constitution cannot countenance convictions based on testimony that state actors knew or should have known was false. Yet in this case, false testimony dominated the proceeding. Indeed, the second biggest casualty in the sordid and calculated quest to convict a man innocent of the crime was the truth itself. That quest was "inconsistent with the rudimentary demands of justice[.]" *Mooney*, 294 U.S. at 112.

Claim VI should be remanded for further factual development, and habeas relief, in the form of a new trial, should follow.

VII. CHARLIE FLORES'S RIGHTS TO A FAIR TRIAL, TO DUE PROCESS, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE STATE'S KNOWING USE OF FALSE TESTIMONY RELEVANT TO HIS PUNISHMENT.

Charlie Flores' constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated by the State's knowing reliance on false testimony in the punishment phase. No witness had attested to who had shot Betty Black. But the State sought to convict Charlie as the triggerman and then to seek a death sentence based on the argument that he, as triggerman, was more culpable than his co-defendant. The prosecutors knew this theory was false. The State also knowingly relied on false and misleading aggravating evidence to increase the odds of obtaining a death sentence contrary to the constitutional mandate that death sentences be based on a process that is reliable and non-arbitrary.

A. Legal Standard

The legal standard for a "false testimony" claim under federal constitutional law is described in Claim VI. That briefing is incorporated here by reference.

B. Application of Law to Facts

1. The State knowingly presented and failed to correct false and misleading testimony relevant to assessing punishment.

Prosecutors knowingly presented and failed to correct false evidence relevant to the punishment phase.

a. Multiple witnesses were induced by the State to testify falsely or misleadingly.

As described at length in Claim VI above, the State sponsored a host of witnesses who testified falsely during the guilt-phase. That briefing is incorporated here by reference. The false testimony that was intended to support the State's position that Charlie was not only guilty, but *more culpable* than both Jackie Roberts and Ric Childs, is particularly relevant to the instant claim because this factor is a punishment consideration. The false testimony in the guilt phase relevant to punishment falls into two basic categories: (1) false testimony to make Charlie appear particularly violent; and (2) false testimony about Ric having "the bigger gun" that the State urged the jury to assume had been used at the crime scene to shoot the dog (and thus not Mrs. Black). Then the State also adduced additional false testimony in the punishment phase.

i. <u>False testimony knowingly adduced in the guilt-phase that was material to punishment</u>

The State knowingly elicited false testimony to make Charlie appear violent and "trigger happy." In the guilt-phase, the State relied heavily on uncorroborated accomplice-testimony from Jackie Roberts meant to caricature Charlie as a maniacal fiend who forced Jackie and Ric to pursue the hidden drug money at the Blacks' house. 34 RR 138-139. Likewise, the State coached her to add to her false timeline an incident at a gas station where she allegedly sent gas flying everywhere during a

getaway attempt, prompting Charlie to come running, grab her by the hair, and demand to know what she, "bitch," thought she was doing. 34 RR 145-148. The State also expressly urged her to testify falsely that Charlie was demanding immediate reimbursement for being shorted in the drug deal that she and Ric had set up. 34 RR 150-151. None of that happened. Ex. 4. And the State had ample reason to believe that Jackie was anything but credible, *e.g.*: she had lied about having been off drugs for two years before she met Ric (34 RR 110); lied about being in some "antennae repair" business with Jason Clark (34 RR 108; 38 RR 115); lied about being unconcerned that Gary Black had told his parents to cut her "allowance" from his hidden drug money in half (38 RR 150); lied about whether she had told Ric to look for the money hidden at the Blacks' house behind the bathroom walls (38 RR 119); lied about having drawn a map for a babysitter, not for Ric, although, after the murder, such a map was found in Ric's backpack, which Jackie's ex-husband Doug admitted throwing away to protect Jackie (38 RR 121-131); lied about knowing that Ric's backpack, which had been left in her car the morning of the murder, was brought from her car to Ric by Ric's uncle while Jackie and Ric met privately, for hours, knowing they were suspects in Betty Black's murder (38 RR 148); lied about how long she had spent holed up with Ric (she said it was "45 minutes," 34 RR 165, whereas police records show it was over three hours).

Similarly, the State knowingly permitted James Jordan to testify that he had identified Charlie as the person who had shot towards Jordan's car as Jordan had chased after the fleeing SUV Charlie was driving on I-30 on January 31, 1998. The State knew that Jordan could not have made an identification because his initial physical description to the police the night of the incident was very vague and, in any event, did not match Charlie's appearance at all. (It more closely resembled Jonathan Wait Jr. who indisputably helped Charlie that night with attempting to get rid of Ric's Volkswagen and who was the actual shooter.) Also, the State knew that the testimony Jordan gave, on almost every point meant to lend credence to his ability to make an identification, was at odds with statements he had made the night of the incident and a few days later. *Compare* 37 RR 14-30 *with* SXR100.

The State also knew that Jordan's testimony about being able to identify the shooter was false because the State knew that lead detective Callaway in Farmers Branch had conferred with the Arlington PD, before Jordan endeavored to make an identification, which is how Arlington PD was able to present Jordan with Charlie's photo. SX100. Jonathan Wait Jr., an interested witness who was the actual shooter, was recruited to give false testimony to corroborate Jordan's false testimony about his ability to identify Charlie as the shooter. 36 RR 269-270.

Second, the State adduced false testimony to support its false narrative that Charlie, not Ric, had shot Mrs. Black. When trial began, the prosecutors knew they

had no evidence to support that hypothesis. Initially, the prosecutors tried to utilize their star witness, Jackie Roberts, for this purpose. But her attempt to give the State (false) evidence to support the inference that Ric had the "bigger gun" the night before the murder was botched. 34 RR 144. The State encouraged her to remedy the problem by obtaining a rush transcript for her to study before she was recalled to the stand for cross-examination a few days later. 38 RR 111. The State then induced her to testify falsely: "when I stated the fact that the Defendant had the largest gun, he had the largest gun, but not the largest handgun. Rick Childs had the largest handgun. The Defendant had the smaller one." 38 RR 113. Her suggestion that Ric had armed himself with a "bigger" handgun in the hours before Mrs. Black was shot with a .380 pistol, a smaller caliber weapon, was meant to support the State's argument that a particular bigger gun (a .44 magnum) had belonged to Ric and been used to shoot the dog. Yet the State knew the whole, convoluted mess involving this weapon was false.

Most critically, the State solicited false testimony from trace-evidence analyst, Charles Linch to support its "bigger gun" story. Linch testified about finding potato starch deep in the barrel of the .44 magnum. The prosecution then pretended that this evidence gave rise to a "reasonable deduction" that made Charlie more culpable. As ADA Davis argued:

> I submit to you it's a reasonable deduction from the evidence that actually what those two people went in and got was a .44 caliber

> Magnum, and a .380 auto. Richard Lynn Childs had that .44 Magnum in his possession, and this man right down here, Charles Don Flores, had that .380 semi-automatic pistol in his possession.

39 RR 51. There was, however, no such "reasonable deduction" to be made from the State's false "potato-starch-in-the-bigger-gun" madness.

As explained at length in Claims II and VI above, the factual basis for which is incorporated here by reference, the State knew or should have known that the entire premise of Linch's testimony was false. It was false that finding evidence of potato starch in the .44 magnum would indicate it had been used in the crime. Thus, his testimony furthered a false agenda. Moreover, several specific details can now be seen as false—only because Linch's testimony was compared to Linch's casefile and other SWIFS records after those materials were finally produced. These records show that ADA January had told Linch what the State was hoping Linch would find before Linch did his testing and reveal that Linch did not really find what he described on the stand. *Compare* 36 RR 208-216 *with* Ex. 65; *see also* Ex. 73. Seemingly unbeknownst to Linch, he was recruited by prosecutors who knew firsthand his eagerness to help the prosecutors as they flailed around mid-trial seeking some evidence. They wanted something that seemed facially objective to support the State's "bigger gun" story, which had been presented during Opening Statements. Linch's false testimony enable the prosecutors to argue that Charlie, not

Ric, had shot Mrs. Black—even though they knew that Ric had confessed to shooting Betty Black. Ex. 9.

Had the prosecutors been seeking the truth, not merely a conviction and death sentence, they would have tried to test the veracity of the string of suspect assumptions underlying the "bigger gun" hypothesis. But there is no evidence that the State sought to do any of the following:

- Assess who had placed the .44 magnum in a closet at 11807 High Meadow, High Meadow, who owned it, or how and when it had been acquired and placed in that closet;

- Discover from a ballistics expert whether there was any evidence linking that particular .44 magnum to the crime scene (and the death of the dog);

- Explain how the chain of custody had been broken when the .44 magnum was removed from the FBPD evidence locker and ended up in the DA's Office for some period of time; or

- Ask someone with basic scientific competence if microscopic bits of potato could survive inside the barrel of a gun after it had been fired—let alone fourteen months afterwards, which is when the prosecutors asked Linch to find potato residue inside this particular gun.

Instead, the State ignored the significant indication from Ric himself that the .44 magnum had *not* been used in the Black home invasion. The same custodial interview during which Ric had made this admission, there are clues as to a larger problem—investigators who made unsettling jokes with the strung-out Ric, with whom they seemed to be on oddly friendly terms, as they tried to put words in his mouth. This interview does not resemble any attempt to solicit truthful information

about what had happened at the Blacks' house. Rather, the quest, early in the investigation, seemed to be for information to implicate "bad cat" Charlie, whether or not he had actually been involved, as investigators falsely insinuated that he was affiliated with the "Mexican Mafia." *See* SXR101.

ii. False testimony adduced in the punishment phase.

The pattern of adducing false testimony was not limited to the guilt phase of trial.

In the punishment phase, the State re-called FBI agent Mike Flinchbaugh (who had testified in the guilt phase about apprehending Charlie). 40 RR 73-75. During his second time on the stand, Agent Flinchbaugh testified about a list of names and addresses found in Charlie's briefcase upon his arrest. 40 RR 75-76. Through Agent Flinchbaugh, the State created two false impressions meant to further tar Charlie unfairly. First, Flinchbaugh testified that this collection of addresses amounted to the remaining contents of the briefcase that had been seized. In fact, the briefcase had also contained love letters from Myra that corroborated what she had told Charlie and his lawyers about the harassment she had sustained and the fear of losing her children. The letters also expressed great love for Charlie and affection for his parents. That Charlie had received and cherished these letters was clearly relevant mitigating evidence that should have been disclosed. *See Penry v. Lynaugh*, 429 U.S. 302, 319 (1989) (evidence of "the defendant's background and character is

relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable"); *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (emphasizing the "low threshold for relevance" generally and the even broader standard that must apply to mitigating evidence in the punishment phase of a capital case). But these letters were not disclosed for another two decades. Ex. 40.

