No.

In The
SUPREME COURT OF THE UNITED STATES

CLEVE FOSTER,
Petitioner,

v.

STATE OF TEXAS,
Respondent

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

THIS IS A DEATH PENALTY CASE

Mr. Foster is Currently Scheduled to be Executed
Tuesday, January 11, 2011, sometime after 6:00 p.m.

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QUESTION PRESENTED

Texas has recognized that condemned prisoners must have the assistance of counsel to be able to challenge their convictions and death sentences in state habeas corpus proceedings by providing a statutory right to counsel in such proceedings. The Texas Court of Criminal Appeals, however, has determined that the statutory right to habeas counsel does not require that counsel provide effective assistance. In fact, appointed state habeas counsel often performs abominably, as did counsel appointed to represent Mr. Foster, when he failed to perform the investigation necessary to adequately assert his powerful claim of innocence, or raise the trial ineffectiveness claims pivotal to same. As a direct result, subsequent efforts, in any court, to investigate and present these facts and claims were thwarted.

In Mr. Foster's case, newly appointed federal habeas counsel identified and attempted to investigate and raise a claim that trial counsel were ineffective in failing to present to the jury a confession written by Mr. Foster's co-defendant, and in failing to secure a blood spatter expert to draw into question a pivotal fact in the prosecution's extraordinarily weak case. The state opposed discovery and funding for investigation and experts because these particular claims had not been raised in the initial state habeas proceedings, and argued that any subsequent attempt to raise them in state habeas proceedings would be procedurally barred. The federal courts accepted the state's argument, supplied only the most minimal investigative funding, found the claims unexhausted and defaulted, and denied relief. Thereafter, when Mr. Foster's federal habeas counsel were able to secure the *pro bono* assistance of a blood spatter expert and present the more-fully-developed claim to the state courts, the Court of Criminal Appeals dismissed the claim related to the ineffective assistance of trial counsel for failing to secure and present blood spatter testimony because it had not but could have been raised in the first state habeas proceeding. The claims and facts in support, while pointing strongly to Mr. Foster's innocence, failed to meet the CCA's heightened burden imposed at the successive state habeas stage.

In sum, Texas' provision of habeas counsel without requiring competent performance has precluded condemned prisoners like Mr. Foster, who have the misfortune of being assigned counsel who perform ineffectively, from even the most minimal review of viable constitutional claim. The question that arises out of these circumstances is:

Whether the rights to equal protection, due process, and access to the courts demand that condemned prisoners be afforded the effective assistance of counsel in pursuing state habeas remedies with respect to claims, such as innocence and ineffective assistance of trial counsel, that can only be raised in state habeas proceedings and if not raised there are thereafter barred?

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INTRODUCTION

Mr. Foster has consistently asserted his innocence. The state's case against him – based on the law of parties – was, at best, circumstantial, inferential, and threadbare. Nonetheless, Mr. Foster is facing imminent execution. It was only because of trial counsel's ineffectiveness that he was convicted and sentenced to death on such sparse evidence. Had he been competently represented in his initial state habeas proceedings, and had his claims of ineffective assistance of counsel and innocence been properly investigated and presented at that time, he would have been entitled to relief. Because they were not, they have never been fully considered by any court. Mr. Foster is thus scheduled to be executed tomorrow despite the fact that his substantial claim of innocence, and meritorious claim of constitutional trial error, has never been considered by any court.

OPINION BELOW

The unpublished opinion of the Texas Court of Criminal Appeals was issued December 30, 2010. *Ex parte Foster*, No. WR-65,799-2 (Tex. Crim. App. Dec. 30, 2010) (attached as Appendix 1).

JURISDICTION

The Texas Court of Criminal Appeals' decision for which review in this Court is being sought was entered on December 30, 2010. *See* Appendix 1. A Suggestion for Reconsideration was filed on January 7, 2010, and is still pending. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

This case involves the right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution, and the right of access to the courts under the Fourteenth Amendment.

The **Sixth Amendment** to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

The **Fourteenth Amendment** to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

This case involves Tex. Crim Proc. Code § 11.071 § 5(a)(1), which states as follows:

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

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

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Cleve Foster was convicted and sentenced to death for the murder of Nyannuer "Mary" Pal in the Criminal District Court No. 1 of Tarrant County, Texas on February 12, 2004. The conviction and sentence were affirmed on direct appeal. *Foster v. State*, No. 74,901 (Tex. Crim. App. Apr. 12, 2006). This Court denied certiorari review on January 08, 2007. *Foster v. Texas*, 549 U.S. 1118 (2007).

Counsel - not the undersigned - was appointed to represent Mr. Foster for purposes of his state habeas proceedings. The Court of Criminal Appeals denied Mr. Foster's Application for Writ of Habeas Corpus. *Ex Parte Foster*, No. 65,99-01 (Tex. Crim. App. Mar. 21, 2007). In doing so, it adopted wholesale the Findings of Fact and Conclusions of Law submitted by the state which had previously been adopted by the trial court.

Mr. Foster challenged his conviction in federal court pursuant to 28 U.S.C. § 2254. The United States District Court denied his petition, *Foster v. Quarterman*, 2008 WL 5083078 (N.D. Tex.), and the United States Court of Appeals for the Fifth Circuit Court of Appeals denied Mr. Foster a Certificate of Appealability. *Foster v. Thaler*, 369 Fed. Appx. 598, 2010 WL 924885 (5th Cir. March 15, 2010). Mr. Foster's Petition for Writ of Certiorari was denied. *Foster v. Texas*, __ U.S. __, 2010 WL 3698830 (Dec. 13, 2010).

It was not until December 17, 2010 that Mr. Foster was able to obtain the *pro bono* services of a blood spatter expert. The expert's affidavit was presented by way of a subsequent Application for Writ of Habeas Corpus to the Texas Court of Criminal Appeals. The Court of Criminal Appeals dismissed Mr. Foster's subsequent Application on December 30, 2010 in *Ex Parte Cleve Foster*, No. WR 65,799-02 (Tex. Crim. App. Dec. 30, 2010). *See* Appendix 1. Judge Cochran filed a statement concurring in the dismissal. *Id.* Judge Price, joined by Judge Holcomb, dissented, stating "[i]t is simply intolerable to refuse to entertain a claim from an arguably innocent applicant, raised in a subsequent writ application, simply because he was unlucky enough to draw initial writ counsel of questionable competence." *Id.*, slip op. at 3 (Price, J., dissenting). Judge Price also noted that "I am inclined to agree with applicant, at least on the basis of his pleading, that his trial counsel provided ineffective assistance of counsel in this [failure to obtaing the assistance of a blood spatter expert] regard." *Id.*, slip op. at 1, fn. 1.

II. STATEMENT OF FACTS

A. Background

Cleve Foster and his friend/roommate, Sheldon Ward, were regulars at the Fat Albert's bar and pool hall in Fort Worth, Texas, and would spend several nights a week there. (RR 17:22)[1] On February 13, 2002, they arrived at Fat Albert's around seven in the evening. (RR 17:23) A few hours later, another semi-regular customer, Mary Pal, arrived. (RR 17:24) Ms. Pal did not know Mr. Foster and Ward, but that night all three

[1] "RR" represents Reporter's Record from the trial followed by the volume and page number.

shared a pool table. (RR 17:24) As the night wore on, Ward became friendlier with Ms. Pal. The two danced for a few moments and the bartender remembers that Ward touched Ms. Pal's buttocks with his hand. (RR 17:27;42) Mr. Foster and Ms. Pal, on the other hand, never danced and most of the interaction was between Ward and Ms. Pal. (RR 17:27;38) At closing time, Ms. Pal, Mr. Foster and Ward all left at the same time. (RR 17:27) From her view at the entrance door, the bartender saw Ms. Pal standing outside her car talking to Mr. Foster and Ward as they sat inside Mr. Foster's white truck. (RR 17:30) After a few moments, Ms. Pal got in her car and drove west. (RR 17:30) Mr. Foster and Ward followed. (RR 17:30)[2]

Early the next morning, construction workers working in a secluded area discovered the Ms. Pal's naked body. (RR 17:103) Ms. Pal died of a close head shot wound to the head. (RR 17:133; 18:13) A piece of duct tape with blood on it was found near the body along with a Whataburger cup found several feet away. (RR 17:138, 139) The duct tape was not tested or, for that mater, ever linked to Ms. Pal's murder and the Whataburger cup contained no fingerprints. (RR 17:154, 155)

At trial, the state offered the testimony of Tarrant County Chief Medical Examiner Nizam Peerwani. (RR 18:6). Peerwani had been the chief medical examiner for twenty-three years, nevertheless, there is no evidence that Peerwani was an expert in blood spatter or crime scene analysis. (RR18:6) Nevertheless, Peerwani opined that, based

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[2] There is no indication as to how far the bartender saw Mr. Foster and Ward follow Ms. Pal or whether it was necessary for Mr. Foster and Ward to initially travel in one direction in order to get on a main road or highway that would take them in to where their hotel room was located.