ADA January, in essence, testified that "at [his] request" Flinchbaugh had been asked to investigate the names in the address book. 40 RR 76. Flinchbaugh noted that some of the people in the address book—Antonio Jojola, Jose Flores, Juan Jojola—had numbers by their numbers that were "Texas Department of Correction" (TDC) numbers. 40 RR 76-77. These individuals happened to be Charlie's brothers and, since they were then in prison, their addresses included TDC numbers. Using the other names in the address book, not birthdates, Flinchbaugh purported to have learned that, in addition to Charlie's brothers, about 30 other (unidentified) people in his address book had TDC numbers too. 40 RR 78-79. January then asked Flinchbaugh to speculate about whether any of these people had "gang affiliations." 40 RR 79. Although the defense objected to this line of questioning, this false insinuation was put before the jury—that Charlie was somehow affiliated with a vast array of anonymous gang members.

Yet, before trial, the State knew that TDC had reported that Charlie had ***no gang affiliation***. 40 RR 83. Moreover, there is nothing in Agent Flinchbaugh's testimony (or elsewhere in the record) suggesting that he was qualified to research or opine about gangs or that he had used a reliable methodology—or any methodology at all—to do whatever this investigation was that ADA January had asked him to undertake. But the State, using Flinchbaugh, had accomplished the mission of falsely injecting into the punishment-phase case the word "gang" in conjunction with Charlie. This whole episode violated the constitutional principle that heightened reliability is paramount to avoid the kind of arbitrary sentencing that violates the Eighth Amendment. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *accord Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion"); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, th[e] Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.") (internal citations omitted).

One of the State's worst overreaches in the punishment phase involved false testimony *about* a witness who then never testified because she ended up dodging a subpoena. Her name was Sherry Harris. She disappeared after being asked in the hallway whether she had medical records to support testimony her ex-husband, Shawn Preston, had just provided. Preston testified at length about a bizarre incident that had allegedly occurred in April of 1997. Preston's story was that Charlie, a total stranger, had come knocking on their apartment door, insisting that a blonde woman had just ripped him off; a fight had ensued, which Preston described as lasting for "45 minutes to an hour" after Sherry, who he described as three months pregnant, had been "kicked in the stomach" and then jumped over the wrestling men to go call the police. 40 RR 46-48. Preston described a violent battle that he and Charlie had supposedly engaged in, spanning multiple locations, during which Preston had seized a gun from Charlie. The police eventually showed up and pulled the men apart in a parking lot. 40 RR 63-73. But the police report from this incident does not support Preston's wild tale. *Id*. Then it came out during cross-examination that neither Preston nor his ex-wife Sherry Harris had sought any medical attention that night, had provided any kind of written statements to police, or had decided to press charges. 40 RR 56-58.

But then, to put an exclamation mark on his suspect testimony, in re-direct the State asked:

Q. Did she [Sherry] have the baby she was pregnant with?

A. No, she didn't. She lost it.

40 RR 62. This testimony created the distinct (and false) impression that this woman, Sherry Harris, had sustained a miscarriage because of Charlie's reputed assault (for which she did not press charges).

Later that day, the defense sought to get medical records related to Sherry Harris, seemingly, because Charlie had told them that the testimony about her was patently false. 40 RR 167. Sherry Harris, who had been sworn in and was present in the courthouse while her ex-husband had testified, reportedly said that, two days after the encounter with Charlie, she had gone to a particular hospital because of the miscarriage, had the records to prove it, and would go get them and come right back. But she did not come back. Then she ducked a subpoena. 41 RR 18. Later that day, her medical records were obtained by the State; those records showed that there had been no hospitalization in the relevant time period or any treatment related to a miscarriage at any time. 41 RR 23.

The next morning, the defense provided the court with an update and asked for a continuance to enable them to attach the witness, but the motion was denied. 41 RR 11-19. The defense was left to read into the record an explanation of what the medical records showed, which was ***no record of any miscarriage***. Indeed, the records showed that the only hospitalization Sherry Harris had had the entire

calendar year of 1997 (in July, not April when the incident with Charlie had occurred). And that hospitalization arose from a toothache:

> The incident in July of 1997, which is again the only time she presented herself to that hospital in the calendar year 1997, indicates that on July the 30th she was brought by ambulance to the hospital complaining of a toothache, which she had injured. She had injured a tooth opening a beer bottle with her teeth at work. She requested a particular type of medication for that, which they declined to give her.

41 RR 14.

The State knew or should have known that Preston's story was, in large measure, false. And before putting something as salacious and upsetting before the jury as the suggestion that Charlie had kicked a pregnant woman in the stomach and caused a miscarriage, the State should have (1) given the defense notice and (2) ascertained whether the story had any validity. The State did not do either of these things. Its modus operandi throughout trial was to throw whatever the prosecutors could come up with before the jury, however unreliable and unverified—in violation of the U.S. Constitution. *But see Gardner v. Florida*, 430 U.S. 349, 358 (1977) (holding that sentencing decisions regarding the death penalty must "be, and appear to be, based on reason rather than caprice or emotion.").

2. The false testimony was material.

Since 1976, if Texas wanted to secure a death sentence, it must convince a jury that there is "a probability that the defendant would commit criminal acts of

violence that would constitute a continuing threat to society." *See* TEX. CODE CRIM. PRO. art. 37.071, sec. 2(b)(1). This special issue is known colloquially as the "future dangerousness" special issue.

By the time of the Flores trial, juries in death penalties also had to decide "whether, taking into consideration all of the evidence, ***including the circumstances of the offense,*** the defendant's character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." TEX. CODE CRIM. PROC. art. 37.071, sec. 2(e). This special issue was adopted only about after Texas's sentencing scheme was found unconstitutional as applied in *Penry*, 492 U.S. at 328; *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) (explaining that "well before our decision in *Penry* [*v. Lynaugh*], our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.").

In cases like this one, where the State cannot prove which of co-defendants caused the death of the decedent and relies instead on the "law of parties" or a theory of "accomplice murder," the jury is also asked to decide a third special issue: whether

the defendant intended or anticipated loss of life. *See* TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(2).

Thus, in seeking to convince a jury to answer the special issues so as to ensure that a death sentence will be imposed, the State needs to convince a jury of at least two things. First, the jury needs to find, beyond a reasonable doubt, that the defendant will be a future danger (by predicting that there is a probability he will "commit criminal acts of violence that would constitute a continuing threat to society"). Second, the jury needs to find that there is insufficient mitigation to warrant a life sentence instead. *See id*., sec. 2(b). One way the State can do that is by arguing that "past is prologue," and harping on the underlying offense itself. Then, in law-of-parties cases like this one, the State has an additional burden of proving that a defendant who did not kill the victim nevertheless should have "anticipated" the loss of life, a decidedly low burden in cases involving guns. *Id*.

In this case, the State sought to characterize the "circumstances of the offense" to suggest that Charlie Flores was not just involved but primarily responsible for the crime—as both the impetus behind the burglary and as the person who had shot the defenseless Betty Black. All of the false testimony, but particularly the evidence meant to make Charlie seem more culpable and more dangerous than Ric and Jackie, was material to the sentence he received.

As described above, part of how the State accomplished its mission was by suppressing considerable material favorable to the defense, including information about his co-defendant, Ric Childs. For instance, the State did not disclose, and thus the jury did not hear, about Ric's "history" with both the Farmers Branch SID and the Irving PD, his status as the son of a local police officer, his status as the brother of some kind of police informant, and his long history of receiving minimal punishment despite a criminal record dating back to his teen years. Yet that undisclosed history suggests significant bias and an arbitrary basis for the radically disparate treatment that Ric and Charlie received from the criminal justice system. That kind of arbitrariness has no place in the dispensation of death sentences. *See Gregg*, 428 U.S. at 195 (requiring that the procedures for imposing a death sentence must be structured to reduce arbitrariness and capriciousness as much as possible).

The State possessed considerable information indicating that, regardless of who was with him, Ric had greater culpability, as instigator of the burglary and as the person who shot Betty Black. The suppression of this evidence was accomplished by hiding: most of the fruits of the police investigation, the evidence of the corruption that permeated the investigation, and the evidence of highly personal motives on the part of law enforcement for shielding Ric Childs from paying for his crimes. The suppression was also accomplished by deleting critical information about Ric's admission to being the shooter from a typed interview of

the first known interview with Ric's co-conspirator Jackie Roberts. Ex. 16. The suppression was also accomplished by waiting to finalize a remarkable plea deal with Ric, in which he confessed to being the shooter, until after Charlie had already been sentenced to death. Ex. 9; Ex. 3.

Again, the State's reliance on the false testimony in its punishment-phase Closing Arguments shows that its false theory of greater relative culpability was material. At the end of the punishment phase, the State doubled-down on its insistence that Charlie, not Ric, had shot Mrs. Black. Moreover, a central theme of the State's punishment-phase Closing Arguments involved pushing the false theory that Charlie, not Ric, had been the shooter, relying yet again on their "bigger gun" fiction:

- "the evidence in this case shows that that man [Charlie Flores] is the trigger man and not Ricky Childs." 41 RR 53.

- "if you wanted to give him [Charlie Flores] every benefit of every possible doubt in the world and ignore some of the evidence in the case, for example, the larger caliber weapon being in Ricky Child's [sic] possession in his house with the potato in it, well, we know that's the gun that shot the dog." 41 RR 87.

- "We showed you that the larger weapon was on the possession of Richard Childs. The Defense lawyer didn't mention that. I guess he was asleep and didn't hear that part." 41 RR 92.

The entire purpose of revisiting this line of argument in the punishment phase was to convince the jury, by relying on the State's Ric-had-the-bigger-gun falsehood,

that Charlie Flores should be sentenced to death because he had been more culpable than Ric Childs in perpetrating the offense.