upon his examination of Ms. Pal's wounds, she was not shot where her body was found. (RR18:13) Meanwhile, the lead detective on the case, Detective John McCaskill, testified that, in his lay opinion as a homicide detective, one person could not have killed Ms. Pal and moved her body to where it was found without help. (RR17, 100, 140) McCaskill opined that two people carried the body and dumped it where it was found. (RR 17:140)

DNA testing revealed Ward's semen in Ms. Pal's anus and on her inner thigh. (RR17:187-88) Mr. Foster's semen was found in Ms. Pal's vagina. (RR 17:188) There was a stain on the passenger seat of Mr. Foster's truck that could not be excluded as belonging to Ward or Ms. Pal, but was excluded as belonging to Mr. Foster. (RR 17:196)

Police found a gun *registered to Ward* in a drawer in the motel room shared by Ward and Mr. Foster. (RR 17:56; RR DX#2) Ms. Pal's blood was discovered on the muzzle of Ward's gun. (RR 17:182)

After Ward submitted to the DNA testing that revealed his semen in Ms. Pal's anal cavity and her inner thigh, he fled the jurisdiction. (RR 17:187-88). When Ward was finally arrested, the police discovered his bloody clothes in his car. (RR 17:152) Although Mr. Foster was allegedly a "party" to Ms. Pal's killing and allegedly helped to dispose of her body, no bloody clothes belonging to Mr. Foster were ever found.

B. Ward Has Given Four Statements Exonerating Mr. Foster

Sheldon Ward has confessed to the murder of Ms. Pal four times and each and every time he clearly stated that he killed Ms. Pal alone. There are inconsistences in Ward's statements - as to whether Mr. Foster was with him when he originally picked

Ms. Pal up from her apartment complex, or whether he remembered actually shooting Ms. Pal but only standing over her dead body. Regardless, *all* the statements make clear that Ward alone murdered Ms. Pal and that Mr. Foster had nothing to do with it.

1. Statement One[3]

Ward's first confession came in the form of a handwritten note written to Mr. Foster. (RR DX-PT #1) Ward confessed to Mr. Foster that he killed Ms. Pal after he and Ms. Pal left the motel room. Not only did Ward not implicate Mr. Foster in the murder, but he apologized to Mr. Foster for getting him into trouble and tried to make it up to him by giving him his car. *Significantly, although this note explained why Mr. Foster's semen was found in the victim's vagina, Mr. Foster's trial attorneys never presented it to the jury*. The note read:

> Duke,
>
> Hey man. I'm sorry you had to be involved in this. I fucked up & I can't let you take the fall for this. I drugged you the other night with your own sleeping pills & took your truck. Just to prove you were out cold I had Mary ride you while you slept. I hope nothing bad happens to you. My hope is that the law will see this too. I can't take this any longer. I hope you don't lose your truck but if you do take my car. I won't be needing it where I'm going. So long friend you've done so much for me that I can't begin to thank you, but, well: THANK YOU!
>
> P.S. Take my check for all the trouble I've caused!
>
> Your Bro
> /s/ Sheldon

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[3] *See* Appendix 7.

To whom it may concern, 2:30AM 2/22/02

I, Sheldon Ward, confess to the murder of Mary. I acted alone without any outside help or motivation. I am truly sorry for what I've done. I never meant for anyone to get hurt.

/s/ Sheldon Aaron Ward

2. Statement Two[4]

After Ward left the handwritten note, his friend, Duane Thomas, picked him up at the motel where he and Mr. Foster shared a room. (RR 18:53) When Thomas arrived, both Ward and Mr. Foster were there. (RR 18:55) Mr. Foster stood in the doorway as Ward placed his bags in the back of Thomas' truck and then Thomas and Ward left. (RR 18:55) Thomas drove Ward toward Thomas' home where Ward confessed for a second time. (RR 18:55) Ward told Thomas that "he had been doing drugs and drinking and that *he* had followed a girl home from a bar...forced her into a truck at gunpoint and made her get into the floorboard...taken her out someplace and raped her and then drove down some old country road and stripped her down naked and blew her brains out." (RR 18:56-57(emphasis added)) After hearing this, Thomas stopped at a gas station and called the police. (RR 18:58)

3. Statement Three[5]

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[4] *See* Appendix 8.

[5] *See* Appendix 9 (transcript of audio confession).

Ward's third confession was audio-recorded by Detective Johnson shortly after his arrest. (RR DX #3) According to Ward, while he and Mr. Foster were at Fat Albert's bar, he and Ms. Pal made arrangements to meet up after the bar closed. Ward rode from the bar to the motel room with Mr. Foster. He then left Mr. Foster at the motel room and drove Mr. Foster's truck alone to Ms. Pal's apartment. Ward and Ms. Pal had sex in the truck then went to the motel room and had sex again. Ward then explained that the next thing he remembered, he was standing over Ms. Pal's dead body, looked down, and saw the gun in his hands. He panicked, took Ms. Pal's clothes off, left her body, and later dumped her clothes in an unknown dumpster. Ward told Detective Johnson that the clothes he was wearing were spotted with blood and he had placed them in his car. Ward's entire confession to Detective Johnson consisted of the singular "I" and never "we." Indeed, when Detective Johnson asked about Mr. Foster, Ward, not appearing to understand the question, simply stated that he left a note for Mr. Foster apologizing for the trouble.[6]

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[6] During summations of *Ward's* trial, the state honed in on Ward's use of the singular "I":

> Now, I hope nobody is going to stand up here and ask you not to believe Duane Thomas's testimony. Because I'll guarantee you, at some point in this trial, you're going to be asked to believe the part about Cleve being bad medicine. You remember that? How Duane volunteered that? *There's no evidence that Cleve Foster had anything to do with this other than he was in the truck when they left.* I suspect he did. But when Sheldon was talking to Duane, he didn't say anything about Cleve, did he? It was I. I. My gun and what I did.

State v. Sheldon Ward, No. 0835934A (Criminal District Court #1 of Tarrant County, Texas) (RR 22:45) (emphasis added).

Also, Not surprisingly, Mr. Foster was never even mentioned in the appellate opinion affirming Ward's conviction. *Ward v. State*, 2007 WL 1492080 (Tex. Crim. App. May 23, 2007)

4. Statement Four[7]

From death row, Ward confessed again. In this fourth and final confession, Ward explicitly exonerated Mr. Foster.

> 22 May 2005
>
> I, Sheldon A. Ward #999454, do here state that on the night Feb 13/morning of Feb 14, 2002 left Fat Albert's with Cleve Foster in his truck and picked up Mary at her apartment. We then went to my and Foster's hotel room where we (Mary and I, Mary and Foster) had consensual sexual intercourse. There was no kidnaping, no rape; Foster did go to sleep sometime later, and if I used his truck later that morning he was not aware of it. Aside from his medications we were all very drunk and he was clearly passed out.
>
> /s/ Sheldon A Ward 22 May 05
> Sheldon A. Ward #999454

C. Blood Spatter Evidence

As noted above, Medical Examiner Peerwani, opined that Ms. Pal was not shot where her body was found. (RR18:13) Nevertheless, the state did not qualify Dr. Peerwani as an expert in either crime scene analysis or blood spatter analysis.

Likewise, Detective McCaskill offered his lay opinion at the trial that he did not believe the victim was killed where her body was found. (RR 17:136-37)

> Q. And being at the crime scene and examining the crime scene photographs, do you have an opinion as to whether or not Niner Pal was shot as she lay [where her body was found?
>
> A. No sir. I don't believe that she was.

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[7] This statement was introduced in Mr. Foster's federal habeas petition. *See* Appendix 10.

(RR 17:136-37) McCaskill opined that Ms. Pal was not killed where her body was found based upon his analysis of the "blood splatter"[8] despite the fact that the state did not establish his expertise in this area. (RR 17:137) Moreover, McCaskill testified that he did not believe Ms. Pal could have been killed by one person because he believed that her body must have been carried to the scene by two persons and that Ward, who was 5'6" and 140 pounds, needed Mr. Foster's help. (RR 17:136, 17:157) ("I would be able to say her appearance would be consistent with two people carrying her out there. I'm very comfortable saying that.").[9]

In order to obtain its conviction in this case, and sustain it in the face of sufficiency challenges, the State of Texas has repeatedly relied upon this theory: that Ward could not have acted alone and that Mr. Foster must have been a "party" because the victim had to have been killed elsewhere, and carried to where she was found by two people.

1. <u>State's Repeated Reliance on its Blood Spatter Arguments</u>

a. Trial

When the trial judge expressed skepticism as to whether she should let the state's case go to the jury after the defense made a motion for a directed verdict at the close of

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[8] McCaskill's reference to it as "blood splatter" rather than "blood spatter" evinces his lack of expertise. (RR 17:137)

[9] McCaskill testified that, on the other hand, Mr. Foster was "roughly 6 foot maybe 225, 230." (RR 17:136)

the evidence, the prosecutor honed in on the state's theory that it was impossible for Ward to have acted alone because Ms. Pal was not killed where her body was found:

> Detective McCaskill gave an opinion. That it looks like two people carried her body and threw her down. That's the evidence in front of the jury. And if Sheldon Ward weights approximately 155 pounds, Mary Pal weights 147 pounds, this defendant is much larger and much bigger than both of them.