The truth was: Ric Childs had set up the drug deal involving Charlie and Terry Plunk through Jackie; the timing of the drug deal was exploited to implicate Charlie in a far more serious crime that *Ric* had committed; Ric committed the capital offense while the State knew that Ric was out on bond and had failed to appear and had already committed other crimes; Ric had enter the Blacks' house on January 29, 1998, with some other white male with long hair whose identity has intentionally been suppressed; Ric and Jackie had been planning the burglary, perhaps since the outset of their relationship, and Jackie had provided Ric with crucial information about, and the means to get into, the Blacks' house; and *Ric* had shot Betty Black, a fact that he confessed to Jackie soon afterwards. This admission was then knowingly suppressed by the investigators and prosecutors working on the case. Even assuming that Charlie Flores was present when Mrs. Black was shot, ***which Charlie Flores adamantly denies***, Ric Childs was patently more culpable. And it was material that the jury heard false testimony suggesting that Ric was merely caught up in Charlie's "spell."

Former ADAs January and Davis were intent on convincing the jury that Charlie Flores, not Ric Childs, had shot Mrs. Black—although, under Texas's law of parties, the State did not need to prove who had pulled the trigger. But it is

indisputable that seeing one of two co-defendants as more culpable is material—if the desired end is a death sentence.

C. Conclusion

The State knowingly adduced false testimony that it relied on in urging the jury to answer the special issues so that Charlie Flores would receive a death sentence. Because Charlie has established in Claims IV & V above that he can prove materiality under the more demanding *Brady* materiality standard, he can certainly satisfy the more lenient standard that applies to false-testimony claims. *See Bagley*, 473 U.S. 667, 679 n.9 (1985) (explaining the that standard for false testimony claims under *Napue*/*Giglio* is more lenient and is equivalent to the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967)).

If, for some reason, Claim VI is not authorized, Claim VII should be remanded for further factual development. In that event, habeas relief, in the form of a new punishment-phase trial, should follow.

VIII. CHARLIE FLORES'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS WERE VIOLATED BY THE STATE'S USE OF FALSE TESTIMONY, EVEN IF UNWITTINGLY, UNDER *EX PARTE CHABOT*.

Charlie Flores's conviction was obtained through the State's use of false and misleading testimony in violation of his right to due process of law. U.S. CONST. AM XIV; TEX. CONST. art. I, §S 1, 19; *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009); *see also Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012) (noting that, "taken as a whole, [the testimony] gave the jury a false impression").

In short, if the CCA were to determine that the State did not *knowingly* rely on the false testimony described in Claims VI and VII above, Mr. Flores is nevertheless entitled to relief under the more lenient State-law standard announced in *Chabot* and its progeny.

A. Legal Standard

The Due Process Cause of the Fourteenth Amendment can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly. *Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011). An applicant need not show that one of the State's witnesses committed "perjury[.]" Instead, "it is sufficient that the testimony was 'false.'" *Chavez* 371 S.W.3d at 208 (quoting *Robbins*, 360 S.W.3d at 459). "[A] a witness's intent in providing false or inaccurate testimony and the State's intent in introducing that testimony are not relevant to false testimony due-process error analysis." *Chavez*, 371 S.W.3d at 208

(citing *Robbins*, 360 S.W.3d 459.) A *Chabot* claim thus has two essential elements: "the testimony used by the State must have been false, and it must have been material to the defendant's conviction." *Robbins*, 360 S.W.3d at 459.

The CCA has held that whether testimony is false for purposes of a *Chabot* claim turns on "whether the testimony, taken as a whole, gives the jury a *false impression*." *Chavez*, 371 S.W.3d at 208 (emphasis added) (citing *Ghahremani*, 332 S.W.3d at 447; *Alcorta v. Texas*, 355 U.S. 28, 31 (1957)); *cf. id*. (equating "false" testimony with "inaccurate" testimony). Testimony typically presents a "false impression" when a "witness omitted or glossed over pertinent facts." *Robbins*, 360 S.W.3d at 462. As such, an applicant need not prove that the testimony was literally not true:

> We have explained that "'[t]estimony that is untrue' is *one of many* ways jurists define false testimony [and the] Supreme Court has indicated that '*improper suggestions, insinuations and, especially, assertions of personal knowledge*' constitute false testimony."

Robbins, 360 S.W.3d at 460 (emphasis added).

To show that the State's presentation of false testimony is material, an "applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Chabot*, 300 S.W.3d at 771 (quoting *Ex parte Fierro*, 934 S.W.2d 370, 374-75 (Tex. Crim. App. 1996)). This is done by a showing of a "'reasonable likelihood that the false testimony affected the

applicant's' conviction or sentence." *Chavez*, 371 S.W.3d at 207 (quoting *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011)). The standard of materiality is the same for knowing and unknowing use of false testimony. *Id.* at 207 (quoting *Chabot*, 300 S.W.3d at 771.).[205]

This is a relaxed materiality standard, one "more likely to result in a finding of error than the standard that requires the applicant to show a reasonable probability that the error affected the outcome." *Chavez*, 371 S.W.3d at 207 (internal quotations omitted). *Accord Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010) (appellant was entitled to relief by showing "a *fair probability* that appellant's death sentence was based upon . . . incorrect testimony") (emphasis added).

B. Application of Law to Facts

Mr. Flores has pled facts and adduced evidentiary proffers more than sufficient to satisfy the two elements of a *Chabot* claim. He has shown that testimony used by the State was false, and that the false testimony was "material to the defendant's conviction." *Robbins*, 360 S.W.3d at 459. He has made this evidentiary showing in briefing the false testimony claims (Claims VI and VII) brought pursuant

[205]Some members of the Court of Criminal Appeals have argued that a *Chabot* claim should require a greater materiality showing than a claim based on the State's deliberate use of false testimony. *See. id*. at 216 (Keller, P.J., dissenting) (discussing a "materiality ladder" for various constitutional violations, and arguing that "[t]he materiality standards for knowing and unknowing use are in fact distinct."); *Henderson II*, 384 S.W.3d at 835-836 (Price, J., concurring) (same). However, that is dicta, and the instant case is not one where the materiality element is weak.

to the more demanding federal constitutional law standard in *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972). That briefing and the evidentiary proffers upon which it relies are incorporated here by reference.

C. Conclusion

Mr. Flores has demonstrated that the State *knowingly* adduced false testimony material to obtaining both a conviction and a death sentence. *See* Claims IV, V, VI, and VII above. But under *Chabot* and its progeny, he need only show that his trial was materially tainted by false or misleading evidence whether or not State actors were aware of the falsity of the challenged testimony. *See, e.g.*, *Chavez*, 371 S.W.3d at 208. Therefore, if, for some reason, Claims IV, V, VI, and VII are not authorized for further factual development, Claim VIII should definitely be remanded and adjudicated under Texas state law. In that event, habeas relief, in the form of a new trial, should follow.

IX. DEFENSE COUNSEL IMPROPERLY OVERRODE CHARLIE FLORES'S SIXTH AMENDMENT RIGHT TO MAINTAIN THAT HE WAS INNOCENT OF BETTY BLACK'S MURDER, RESULTING IN A STRUCTURAL ERROR UNDER *MCCOY V. LOUISIANA* THAT REQUIRES A NEW TRIAL.

Charlie Flores's trial counsel violated his Sixth Amendment right to decide upon the objective of the defense when lead counsel spontaneously decided during his guilt-phase Closing Argument to concede Charlie's presence at the crime scene, without his consent and contrary to fact, and then *urged* the jury to find Charlie guilty. Even if counsel had only conceded Charlie's presence at the scene, that concession would have been equivalent to conceding guilt to capital murder under the law of parties, one of the theories upon which the State relied and that was plainly in the jury charge. Although it is not a requirement of the instant claim, it is noteworthy that trial counsel knew or should have known that this decision furthered no rational trial "strategy" and, indeed, constituted a total betrayal of the client.

Demonstrating how Charlie's trial objective was overridden by his counsel is certainly a more complex undertaking than it was in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). But the same constitutional violation occurred: the accused was denied, by his own counsel, the Sixth-Amendment right to maintain his innocence and put the State to its proof.

Historical documents dating back twenty years—long before *McCoy* was decided—show that Charlie objected vociferously to being robbed of his autonomy

with respect to the most basic trial objective and tried for years to urge courts to look at this usurpation of his rights by his own counsel. *See* Ex. 68. At long last, *McCoy* provides a previously unavailable vehicle for relief, clarifying how a Sixth-Amendment-autonomy claim is not appropriately addressed within the ineffective-assistance-of-counsel (IAC) frame. *See McCoy*, 138 S. Ct. at 1510-11 (rejecting the application of *Strickland* and *Cronic* and holding "we do not apply our ineffective-assistance-of-counsel jurisprudence").

Rather than respecting his autonomy, Charlie's trial lawyers misinformed him about the law (because they either did not understand it themselves or chose not to provide accurate information) and then his lead counsel went completely rogue in Closing Arguments—unexpectedly inviting the jury to "**[f]ind him guilty of murder; find him guilty of whatever you want to**[.]" 39 RR 86. These circumstances, described more fully below, easily satisfy Charlie's burden for this Court to consider the merits of his claim and to grant him a new trial.

A. Legal Standard

In *McCoy v. Louisiana*, the Supreme Court of the United States held that a criminal defendant possesses a fundamental right to decide his trial objectives. The individual's autonomy includes not only the rights to decide "whether to plead guilty, waive a jury, testify in his or her own behalf, and take an appeal," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), but also the right to insist on maintaining his

innocence. *McCoy*, 138 S. Ct. at 1508. A corollary of the right to maintain innocence is a defendant's right "to decide on the objective of his defense." *Id.* at 1505.

McCoy further emphasizes that this right to autonomy is paramount in capital cases, like this one, where the defendant's life is at stake. *Id.* at 1508 (holding that the Sixth Amendment protects "choices about what the client's objectives in fact *are*") (emphasis retained). Because the "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as . . .'structural'" error, Charlie is entitled to a new trial. *Id.* at 1511.

Prevailing on a "*McCoy* claim" requires satisfying two elements.

First, the habeas applicant must show that he clearly expressed to counsel his desire for a particular defense. *Id.* at 1509. The decision does not demand that this expression occurred on the record; it is the client's clear assertion of his objective that matters, not whether that assertion happens in or out of court. As the Supreme Court explained, "[i]f, after consultations with [defense counsel] concerning the management of the defense, [the client] disagreed with [defense counsel's] proposal to concede [the client's guilt] . . . it was not open to [counsel] to override [the client's] objection." *Id.*

Second, the habeas applicant must show that trial counsel acted contrary to the defendant's expressed objective.