(RR 18:75)

The state then repeated its theory/argument to the jury:

> Recall what Detective McCaskill told you. Look at this body. Look how it's laid out there. It's tossed away like so much garbage by two people. Not by one but by two. And [Mr. Foster's] right there with [Ward] every step of the way.

(RR 18:85-86)

b. Direct Appeal

On direct appeal, Mr. Foster argued that the evidence was both legally and factually insufficient to support the guilty verdict in the case. The state again relied on its theory that the blood spatter evidence indicated that Ward could not have acted alone. In reciting the facts of the case, the Texas Court of Criminal Appeals spent a great deal of time focusing on the state's theory that, based upon the blood spatter, Ward could not have acted alone:

> McCaskill testified that there "was no forensic evidence found in or on [appellant's] truck that linked the victim [sic] to this crime ." He opined that it was very unlikely that "a person could shoot and kill another" and "not get something on them, and then take a body that is bloody from one location to another and dump it and not get anything on their clothing or anything in their truck." He also testified that it was possible that only one person could have carried Mary's body where it was found even though he was "very comfortable" with saying that two people carried her body to the location where it was found.

McCaskill believed that Mary's body was carried to the location where it was found after Mary was shot elsewhere because there was no "blood splatter around the area."

Q. [PROSECUTION]: And being at the crime scene and examining the crime scene photographs, do you have an opinion as to whether or not [Mary] was shot as she lay in that location [where she was found]?

A. [MCCASKILL]: No, sir. I don't believe that she was.

Q. Can you tell the jury why?

A. Well, we typically would have seen a lot of blood splatter [sic.] around the area. Because it was what appeared to be a close contact wound, there's what's referred to as blow back. A shot that's fired from a centerfire handgun, a large-caliber handgun, has quite a bit of actual muzzle blast, and it creates-the blast itself causes quite a bit of damage which will cause flesh and bodily fluids to come back out. And we would normally see that on the area, possibly the ground around there or on her body itself. And we did not see that in this case.

The medical examiner also testified that there would have been "a profuse amount of blood" associated with Mary's gunshot wound.

Q. [PROSECUTION]: If [Mary] had been found in the place she was shot, in other words, lying on-if she had been lying on some dry leaves, dead leaves, and had also been shot there, what kind of matter or blood would you expect to find around these wounds?

A. [MEDICAL EXAMINER]: This was, in fact, a rather devastating gunshot wound, and the bullet had passed through the brain stem and blood vessels, so there would be a profuse amount of blood there, I would suspect.

Q. And would the path of the bullet have also expelled brain matter in the area or do you have an opinion about that?

A. Yes. Certainly there's a possibility but one can't say with certainty, but frequently, with an explosive gunshot wound and increasing pressures and bleeding, the blood and the brain matter frequently oozes out both from the entry gunshot wound as well as the exit gunshot wound.

> The evidence also showed that Mary was five-seven and 130 pounds. Ward is roughly five-six and 140 pounds. Appellant is a big man, is roughly six feet tall and approximately 225 pounds. McCaskill testified that he believed it possible "that two people might have carried [Mary's body] out there."
>
> Q. [PROSECUTION]: Let me take you back to State's 24. Is there anything of significance to you about how her body was lying?
>
> A. [MCCASKILL]: Yes, sir.
>
> Q. Tell us what that is?
>
> A. In particular, I considered her right arm here, and the way that she was lying with that arm up, I considered the possibility that two people might have carried her out there. One person carrying her feet, the other person carrying the arms, and they might have just dropped her in that position.

Foster v. State, 2006 WL 947681, *3-4 (Tex. Crim. App. April 12, 2006) In ruling on the sufficiency challenges, the Texas Court of Criminal Appeals also relied, in part, on "McCaskill's testimony that he was 'very comfortable' with saying that two people were involved in moving Mary's body to the location where it was found." *Id.* at *6.

c. State Habeas

In the state's Proposed Findings of Fact and Conclusions of Law, adopted by the trial court and then the Texas Court of Criminal Appeals, it was noted that "Ms. Pal was not shot where her body was found because there was no blood spatter or blowback in the area." *See Ex parte Foster*, No. C-1-007519-0839040-A, *State's Proposed Memorandum, Findings of Fact and Conclusions of Law*, and *Order* adopting same (Aug. 31, 2006).

d. Federal Habeas- District Court

In recounting the evidence in the case, the district court noted:

> McCaskill also testified that, although it was possible that only one person could have carried the victim's body to where she was found, he was 'very comfortable' with stating that two people carried her body to that location. As support for this opinion, McCaskill pointed to the way the body was found, with the right arm up, perhaps indicating that one person carried her by her feet and one by her hands. As further support for this opinion, McCaskill testified that Mary was five-seven and 130 pounds and Ward is only approximately five-six and 140 pounds, while Foster is six-feet tall and around 225 pounds.