B. Facts Relevant to the *McCoy* Claim

On May 1, 1998, Charlie was apprehended. 35 RR 18. In absentia, he had been charged with the capital murder of Mrs. Black, who had been shot in her home on January 29, 1998, sometime between 6:45 and 9:30 a.m. Because Charlie was indigent, he was appointed counsel: Brad Lollar, lead counsel, and Doug Parks, second chair.

During the few pre-trial meetings Charlie had with counsel, he explained his role in events the night before Mrs. Black's death; he insisted that he was not guilty of the murder; and he noted that he had an alibi defense: when Mrs. Black was shot on the morning of January 29, 1998, in Farmers Branch, Texas, he had been sleeping in his trailer in Irving, Texas and had then gotten up to help his partner Myra Wait get her children ready for school. Ex. 4. Lollar, however, was skeptical. He repeatedly demanded of Charlie that he "come clean," suggesting that Lollar believed that Charlie had at least been present at the scene. Lollar also suggested that ADA January would offer Charlie a life sentence if he would plead guilty. *Id.* ¶34. Charlie refused to do this.

Lollar told his client that, as a legal matter, it was okay if Charlie had been present at the scene because he could try to convince the jury that co-defendant Ric Childs had acted based on an "independent impulse" in shooting Mrs. Black and that Charlie could then only be convicted of burglary. *Id.*

Lollar's purported objective was to emphasize that the State had no physical evidence linking Charlie to the scene and no means to prove who had actually shot Mrs. Black. Lollar suggested that this approach might allow the jury to go for a "lesser included offense" instead of capital murder and thus save him from the death penalty. Lollar and co-counsel Doug Parks told Charlie's parents as well that they should go for a "burglary conviction" to avoid the death penalty. *Id.*; Ex. 69. Lollar repeatedly told Charlie that he thought there was no way the State could prove capital murder, so a maximum twenty-year sentence for burglary would be a far better outcome than the death penalty.

Lollar also voiced his professional opinion that Charlie's alibi witness (Myra Wait) was tainted because she had helped Charlie try to evade arrest and the DA's Office was actively seeking to indict her for that conduct.

What remains of trial counsel's file suggests that Lollar did not interview Myra Wait until March 6, 1999, shortly before the presentation of evidence began. Lollar's notes from that interview indicate that Myra told him, among other things, that Charlie was in bed sleeping when her alarm went off at 6:15 a.m. on January 29, 1998. Ex. 36. Also, his co-counsel Doug Parks' notes confirm that Myra could indeed provide an alibi defense, describing "Myra's Statement" as being that she "did not tell police that C told her he was there and shot the dog" and "says C at home exactly at time of murder." Ex. 44.

Meanwhile, Charlie's elderly parents, Lily and Carter Flores, had been thrown in the Farmers Branch jail, held for several days, and charged with crimes arising from abetting his escape as a fugitive. They were told that bond would be set at $30,000 each unless they agreed to cooperate and to sign statements inculpating their son. Only after they signed statements were they transferred to the Dallas County jail where bond was lowered to $1,500. The DA's Office also continued to try to indict Myra who had sobbed hysterically to Charlie in phone calls from jail about fearing for her life and being threatened by law enforcement with the prospect of prison and having her children permanently taken from her. Ex. 4 ¶32; Ex. 13.

During trial,[206] the defense team also learned that the FBI, working with the Farmers Branch PD, had rounded up several of Charlie's acquaintances who had their own legal troubles and had shaken them down trying to get evidence to inculpate Charlie. For instance, the defense learned that a young drug addict named Homero Garcia had been apprehended, interrogated, and after being awake for four days signed an "Affidavit" that had been typed-up by law enforcement. The Affidavit included a statement that Homero had signed suggesting that Charlie had confessed to being present at the Blacks' house and had said he "just shot the dog." Ex. 45. When it became clear that Homero had been subpoenaed to testify, Charlie

[206] Less than a year after Mrs. Black's death and less than nine months after Charlie's arrest, voir dire began on January 25, 1999. *See* 1 RR.

continued to insist on his innocence, demanding that his lawyers put on his alibi defense.

Meanwhile, when Myra visited Charlie in the jail, her terror was palpable. All of his loved ones believed that, if they testified in support of Charlie, then ADA January would use his authority to prosecute them and send them to prison as he had threatened to do. As his diabetic mother, then 60 years old, recalled: She and her husband "were both put in jail cells for a few days, and we were essentially threatened with the choice of either taking a plea deal where we pled guilty to aiding Charlie's fleeing, or else to face the prospect of many years of prison time." Ex. 29 ¶18. Charlie complained to Lollar about how his loved ones were being harassed, but Lollar simply responded that January "could do that." Ex. 4.

In voir dire, the law of parties was discussed repeatedly by counsel. For instance, on January 26, 1999, Mr. Lollar told one potential juror:

> And the question that would be asked of you in the guilt or innocence phase of a capital murder trial where the person on trial is a party and not the actual shooter, the question before—before you would be entitled to find the non-shooter guilty, you would have to have determined as a jury, all 12 of you would have to agree beyond a reasonable doubt that they should have ***anticipated*** that death would occur.

5 RR 67 (emphasis added). Based on subsequent events, either Lollar did not understand what "anticipated" meant as a matter of law or he intentionally misled his client about the State's burden.[207]

When the presentation of evidence began on March 22, 1999, Charlie was asked in open court what his plea was, and he said "not guilty." 35 RR 21. Then, the indictment was read to the jury, accusing Charlie of knowingly or intentionally causing the death of Elizabeth Black by shooting her with a firearm in the course of committing or attempting to commit robbery or burglary. Charlie again pled not guilty. 35 RR 25.

In the middle of the State's case, prosecutors informed the defense that one of the Blacks' neighbors, Jill Barganier, was suddenly prepared to identify Charlie after having seen him in the courtroom sitting at the defense table. *See* Claim I. Mrs. Barganier was an important witness because she had succeeded at identifying Ric Childs as the driver of the Volkswagen Beetle spotted in the Blacks' driveway the morning she was shot. It agonized Mrs. Barganier that she had been unable to identify the car's passenger despite multiple attempts to do so. *Id.* She tried to make a composite sketch from her memory of the passenger, but the jury never saw that

[207] The State was not required to adduce evidence that the specific act of murder was anticipated in advance; the State only needed to establish that the defendant knew that his cohort had a deadly weapon. *See, e.g.*, *Cook v. State*, 858 S.W.2d 467, 470 (1993) (holding that a defendant's presence at the scene and participation in the underlying armed robbery was sufficient to convict him of capital murder as a party regardless of who pulled the trigger).

image—and thus did not see that her composite, created back on February 4, 1998, looked nothing like Charlie Flores. *Id.*

Because a police-conducted hypnosis session had been one of the tools used to try to augment Mrs. Barganier's faint memory, a hearing was necessary before she could be permitted to testify about her in-court identification thirteen months after-the-fact. First thing on March 22, 1999, the trial court hastily convened a "Zani hearing." 36 RR. The trial court was supposed to use the hearing to assess whether the hypnosis session that Mrs. Barganier had been shepherded through had comported with "procedural safeguards" required by Texas law. *See State v. Zani*, 758 S.W.2d 233 (Tex. Crim. App. 1988). The State argued that "the hypnosis had little or nothing to do with her in-Court identification at all[.]" 36 RR 116. The court denied the defense's motion to preclude Mrs. Barganier from testifying about her post-hypnosis identification. 36 RR 1-117.

Mrs. Barganier was allowed to testify to the jury at the end of that same day, asserting that she was now "more than 100 percent" sure that it was Charlie Flores she had seen getting out of a psychedelic Volkswagen Beetle outside of the Blacks' house at 6:45 the morning of Mrs. Black's murder. 36 RR 293. After this testimony, however inaccurate, Charlie believed he had no chance for an acquittal unless he testified because he was the only person who could contradict some of the lies that were before the jury. Ex. 4. Lollar, however, insisted that Charlie testifying would

be "suicide," arguing that he would be cross-examined about all of his extraneous offenses before and after the murder. Moreover, Lollar had been telling his client all along that the jury would hate him and want to find him guilty of *some* offense because of all the extraneous offenses that the State planned to put on. So, after Mrs. Barganier was allowed to testify, Charlie told his attorneys that, instead of "Plan A"—the alibi defense—he was willing to go with "Plan B"—Lollar's plan. *Id*.

"Plan B" was for Lollar to argue the flaws in the State's case in hopes that the jury would settle on a lesser-included burglary offense. "Plan B" did ***not*** involve conceding Charlie's presence at the scene or conceding guilt. In fact, one way his attorneys convinced him not to testify was by telling him that, by not putting on a specific defense, he would still be able to pursue his innocence claim on appeal. *Id.*

The contemporaneous trial record establishes that, in an unreported charge conference held on March 29, 1999,[208] Lollar seemingly argued for inclusion of an "independent impulse" instruction as a means to allow the jury to reach a verdict on a lesser-included offense. ***But that request was denied***—a sequence memorialized on the record the next day. *See* 39 RR 11-12:

[208] For some reason, Charlie was not present during this charge conference and there is no evidence of a valid waiver of his presence. That violation of his constitutional rights under the Fifth and Sixth Amendments should have been raised in his direct appeal. It was not.

MR. LOLLAR: Your Honor, the one objection we have is the Court has not given us the Independent Impulse Charge, which we talked at great length yesterday afternoon. We feel that it is appropriate under the circumstances of the case and it should be included in the Charge.

THE COURT: Well, that objection is overruled.

MR. JANUARY: We would like to have the Defense put on the Record, in our discussions yesterday, they specifically mentioned they did not want the lesser included of either aggravated robbery or robbery for strategic purposes. We would like to have the Court inquire as to the Defense's wishes in that regard.

THE COURT: Mr. Lollar, would you speak to that?

MR. LOLLAR: Yes. We don't want robbery or aggravated robbery in the Charge.

THE COURT: All right. And is that because of some strategic motive, or if you can characterize it.

MR. LOLLAR: Yes.