Foster v. Quarterman, 2008 WL 5083078, *3 (N.D. Tex. Dec. 2, 2008)

e. Federal Habeas-Fifth Circuit

Likewise, in denying Mr. Foster's Motion for a Certificate of Appealability, the United States Court of Appeals described the "physical evidence" that "linked "Mr. Foster to the as, *inter. alia*,:

> [A] police detective and medical examiner testified that Pal was not shot where her body was found because there was no blood splatter in the area. Since the soles of her feet indicated that she had not walked to the location where her body was found, the detective testified that he was "very comfortable" with stating that two people carried Pal's body to that location. In support of his testimony, the detective noted that the raised-arm position of Pal's body suggested she may have been carried by her feet and hands. In addition, the detective noted that Pal was five-seven and 130 pounds and Ward is only five-six and 140 pounds, while Foster is six feet tall and around 225 pounds.

Foster v. Thaler, 369 Fed. Appx. 598, 600 (5th Cir. 2010)

f. State's Response to Mr. Foster's Petition for Writ of Certiorari

In responding to Mr. Foster's Petition for Writ of Certiorari before this Court, the state filed a response arguing:

> Detective McCaskill also testified regarding the scene where [Pal's] body was discovered. McCaskill explained that the ground around the body was not disturbed, so it did not appear that the body was dragged to that

> location. 17 RR 134-35. The position of the body and her arm indicated (1) that the body may have been carried by two people (one carrying the feet and the other carrying the arms), 17 RR 140, and (2) that the body was dropped to the ground, 17 RR 136. In looking at the soles of [Pal's] bare feet, it did not appear that she had walked to the area. 17 RR 135-36. The lack of blood, flesh, or bodily fluids on the ground around the body indicated that she was not shot at that location. 17 RR 136-37. Finally, McCaskill testified that Ward weighed about 140 pounds, [Pal] weighed about 130 pounds, and Foster weighed about 225 or 230 pounds. 17 RR 136.

Foster v. Thaler, No. 10-6595, Br. Opp. at 4-5

2. Findings of Gary Rini

Gary Rini is a well credentialed blood spatter expert. *See* Appendix 3 (Rini Curriculum Vitae). As noted above, Rini just recently agreed to review this case *pro bono* in light of Mr. Foster's imminent execution. *See* Appendix 4 (Affidavit of Adrienne Dunn) at ¶ 5.[10] Rini prepared an affidavit concluding that, contrary to the theory that the state advanced at every turn, Ms. Pal was, in fact, killed where her body was found. *See* Appendix 5 (Rini Affidavit) at 4 .

Rini noted bloodstain patterns from the scene where Ms. Pal's body was found that "could have only been generated at the time the decedent sustained her fatal wound at the location and the position she was discovered." *Id.* He further noted a "'PASSIVE' bloodstain pattern" on the victim's right cheek which, based upon its downward "drip," allowed him to conclude, "the decedent was shot at the location, and in the position, at which she was discovered." *Id.* Rini observed "no evidence that [Ms. Pal] was shot

[10] Rini was given $1,000 donated by a supporter of Mr. Foster. Id. at ¶ 5.

elsewhere and transported to the location at which she was discovered" as repeatedly argued by the state. *Id.*

REASONS FOR GRANTING THE WRIT

I. STATE HABEAS COUNSEL'S INCOMPETENT PERFORMANCE FOREVER PRECLUDED MR. FOSTER FROM OBTAINING FULL MERITS REVIEW OF HIS CLAIMS OF INNOCENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL IN ALL SUBSEQUENT COURTS, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AND ACCESS TO THE COURTS.