Thus, before Closing Arguments began, defense counsel no longer had any basis for believing that the jury might go for the "lesser included offense" of burglary by first making an "independent impulse" finding. That option was not even in the charge. As a matter of law, if the jury was convinced that Charlie had participated in the burglary, then the jury could find him guilty of capital murder relying on a law-of-parties theory—which was plainly *in* the charge. The jury would then never reach

the part of the charge featuring lesser included offenses. ADA Davis made this point insistently in presenting the first Closing Argument for the State:

> Lastly, the final pages here deal with lesser included offenses. And it's important to remember this, that you don't even consider those lesser included offenses unless you believe that this man is not guilty of capital murder. See, you start with the highest offense. You consider is this man guilty of capital murder. If you believe that he's guilty of capital murder, as the facts show in this case, that ends your consideration. That's it. You don't get to the lesser included unless you have some reasonable doubt about his guilt of the first offense. And I'll suggest to you the facts in this case clearly show that this individual is guilty of capital murder, and that will stop your consideration at that point before you get to the question of whether he is guilty of murder or burglary in this case.

39 RR 45-46.

But then, without obtaining Charlie's consent, Lollar stood up and made a series of statements implicitly and quite explicitly conceding that Charlie had been present at the scene at the time of the murder and *urged the jury to convict*. Ultimately, Lollar told the jurors that it was okay to find Charlie guilty of capital murder even as he insisted that the State had not proven that Charlie was the shooter or had the requisite intent to commit capital murder:

- "Could it not also be true that he was doing those things [extraneous offenses] **because he was there at the scene at the time of the murder** committed by Rick Childs; that he knew that the Volkswagen was the vehicle that **they had gone over there in**; that sooner or later the police were going to figure out who did it, who was there, who was involved?" 39 RR 68 (conceding Charlie's presence at crime scene).

- "Between Richard Lynn Childs and Charlie Don Flores, who is the more likely shooter of Elizabeth Black? 39 RR 69 (implicit concession that Charlie had been at the scene with Ric).

- "Who had the greater motive **between Charlie Flores and Ricky Lynn Childs** to kill or to shoot Ms. Black? 39 RR 71 (same).

- "I don't think there's a way in the world that any reasonable juror could feel, under the state of this evidence, that the State has proven beyond a reasonable doubt that Charlie Flores shot Ms. Black…. **It's a possibility that he did**, but we don't send people to the penitentiary or to death row based on possibilities." 39 RR 80 (same).

After these stunning "concessions," Lollar turned to the law-of-parties question in the jury charge. Lollar noted that the question required finding that Charlie and Ric had entered into a conspiracy to commit burglary and that, in an attempt to carry out the conspiracy, Ric had intentionally caused the death of Elizabeth Black and that the intentionally-caused death should have been anticipated. Lollar then argued that there was no evidence of "anticipation" because no one had expected Mrs. Black to be home, and thus the shooting by Ric Childs was only an impulsive act on his part—which was a misrepresentation of the State's burden. 39 RR 82. But then Lollar conceded that the jury might nevertheless find his client guilty of capital murder: "Should Charlie Flores have reasonably anticipated that Rick Childs was going to commit the intentional murder? … If you believe that they knew that there was going to be somebody in there and that they were going to kill them, **if there was somebody in there, then find him guilty of capital murder**." 39 RR 85-86.

In wrapping up, Lollar outright asked the jury to find his own client guilty while also insisting that his guilt was not enough for capital murder: "**Find him guilty of murder; find him guilty of whatever you want to**, but it's not capital murder." 39 RR 86.

Charlie did not jump up and object to this shocking development. He was, throughout trial, required to wear a stun belt as an officer stood directly behind him threatening to light him up with 50,000 volts if he made any sudden moves. 40 RR 156. That officer had also informed Charlie that if he were to shock him, he would not be getting up, he would "defecate in [his] pants, and [he was] going to urinate." 40 RR 159. That officer further explained that at least six armed members of the sheriff's office were in the court watching him at all times. 40 RR 155-156. At one point, the judge directed this officer to "zap the heck out of him if he creates any disturbance" even though the officer armed with the stun device had admitted that he had not seen Charlie "act inappropriately at any time in the Courtroom[.]" 40 RR 164, 156. In short, had Charlie stood up in court and disrupted the proceedings by contradicting his own lawyer, he would very likely have had "the heck" zapped out of him.

As Charlie sat by helplessly, ADA January stood up and seized upon Lollar's concessions in making the State's final closing argument: "The defendant's guilty whether he's a party or whether he's the shooter. We've been over that." 39 RR 95.

Charlie was convicted of capital murder. 39 RR 113. The punishment-phase trial began immediately thereafter. 39 RR 115. After the State put on two days of evidence, the defense informed the court that it would not be calling ***any*** witnesses. This is the explanation counsel provided, outside the jury's presence:

> [T]he State has rested their case in chief in punishment, and it is our turn to present evidence. It was our intent to call to the stand the Defendant's father, Caterino Flores, his mother, Lily Flores, and his wife, Myra Wait Flores. We would state for the record that both Mr. and Mrs. Flores are currently under indictment for the offense of hindering apprehension, the subject matter of that, those cases being assistance and aid allegedly given to the Defendant in this case, Charlie Don Flores. Those cases are pending. . . .We keep hearing that [Myra's] the subject of Grand Jury investigation. We've heard she's been no-billed twice, and yet the matter is still before the Grand Jury.

40 RR 140-41. Myra was not in the courtroom at the time, although she had been subpoenaed and was present each day in the courthouse. She was never even asked about the prospect of testifying in the punishment phase. She never told anyone that she did not want to testify or that she would plead the Fifth if she were called to the stand, although she had described feeling very intimidated due to the way the prosecution team had treated her. Ex. 13.

ADA January, the prosecutor who had indicted Charlie's parents and who had sought repeatedly to convince a grand jury to indict Myra Wait, told the jury in his punishment-phase closing: "what is mitigating in this case? … his common-law wife. Where is she? … Bring her on. It's a reasonable deduction from the evidence

they don't have anything good to say about the Defendant, his parents, his brothers." 41 RR 92.

Soon thereafter, the punishment charge was submitted to the jury. The jury announced that it had a verdict after little more than an hour. 41 RR 98. Charlie was sentenced to death.

C. Application of Law to Facts

Charlie's trial lawyers violated his Sixth-Amendment-autonomy right to determine the objective of his defense at trial. His objective was: to present an alibi defense and to maintain his innocence. Instead, counsel conceded guilt and then put on ***no*** affirmative punishment-phase case—thereby dooming their own client. Flores can satisfy both elements of a *McCoy* claim.

1. Charlie Flores expressed his objective to maintain his innocence.

McCoy made clear that a defendant must assert his trial objective to preserve his claim to a Sixth Amendment violation when counsel ultimately ignores or overrides that objective. In distinguishing *Florida v. Nixon*, 543 U.S. 175 (2004), the Supreme Court in *McCoy* focused on how Joe Nixon "never asserted" his purported objective. *McCoy*, 138 S. Ct. at 1509. Instead, Nixon "complained . . . only after trial"—without arguing (or demonstrating) that he had also felt the same way at trial *Id.* While the defendant in *McCoy* made several objections, even opposing his attorney in open court, *McCoy* does not require defendants to lodge a specific and

formal challenge to trial counsel's actions; doing so would unduly burden the constitutional right. The CCA recently struck an appropriate balance. It "agree[d] that a defendant cannot simply remain silent [about his objective] before and during trial," but, at the same time, "should not be expected to object with the precision of an attorney." *Turner v. State*, 570 S.W.3d 250, 276 (Tex. Crim. App. 2018). The CCA concluded that a "defendant makes a *McCoy* complaint with sufficient clarity when he presents express statements of [his] will . . ." *Id.* (internal quotation omitted).

While observing that Robert McCoy expressed his trial objective to maintain innocence "at every opportunity . . . both in conference with his lawyer and in open court," the Supreme Court acknowledged that a defendant's objection to his lawyers' preferred course of action may occur **off-the-record**, during their consultations with the client. *McCoy*, 138 S. Ct. at 1509. "If, after consultations with [defense counsel] concerning the management of the defense, [the client] disagreed with [defense counsel's] proposal to concede [the client's guilt] . . . it was not open to [counsel] to override [the client's] objection." *Id.* Thus, it is the client's clear assertion of his objective that matters, not whether that assertion happens in court or out of it.

Unlike Robert McCoy, Charlie did not make any contemporaneous on-the-record objections when his lawyers failed him and went rogue at the end of the guilt phase. At the time, Charlie was wearing a stun belt and an officer stood directly

behind him threatening to discharge a 50,000-volt shock if he made any sudden moves. 40 RR 156. Charlie was also led to believe that being shocked would cause him to "defecate in [his] pants" and "urinate" on himself and prompt at least six armed members of the sheriff's office to leap up and restrain him. 40 RR 155-159. Therefore, it would have been quite suicidal for him to object on the record.

Twenty-year-old documents, filed with the CCA long before *McCoy* was decided, confirm that Charlie had expressed his objective clearly to counsel before trial and that objective had been overridden. *See* Ex. 68. After his trial, Charlie wrote to all kinds of people about the ineffectiveness of the representation he had received, maintained his innocence, and pleaded for help. He wrote to an investigator briefly retained by his habeas counsel (who ended up failing to do any investigation); he wrote to his habeas counsel (who kept complaining he had no time to work on the case and wanted to withdraw); he wrote to the trial court; he wrote to the CCA; he wrote to the State Bar of Texas. A small excerpt of those communications, which were previously filed in both the CCA and in federal district court, show that Charlie was adamant on this point, *e.g.*: "at no time did Lollar ever tell me, discuss with me in any way[,] that he was going to tell the jury in the closing arguments that I was at the scene of the crime. NEVER NOT EVER." *Id.* (emphasis retained). These documents, created and filed two decades ago, are dispositive.

The CCA well understood that a defendant with a *McCoy* issue "makes a *McCoy* complaint with sufficient clarity when he presents 'express statements of [his] will to maintain innocence.'" *Turner*, 570 S.W.3d at 276 (Tex. Crim. App. 2018) (internal citation omitted). It cannot be that a defendant must have a flagrant mental illness and be struggling to conform his conduct to dictates imposed in court (as was the case with Robert McCoy and Albert James Turner) in order for *McCoy* to apply. *McCoy* turns on whether counsel knew of his client's objective, not on whether the client spoke up in the courtroom when that objective was overridden. *See Thompson v. Cain*, 433 P.3d 772, 777 (Or. App. 2018) ("When a defendant's expressed fundamental objective is to maintain innocence, that defendant's Sixth Amendment guarantees are violated when counsel nevertheless concedes guilt in light of that objective.").