A. Trial Counsel was Constitutionally Ineffective

As discussed above, the evidence that Mr. Foster had anything to do with Ms. Pal's murder – let alone evidence that he was a "party" – was extremely weak. At Ward's trial – where the state was represented by the same people who prosecuted Mr. Foster – the state argued: *"There's no evidence that Cleve Foster had anything to do with [Mary Pal's murder] other than he was in the truck when they left."* *State v. Sheldon Ward*, No. 0835934A (CDC #1 of Tarrant County, Texas) (RR 22:45). Indeed, the judge presiding over Mr. Foster's trial gave serious consideration to directing a verdict against the state at the close of the evidence in the case. RR 18:61-78.[11] Simply put, the case

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[11] RR 18:69-70 (Trial Court: "I don't think that's a reasonable inference from the evidence. I mean, I literally do not see how that's a reasonable-how because they saw a victim, a woman hanging out with one of the two guys at a bar and later the other–the other guy has had sex with her too, how do you assume that that means that it's just as likely that it was consensual as that it wasn't. I mean, I don't think you can draw a reasonable inference that it's more likely rape than consensual sex. Because you don't have any idea where that was in time to the murder. And you've got the other guy [Ward] confessing to the murder alone and never saying anything else except that he did the murder alone and he fled. Evidence from which a presumption of guilty can be drawn–an inference of guilty. And [Mr. Foster] didn't.")

turned on the state's theory that Ward could not have acted alone because it would have taken two people to carry Ms. Pal's dead body to the location at which it was found.[12] Given the extremely weak prosecution case, and the reliance on the allegations that Mr. Foster helped Ward move Ms. Pal's body, trial counsels' failure to investigate or present readily available evidence that could have undermined this central tenet of the state's case was constitutionally ineffective.

1. The Evidence Used to Convict Mr. Foster under the "Law of Parties" was Inferential and Circumstantial.

In arguing Mr. Foster's guilt by inference, the state points to the fact that Mr. Foster and Ward were seen following Ms. Pal out of Fat Albert's parking lot in Mr. Foster's truck several hours before her body was found. RR 17:30. Nevertheless, the bartender, who was in a stationary position, did not testify as to how long she saw Mr. Foster and Ward follow Ms. Pal or whether it was necessary for Mr. Foster and Ward to initially travel in one direction in order to get on a main road or highway that would take them in the opposite direction to where their hotel room was located.

The state also points to alleged inconsistent statements made by Mr. Foster when he was interviewed the day the police executed the search warrants for samples of DNA from Ward and Mr. Foster, Mr. Foster's truck and the motel room. According to

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[12] The concurrence below states "[a]pplicant's expert blood spatter evidence merely impeaches the State's experts on the issue of where Mary was murdered not who murdered her." In fact, there was never a question about who murdered Ms. Pal (Mr. Ward), and at no point did the state allege that it was Mr. Foster. While Judge Cochran views the question of where Ms. Pal was murdered, and whether her body was moved, as "one aspect of the case," it was an aspect the prosecutors felt was vitally important - with good reason, as it was the only thing that linked Mr. Foster as a possibly party to Ms. Pal's murder.

Detective McCaskill, during that interview Mr. Foster first told the police that Ms. Pal had not been in his truck. (RR 17:131) However, Detective McCaskill claimed that Mr. Foster then changed his story and said Ms. Pal left Fat Albert's in his truck and all three went cruising. (RR 17:131) According to Detective McCaskill, Mr. Foster told him that, after they finished cruising around, Mr. Foster dropped Ms. Pal off at Fat Albert's. (RR 17:132) Curiously, only a small portion of the interview was recorded. During the recorded portion, Mr. Foster stated that he did not remember if Ms. Pal was in his truck nor did he remember if Ward drove his truck anytime during the preceding few weeks. (RR SX #28) Moreover, on tape, Mr. Foster is heard adamantly explaining that, prior to the tape being turned on when he mentioned "going cruising," it was McCaskill, not him, that suggested it was with Ms. Pal and, in fact, he could not remember who he went

Cruising with.[13] (RR SX #28). Thus, the *actual* recorded statement presented to the jury was hardly inconsistent.[14]

The state next points to the evidence of Mr. Foster's semen in Ms. Pal's vagina and McCaksill's testimony that Mr. Foster denied having sex with Ms. Pal. However, in his handwritten note (that trial counsel failed to get into evidence before the jury) Ward explained that he drugged Mr. Foster and persuaded Ms. Pal to have sex with Mr. Foster while he was unconscious. *See* Appendix 7. Moreover, there were no signs of vaginal tearing and, therefore, the medical examiner could not determine if the vaginal sex with Ms. Pal was non-consensual. (RR 18:28).[15] In short, the fact that Mr. Foster and Ms. Pal

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[13] McCaskill: Okay, earlier uh, we also talked about on this particular night that you told us that you did go cruising and that you drove around and returned her to Fat Albert's after it was closed. Do you remember telling us that?

Foster: We were out cruising. I'm just not sure who was with.