Likewise, *McCoy* cannot fairly be read as requiring a defendant to waive his Fifth Amendment rights and testify. *See People v. Eddy*, 244 Cal. Rptr. 3d 872, 880, *as modified on denial of reh'g* (Apr. 5, 2019), *reh'g denied (Apr. 12, 2019)* (finding it "unnecessary that defendant actually testify in his own defense in order to enjoy *McCoy*'s protection."). The *Eddy* court found "no authority establishing that defendant's failure to testify divested him of his fundamental right to maintain innocence as the objective of his defense." *Id.* Imposing a requirement that the defendant testify to qualify for Sixth Amendment protections would unduly burden

Fifth Amendment rights: "'[F]ailure of a defendant in a criminal action to request to be a witness shall not create any presumption against him.' . . . It [would be] a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 613 (1965) (quoting *Wilson v. United States*, 149 U.S. 60 (1893)). A defendant cannot be forced to choose between maintaining his autonomy and shielding himself from self-incrimination. *McCoy* requires a defendant to clearly express his objective to his attorney; it dictates no specific forum for that expression. But in any case, Charlie had *wanted* to testify and only opted not to do so because of counsel's advice—which in turn hinged on a total misapprehension of the controlling law. Accepting his attorney's (poor) advice on this front did not involve relinquishing his primary objective, though: to maintain his innocence.

In Charlie's initial state habeas proceeding, he accused his counsel of ineffectiveness, in part, for disregarding his desire to rely on his alibi defense, misinforming him about the law of parties, and overriding his objective to maintain his innocence. *See Ex parte Charles Don Flores*, WR-64,654-01 (Tex. Crim. App. Sep. 20, 2006) (unpub.). Thereafter, in a 2001 affidavit, Lollar made this assertion: "I never told Mr. Flores that he could not be convicted as a party to the offense, and I never told him that he could only be convicted of burglary." Ex. 25. That assertion begs the question of whether Lollar advised that seeking a "burglary only" outcome

was his recommended goal for the litigation. His co-counsel Doug Parks admitted that it was. *Id.*[209] In his 2001 affidavit, Lollar also claimed, incorrectly, that "[i]n final argument, I urged the jury to acquit Mr. Flores of the offense of Capital Murder based on the State's failure to prove beyond a reasonable doubt that the defendant was guilty on any of the three ways allowed for guilt under the Court's charge. I did concede that the jury might find evidence substantiating the defendant's guilt on a lesser charge, based on the evidence they heard." *Id.* In fact, Lollar made *no mention* of a "lesser change" or "lesser included offense" in his Closing Argument. 39 RR 65-87.

More critically, Lollar did not deny that he advised his client not to put on his alibi defense and not to testify. Lollar also did not deny that his client had wanted to maintain his innocence. Nor did Lollar deny that he overrode that objective by deciding, in the moment, to repeatedly concede his client's presence at the crime scene (without the client's consent). Nor did Lollar admit that he specifically invited the jury to "**[f]ind him guilty of murder; find him guilty of whatever you want to**, but it's not capital murder." 39 RR 86.

Charlie's objective was to maintain his innocence and tell his story. *See* Ex. 4 (describing in a sworn declaration what happened before and after he was pursued

[209] Lollar's co-counsel stated that the defense "strategy" was to seek a "burglary only" conviction to avoid the death penalty. *Id.*

for Mrs. Black's death). That objective was expressly conveyed. His only acquiescence was to counsel's (unreasonable) suggestion that Charlie forego putting on his alibi defense and refrain from testifying. Charlie agreed to the latter based on two things. Primarily, he accepted counsel's misrepresentations about the "independent impulse" defensive issue that did not even end up in the jury charge—a fact he could not know because he was inexplicably not present during the off-the-record charge conference. His other concern was the way his loved ones were being tormented because of his legal problems. But dispositively, he ***never*** agreed to the notion of conceding his guilt. "Under *McCoy*, criminal defense lawyers must allow their clients to dictate the fundamental objective at trial, and thus must not concede the *actus reus* of a charged crime over their client's objection." *People v. Flores*, 246 Cal. Rptr. 3d 77, 79 (Ct. App. 2019).

2. Mr. Flores's trial counsel plainly acted contrary to the client's objective by conceding his presence at the crime scene and thus his guilt for capital murder under the law of parties.

Standing up in Closing Arguments and inviting the jury to find your client "***guilty of murder; find him guilty of whatever you want to***" is an action contrary to the objective of maintaining the client's innocence. 39 RR 86. *Cf. State v. Horn*, 251 So. 3d 1069, 1075 (La. 2018) (finding *McCoy* applicable where trial counsel had conceded guilt when the client had only wanted to argue "for accidental killing under the negligent homicide statute.").

That is, there can be no reasonable debate that Lollar acted in a manner contrary to his client's objective in conceding his presence at the crime scene in a law-of-parties case—and then going further, asking for a conviction.

What makes this *McCoy* claim complicated—like everything else about this tortured case—is that the client was first induced by his counsel to make a horrible decision based on a complete misapprehension of the law, then counsel went still further and took steps that could only serve to push his client toward the gurney.

Ultimately, a *McCoy* claim is unconcerned with counsel's motives or with whether counsel's actions, in contravention to the client's objective regarding guilt/innocence were reasonable or "strategic." Indeed, a *McCoy* claim is unconcerned with the truth of the client's protestation of innocence. But in this case, the motives of, and past rationale offered by, counsel must be probed because the State has long relied on counsel's untested, post-conviction affidavits as a basis for urging courts to forego reexamining the record in this case.

Lollar knew, before he stood up to make his Closing Argument, that there was no "independent impulse" in the jury charge—a development that had happened in an off-the-record charge conference outside his client's presence. 39 RR 11-12. Thus, Lollar's concessions in the guilt-phase argument could not be justified as furthering *any* legitimate defensive purpose. And since the defense team had ***no plan*** of any kind for a mitigation case in the punishment phase, the Closing Argument

concessions virtually guaranteed a death sentence. These circumstances make defense counsel's decision to override the client's objective not just indefensible under *McCoy* but simply indefensible.

In *McCoy*, the defendant's lawyer at least had a reasonable strategy in conceding the guilt of his very mentally ill client, against whom the evidence of guilt was overwhelming. McCoy's lawyer was trying to help his client avoid the death penalty. The lawyer argued "that he should be convicted only of second-degree murder, because his 'mental incapacity prevented him from forming the requisite specific intent to commit first degree murder.'" *McCoy*, 138 S. Ct. at 1506 n.1 (internal citation omitted). The Supreme Court noted that the lawyer's intent argument may have encountered problems as a matter of Louisiana law; but it was certainly a rational choice because the argument was part of pursuing a cohesive defense theory across the guilt- and punishment-phases of a death-penalty trial, emphasizing the client's serious mental illness as a means to induce sympathy and potentially save the client from the death penalty. *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1059 (2003) ("First phase defenses that seek to reduce the client's culpability . . . are more likely to be consistent with mitigating evidence of mental illness . . . or trauma.").

Lollar was not animated by any such rational strategy. Conceding presence at the crime scene and entreating the jury to convict his own client of "murder" or "whatever you want" only ensured Charlie's conviction for capital murder under the law of parties. And such actions were not a means to preserve credibility in the punishment phase so as to reduce the prospect of a death sentence because defense counsel ***had no plan whatsoever*** for the punishment phase. The defense put on no mitigation evidence at all. *See* 40 RR 140-142.[210] Guaranteeing that one's own client will be found guilty and sentenced to death cannot be a reasonable objective. *Cf. Richter v. Harrington*, 562 U.S. 86, 108-10 (2011) (explaining that a decision can only be deemed a "reasonable strategic decision" if made after a thorough investigation of law and facts relevant to plausible options); *Baldwin v. Maggio*, 704 F.2d 1325, 1332 (5th Cir. 1983) ("Essential to the rendition of constitutionally adequate assistance in either phase is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived.").

[210] The fundamental unfairness of the fact that no court has ever considered the merits of an IAC claim based on the failure to investigate and present mitigating evidence at trial is illustrated by, for instance: *Gates v. Davis*, 648 F. App'x 463, 465 (5th Cir. 2016) (per curiam) (granting a certificate of appealability on a defaulted IAC-PP claim where no witnesses were presented by trial counsel); and *Washington v. Davis*, 715 F. App'x 380, 384–85 (5th Cir. 2017), *as revised* (Feb. 20, 2018) (granting an evidentiary hearing on a defaulted IAC-PP claim). Charlie's initial federal habeas petition, raising the issue of his state habeas counsel's ineffectiveness, was filed before *Martinez v. Ryan*, 566 U.S. 1 (2012) was decided; he was thereafter denied the benefit of that decision. And the merits of his IAC-PP claim have never been considered.

Charlie's trial counsel, years ago in assisting the State in defending against ineffectiveness allegations, claimed that they repeatedly explained the law of parties to Charlie, without acknowledging Lollar's shocking guilt-phase closing argument, which guaranteed a conviction under the law of parties. This kind of disloyalty cannot be squared with counsel's ethical obligations, let alone the obligation to respect the client's autonomy-right to maintain his innocence. *See* Lawrence J. Fox, Darcy Covert & Megan Mumford, *Protecting the Continuing Duties of Loyalty and Confidentiality in Ineffective Assistance of Counsel Claims*, CRIMINAL JUSTICE ETHICS (2020). How could Lollar have explained the law of parties if he and Parks did not even understand it themselves?

It is undisputed that defense counsel repeatedly told Charlie and his parents that being convicted of burglary as a lesser-included offense was possible, seemingly based on some fantasy of jury nullification. That is, it is undisputable that counsel told the Floreses that, in counsel's learned opinion, a conviction of some kind was likely and a conviction for a lesser-included offense of burglary was the best way to avoid the death penalty; and, based on this perception, counsel advised Charlie not to testify and not to put on an alibi defense. This "advice" made no sense in a law-of-parties case. Defense counsel undeniably told the Flores that a finding that Charlie had participated in the burglary could *preclude* a death sentence—which was wrong as a matter of law absent a virtually unheard of "independent impulse" finding. *See*,

e.g., *Mayfield v. State*, 716 S.W.2d 509, 513 (Tex. Crim. App. 1986) (describing the defensive concept of "independent impulse" as "a somewhat elusive one" and making clear that, for it to be submitted to the jury, the defense must adduce evidence that defendant was present when a crime occurred but did not conspire to commit *any* offense).

Under the law of parties, being a willing participant in one felony with someone who you know entered a scene armed with a gun has long been sufficient to secure a capital murder conviction in Texas. That is true in cases like Charlie's where the State had no proof that the defendant actually caused the death of the decedent—or any physical evidence linking him to the crime scene. *See* TEX. CODE CRIM. PROC. art. 37.071, sec. 2(b)(2) (special issue that merely require juries to decide whether the defendant intended or anticipated loss of life). That is, under the Texas Penal Code an individual can be held criminally responsible and sentenced to death for a murder instigated and committed by another. The statute does not require distinguishing between a "principal" and an "accomplice" in charging or convicting. Instead, the law relies on a tautology: "[a] person is criminally responsible as a party to an offense if the offense is committed . . . by the conduct of another for which he is criminally responsible[.]" TEX. PENAL CODE § 7.01(a). A person is considered "criminally responsible" for the conduct of another person if:

> (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (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; or
>
> (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

Id. § 7.02(a). Also, the Penal Code makes clear that, if one felony was intended, and then another felony occurs, everyone involved in the conspiracy to commit the first felony can be held liable for whatever results:

> 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.

Id. § 7.02(b).

Although some commentators, especially in recent history, have vociferously criticized how the law of parties operates in Texas,[211] ***back in 1999***

[211] More recently, commentators in the public media have bemoaned Texas's outlier status among a minority of jurisdictions that permit capital punishment for those convicted of capital offenses as conspirators. *See* Hooman Hedayati, *Texas "law of parties" needs to be revamped*, HOUSTON CHRONICLE (July 22, 2016), https://www.houstonchronicle.com/opinion/outlook/article/Hedayati-Texas-law-of-parties-needsto-be-8404266.php ("Texas is not the only state that holds co-conspirators responsible for one another's criminal acts. However, it is one of few states that applies the death sentence to them.") (last accessed Jan. 30, 2021); *Texas needs to reform its 'law of parties,' which allows*

when Charlie was tried, no conscious defense attorney could have been oblivious to the fact that the theory of accomplice liability could and had resulted in capital convictions and death sentences. *See Tison*, 481 U.S. at 158 (permitting reliance on felony-murder rule to support application of the death penalty for a defendant who did not intend to cause the death, if he or she played a "major" role in the underlying crime and showed "reckless indifference" to human life).

Excluding "contract murders," which constitute an additional category, the Death Penalty Information Center has identified ten cases involving individuals who have been executed under the felony-murder rule/law of parties during the modern death penalty era, half by the State of Texas. All of these men were convicted and sentenced to death ***before Charlie Flores's trial*** and most had already been executed by then:[212]

death penalty for people who haven't killed anyone, DALLAS MORNING NEWS (Feb. 9, 2017), https://www.dallasnews.com/opinion/editorials/2017/02/09/texas-needs-to-reform-its-law-of-parties-which-allows-death-penalty-for-people-who-haven-t-killed-anyone/ ("To date, 10 people who did not commit the actual killing have been executed in the U.S. under 'parties' or similar laws. Half of them have been in Texas. In some cases, the actual killer received a lesser sentence than the accomplice who was put to death.") (last accessed Jan. 30, 2021).

[212] Death Penalty Information Center, *Executed But Did Not Directly Kill Victim, available at* https://deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim (last accessed Jan. 30, 2021). This collection does not include members of the "Texas seven," who were all convicted of capital murder after a prison break on December 13, 2000 that resulted in one of the seven men shooting a security guard while others were, for instance, waiting elsewhere in a car. *See, e.g.*, Jolie McCullough, *In last-minute ruling, U.S. Supreme Court stops execution of "Texas Seven" prisoner*, TEXAS TRIBUNE (March 28, 2019) (discussing the facts of Patrick Murphy's crime),

Name	State	Execution Date	Description of Crime
Doyle Skillern	TX	1/16/1985	Accomplice in the murder of an undercover narcotics agent. He was waiting in a car nearby when the murder happened. The shooter is serving a life sentence, but eligible for parole. ("Killers' Fates Diverged; Accomplice Is Executed; Triggerman Faces Parole," *Washington Post*, Jan. 16, 1985).
Beauford White	FL	8/18/1987	Stood guard while two men went into a house looking for drugs and then killed six of the house's occupants. The two shooters were executed as well. ("Florida Prisoner Executed after 10-Year Fight for Life," *St. Petersburg Times*, Aug. 29, 1987).
G.W. Green	TX	11/12/1991	Participated in a robbery, where one of his accomplices shot the probation officer who owned the home. The shooter was executed on 9/10/87 and another accomplice is serving a life sentence. ("15 Years After Crime, Texas Inmate Is Executed," *New York Times*, Nov. 13, 1991).
William Andrews	UT	7/30/1992	Participated in a robbery and torture, but his accomplice murdered the victims after he left. The shooter was executed as well. ("Utah Execution Hinges on Issue of Racial Bias," *New York Times*, July 19, 1992).
Carlos Santana	TX	4/23/1993	Participated in a robbery. During the robbery his accomplice murdered a security guard. His accomplice was executed on December 8, 1998. (Texas Department of Criminal Justice website)
Jessie Gutierrez	TX	9/17/1994	Participated in a robbery with his brother, Jose Gutierrez, who killed the victim. Jessie was apparently present during the murder and brandished a gun during the robbery. Jose was also executed (in

available at https://www.texastribune.org/2019/03/28/texas-seven-patrick-murphy-execution-law-of-parties/ (last accessed on Jan. 29, 2021).

			1999). (Texas Attorney General press release, Nov. 17, 1999).
Gregory Resnover	IN	12/8/1994	A police officer was killed when trying to arrest Resnover and Tommie J. Smith. Smith and Resnover both fired shots at the police, but Smith was convicted as the one who fired the fatal shot. Smith too was executed. ("Capital Punishment in Indiana," *Indy Star*, June 15, 2007).
Steven Hatch	OK	8/9/1996	Steven Hatch with his co-defendant Glenn Ake participated in a home invasion. After abusing the family for several hours, Hatch went out to the car while Ake killed the parents. Ake is serving a life sentence. ("Oklahoma Justice: Should Crime Partner Get Death Penalty," *Christian Science Monitor*, Aug. 7, 1996).
Dennis Skillicorn	MO	5/20/2009	In 1994, Skillicorn and co-defendants Alan Nicklasson and Tim DeGraffenreid kidnapped Richard Drummond, who had stopped to help the three with their broken-down car. While Skillicorn and Graffenreid waited in the car, Nicklasson led Drummond a 1/4 mile away and shot the victim. ("Missouri is about to execute Dennis Skillicorn. The state's death penalty may not outlive him very long," *Kansas City Pitch*, May 12, 2009).
Robert Thompson	TX	11/19/2009	In 1996, Thompson and co-defendant Sammy Butler entered a Seven Eleven convenience store in Houston with intent to rob. Thompson shot one clerk who survived the attack. On the way out, another clerk came out firing shots at the vehicle. Butler shot and killed that clerk. Butler was given a life sentence. The Texas Board of Pardon and Paroles recommended clemency for Thompson, which Texas Governor Rick Perry rejected. ("Killer executed after Perry rejects panel's advice," *Houston Chronicle*, November 20, 2009).

Additionally, in March of 1998, one year before Flores's trial, Jeff Wood was convicted of capital murder in Texas for a murder someone else committed in the course of a robbery. The State proved beyond a reasonable doubt that Wood "anticipated that a human life would be taken" simply through circumstantial evidence that Wood had waited outside while another person went inside planning to rob a store and then shot the clerk in the process. *Wood v. State*, 18 S.W.3d 642 (Tex. Crim. App. 2000).

It cannot be the responsibility of the client, who is represented by court-appointed counsel, to research the law to double-check whether or not the explanation of the law he is given by counsel is correct. The entire reason that the Sixth Amendment requires appointing counsel for those who cannot afford to hire counsel is

> lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Gideon v. Wainwright, 372 U.S. 335, 344 (1963). There is no basis whereby Lollar's advice about a "lesser included" burglary charge could have worked in this context and instead deprived Charlie of an *actual* defense.

Even if Charlie had agreed to arguing for a lesser-included offense based on some appeal to jurors' residual doubt about whether he was involved, *McCoy* would apply because counsel went far beyond that, urging the jury to "**[f]ind him guilty of murder; find him guilty of whatever you want to**[.]" 39 RR 86. *See Eddy*, 244 Cal. Rptr. at 878–79 ("The People make much of counsel's statement that defendant was 'waffling a little bit' on the day of closing argument, suggesting that defendant . . . was 'inconsistent' in his defense strategy. However, that statement must be taken in context, and in context it is clear counsel was instructed not to make the argument but did so anyway because of counsel's judgment that it was in defendant's best interests."); *Horn*, 251 So. 3d at 1075 (rejecting the "the state['s] suggest[ion] [that] *McCoy* is not controlling in this case because defendant did not claim outright innocence and instructed his attorneys to make an argument for accidental killing under the negligent homicide statute").

Even assuming that counsel were merely ignorant as to how their lesser-included "strategy" was legally indefensible, they had no right to override Charlie's objective to maintain his innocence. There simply is no scenario whereby it is

constitutional for defense counsel to tell a jury to convict a client who is maintaining his innocence.

In short, the lawyer's actions at issue in *McCoy* at least made sense; the choices were part of a cohesive effort in hopes of securing a life sentence for the client. But the fact that McCoy's lawyer's objective was reasonable did not make it constitutional. Lollar's concession in Flores's case, which made no sense in light of the rest of the trial, amounted to throwing in the towel and linking arms with the State. *A fortiori*, the decision to override Charlie's objective to maintain his innocence offended the Constitution.

D. Conclusion

The Supreme Court's holding in *McCoy* is not limited to its facts: where a mentally ill defendant insisted on maintaining his "absolute innocence" despite overwhelming evidence of his guilt. That Charlie's counsel was also ineffective and unethical does not mean that *McCoy* does not apply. *McCoy*'s facts are just simpler because they do not suggest either mis- or malfeasance on trial counsel's part. The egregious facts here mean that, in *addition* to a *McCoy* violation, justice was not served. And defense counsel's self-serving efforts, years ago, to minimize the indefensible betrayal of their client, apparent from the face of the record, should be roundly rejected because they do not take into account his own words, in open court,

inviting the jury to convict: "**[f]ind him guilty of murder; find him guilty of whatever you want to**[.]" 39 RR 86.

Claim IX should be remanded for further factual development, and habeas relief, in the form of a new trial, should follow.

X. CHARLIE FLORES'S DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR TRIAL WAS VIOLATED BY THE STATE'S USE OF TESTIMONY THAT CURRENT SCIENTIFIC UNDERSTANDING EXPOSES AS FALSE.

A conviction secured by way of discredited science violates the constitutional right to Due Process under the U.S. Constitution's Fourteenth Amendment if the scientific testimony contributed to the conviction. As described in Claims I and II above, Mr. Flores's conviction was obtained utilizing testimony that does not stand up to scrutiny in light of contemporary scientific understanding. Since trial, in different for a at different times, even the State has distanced itself from this particular testimony: the in-court identification made by Jill Barganier in 1999; and the trace-evidence testimony of Charles Linch, a trace-evidence analyst whose forensic science testimony was used to support a theory about whether a given firearm had been used at the crime scene. The scientific justifications for putting this evidence before the jury does not withstand scrutiny and a conviction hinging on that testimony violates the constitutional guarantee of Due Process.

A. Legal Standard

Quasi-scientific evidence that is discredited by scientific advances can give rise to a Due Process violation. For instance, the Ninth Circuit has explicitly held that an inmate establishes a Fourteenth Amendment Due Process violation by alleging a conviction based on junk science generally, and the Shaken Baby Syndrome specifically. *See Gimenez v. Ochoa*, No. 14-55681, 2016 WL 2620284

at *5-6 (9th Cir. May 9, 2016) (recognizing that a Due Process claim based on faulty evidence "is essential in an age where forensics that were once considered unassailable are subject to serious doubt."). The Ninth Circuit's decision aligns with the Third Circuit's *Han Tak Lee v. Glunt*, 667 F.3d 397, 407 (3d Cir. 2012) (holding that, if disproven, trial testimony based on unreliable science undermined fundamental fairness of petitioner's entire trial, making a *prima facie* case for habeas relief on due process claim); *see also Gimenez*, 2016 WL 2620284 at *6 (expressly noting Ninth Circuit's alignment with Third Circuit).

The Supreme Court has explained that the introduction of faulty evidence is unconstitutional when "its admission violates 'fundamental conceptions of justice.'" *Dowling v. United States*, 493 U.S. 342, 352 (1990) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). *See also Estelle v. McGuire*, 502 U.S. 62, 70 (1991) (considering whether admission of battered child syndrome evidence against defendant represented Due Process violation). To the extent that flawed-science claims are a species of false-testimony claims, the false-testimony standard of prejudice applies. As explained above, under *Chabot*, 300 S.W.3d 768,[213] Mr. Flores

[213] Analogous to the *Chabot* holding is the line of Fifth Circuit cases holding that habeas relief is justified on due process grounds where erroneously admitted, prejudicial evidence was "material in the sense of a crucial, critical highly significant factor." *See Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983) (quoting *Anderson v. Maggio*, 555 F.2d 447, 451 (5th Cir. 1977)); *see also Gonzales v. Thaler*, No. 612-CV-15, 2013 WL 1789380 at *3 (5th Cir. 2013) (examining whether admission of scientifically flawed firearms testimony was so arbitrary as to render trial fundamentally unfair); *Woods v. Estelle*, 547 F.2d 269, 271 (5th Cir. 1977) (explaining that the

must "prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Id.* at 771 (internal quotation marks and citations omitted).

B. Application of Law to Facts

1. Two of the State's key witnesses provided testimony that is no longer scientifically defensible.

The testimony justifying admission of Mrs. Barganier's in-court eyewitness identification and the trace-evidence analysis of Charles Linch are contrary to contemporary scientific understanding in the respective fields.

First, Mr. Flores's conviction relies on the testimony of Mrs. Barganier who was permitted to testify about her in-court identification of Charlie Flores made for the very first time thirteen months after (1) she observed two men get out of a strange car in her neighbor's driveway before dawn on January 29, 1998 and (2) she was shown Flores's photograph at the police station a few days later, but did not identify him as one of the men she had seen. That is, the witness who later purported to identify Mr. Flores as one of the men she had observed actually *failed* to pick him out of a photo lineup when first presented with a recognizable, recent photo of him. At trial, the State put on expert testimony and otherwise relied on the prevailing idea

due process implications of erroneous evidence do not stem from state evidentiary rules, but from resultant "error was of such magnitude as to deny fundamental fairness…").

that there was nothing disqualifying about an identification made in court for the first time months after the initial observation. Mr. Flores has adduced significant evidence, in the form of expert testimony, of a new scientific consensus. That new consensus supports finding that the facts of Mr. Barganier's initial failed attempt to identify Mr. Flores is *exculpatory* and that her in-court identification was utterly unreliable. *See* Claim I (incorporated here by reference).

Second, Mr. Flores's conviction relies on the testimony of Charles Linch, an expert the State sponsored at trial. Mr. Linch was then a trace-evidence analyst with the Dallas County crime lab, a.k.a. SWIFS. Mr. Linch's expert opinion, obtained mid-trial, was the only evidence supporting an inferential link between the crime scene and a .44 magnum revolver, which had been recovered from a closet in Ric Childs' grandmother's house the day after his arrest. More specifically, the *only* evidence that supported an inference that this particular weapon had been used at the crime scene was a trace of purported "potato starch" that Mr. Linch supposedly found inside the gun's barrel while conducting mid-trial testing, fourteen months after the weapon was first found by police. Mr. Flores has adduced significant evidence that Mr. Linch's testing and trial testimony was devoid of scientific competency. That evidence includes an expert report from a chemist, quality-control specialist, and laboratory auditor. Additionally, Mr. Flores has evidence that Mr. Linch has now disavowed his testing and testimony as non-compliant with basic

quality-control measures that govern accredited forensic labs. *See* Claim II (incorporated here by reference).

2. The testimony of these two witnesses more than "contributed to the conviction."

As explained in Claims I and II above, scientific developments in the two decades since the Flores trial and since his last habeas application was filed render the State's reliance on Mrs. Barganier's in-court identification and Mr. Linch's trace-evidence testimony inherently flawed and unreliable. These flaws could not have been exposed to the jury through "vigorous cross-examination," as the science was considered sound when Mr. Flores was tried, especially in light of the facts that had been disclosed to the defense until long after trial. *See Gonzales*, 2013 WL 1789380 at *3 (quoting *United States v. Berry*, 624 F.3d 1031, 1040 (9th Cir. 2010)). Both the quality and quantity of this faulty evidence undermined Mr. Flores's right to a fundamentally fair trial, denying him the due process to which he was entitled. Mrs. Barganier and Mr. Linch were among the few non-compromised, non-drug addicts/dealers who tested for the State. Without their facially credible—and quite compelling—testimony, the jury would not have convicted Mr. Flores. *See* Factual Background, Section VII (scrutinizing the myth that other credible evidence supported the conviction).

C. Conclusion

For all of the reasons described in Claims I & II, Mr. Flores was deprived of Due Process. He has established that, in light of contemporary scientific understanding, Mrs. Barganier's identification testimony was not merely unreliable but her initial failed attempt to identify him must now be understood as exculpatory. He has also established that Mr. Linch's trace-evidence testimony about potato starch in the .44 magnum was derived absent any basic quality-control standards that now apply to accredited forensic laboratories (including SWIFS), that it is divorced from basic scientific competence, and that Mr. Linch now disavows both his testing methodology and his testimony.

Claim X should be remanded for further factual development, and habeas relief, in the form of a new trial, should follow. *See Ex parte Robert Leslie Roberson III*, WR-63,081-03, 2016 WL 3543332 (Tex. Crim. App. June 16, 2016) (unpub.) (authorizing a similar claim for further factual development).

STATE OF TEXAS §
COUNTY OF TRAVIS §

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Gretchen Sween, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas in good standing.

2. I am the duly authorized attorney for Charles Don Flores, having the authority to prepare and to verify Mr. Flores's Subsequent Application for a Writ of Habeas Corpus.

3. I have prepared and have read the foregoing Subsequent Application for a Writ of Habeas Corpus, and I believe all allegations in it to be true to the best of my knowledge.

Signed under penalty of perjury:

Gretchen S. Sween

SUBSCRIBED AND SWORN TO BEFORE ME on February 2, 2021.

PATRICIA SKELTON
Notary Public, State of Texas
Comm. Expires 05-08-2022
Notary ID 1154608-0

Notary Public, State of Texas

APPENDIX C

CODE OF CRIMINAL PROCEDURE

TITLE 1. CODE OF CRIMINAL PROCEDURE

CHAPTER 11. HABEAS CORPUS

Art. 11.071. PROCEDURE IN DEATH PENALTY CASE

Sec. 1. APPLICATION TO DEATH PENALTY CASE. Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. REPRESENTATION BY COUNSEL. (a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section,

the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., R.S., Ch. 781, Sec. 11, eff. January 1, 2010.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.

Sec. 2A. STATE REIMBURSEMENT; COUNTY OBLIGATION. (a) The state shall reimburse a county for compensation of counsel

under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed $25,000. Compensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed $25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of $25,000.

Sec. 3. INVESTIGATION OF GROUNDS FOR APPLICATION. (a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Sec. 4. FILING OF APPLICATION. (a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b)

constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Sec. 4A. UNTIMELY APPLICATION; APPLICATION NOT FILED. (a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel's presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

Sec. 5. SUBSEQUENT APPLICATION. (a) 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.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), 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.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Sec. 6. ISSUANCE OF WRIT. (a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code, if the office of capital and forensic writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under Section 78.054, Government Code.

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

(1) make an appropriate notation that a writ of habeas corpus was issued;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

Sec. 7. ANSWER TO APPLICATION. (a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

(b) Matters alleged in the application not admitted by the state are deemed denied.

Sec. 8. FINDINGS OF FACT WITHOUT EVIDENTIARY HEARING. (a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues

material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

Sec. 9. HEARING. (a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

(1) the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

Sec. 10. RULES OF EVIDENCE. The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. REVIEW BY COURT OF CRIMINAL APPEALS. The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

[][]

Art. 11.073. PROCEDURE RELATED TO CERTAIN SCIENTIFIC EVIDENCE.

(a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by a convicted person at the convicted person's trial; or

(2) contradicts scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(c) For purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.

(d) In making a finding as to 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, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since:

(1) the applicable trial date or dates, for a determination made with respect to an original application; or

(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.