McCaskill: Okay, you don't remember who was in the truck with you?

Foster: I don't remember.

McCaskill: Okay, earlier you told us it was Mary. Why would you tell us that if you didn't remember?

Foster: Y'all said it was Mary.

[14] The concurring opinion below, pointing to the alleged inconsistencies in Mr. Foster's statements, is similarly misinformed, and misses the actual text and import of this conversation. *See Ex Parte Foster*, No. WR-65,799-02 at 14 (Cochran, J., concurring).

[15] Judge Cochran's concurrence likewise misses the fact that Ward's statement explained the presence of Mr. Foster's semen, as well as the fact that Mr. Foster's trial counsel *failed* to introduce this statement at trial as a statement against Ward's interests. Judge Cochran also misses what was obvious to the trial judge: even if Mr. Foster and Ms. Pal had sex, this does not

may have had sex does little to establish that Mr. Foster was a party to Ward's later murder of Ms. Pal.[16]

2. <u>Blood Spatter Expert</u>

In the face of this weak evidence, the state has repeatedly returned to its theory that Ward had to have help – Mr. Foster's help – moving the body.[17] The state

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mean that the sex was not consensual. *See Ex Parte Foster*, No. WR-65,799-02 at 14 (Cochran, J., concurring).

[16] The state also points to the fact that the murder weapon was found in the hotel room that Mr. Foster and Ward shared. This is hardly surprising given that Ward admits to murdering Ms. Pal, he lived in the motel room and owned the gun that was registered to him. (RR 17:56; RR DX#2).

In order to explain why there was absolutely no physical evidence tying Mr. Foster to Ms. Pal's murder, the state also pointed out that the police found various items in some fluid in a cooler in the back of Mr. Foster's truck when executing search warrants. These items consisted of three pairs of shoes, bungee cords, black gloves, a bicycle pump, a hatchet, a sheathed knife, two slingshots, a trailer hitch, coat hangers, a brown strap, a bleach bottle, and a liquid detergent bottle and claim that he was trying to destroy forensic evidence with bleach. (RR 17:85) Putting aside the fact that it is hard to see why Mr. Foster would be trying to destroy forensic evidence on such items as a bicycle pump and slingshots, the items were never seized and the liquid was never tested. Nevertheless, in but one example of the state's efforts at sleight-of hand argument to the jury in this case, it had its expert testify that bleach can destroy forensic evidence and then argued in closing that the liquid "in the cooler smelled like cleaning solution *and* bleach." (RR 18:84) However, the state's own witness described the liquid as a "bluish-green fluid" with a "detergent or soap-type smell. (RR 17:85) There was absolutely no testimony that the untested liquid was bleach or smelled anything like bleach.

[17] It is true that, on cross-examination, McCaskill admitted that he "guessed" it was "possible" that one person could have carried Pal's body, but the insisted that, with thirteen years experience he was "very comfortable" that Ward would have needed Mr. Foster's help in carrying the body. (RR 17:156-57).

While the 'is it possible-*anything* is possible' cross examination is great for television legal dramas, it is hardly persuasive cross examination in real life. Moreover, a weak cross-examination without even the benefit of consulting with an expert to prepare the cross-examination is hardly a substitute for expert testimony. *See, e.g., Gersten v. Senkowski* 426 F.3d 588 (2d Cir 2005); *Conklin v. Schofield*, 366 F.3d 1191, 1212-13 (11th Cir. 2004) ("A concession in cross-examination that the wounds he affirmatively said were inflicted before death could equally have occurred after death cannot substitute for the presence of another,

returned to this argument time and time again during the course of this case. This theory is based on the premise that the alleged lack of blood spatter at the scene where the body was found meant that Ms. Pal had been killed elsewhere. Nevertheless, just as his trial attorneys failed to move for introduction of Ward's first and most comprehensive confession (Appendix 7) as a statement against interest, they made no efforts to test the state's theory with a qualified blood spatter expert.

The recent pro bono services of Mr. Gary Rini – the first appropriate *expert* to look at the relevant evidence - determined that the bloodstain patterns from the scene where Ms. Pal's body was found "could have only been generated at the time the decedent sustained her fatal wound at the location and the position she was discovered." Appendix 5 at 4. In contrast to the state's speculation at trial, Mr. Rini found "no evidence that [Ms. Pal] was shot elsewhere and transported to the location at which she was discovered." *Id.*

3. **When the Evidence Discovered in Post Conviction is Considered in Combination with the Feeble Evidence Presented Against Mr. Foster at Trial, No Reasonable Juror would have found him Guilty of Capital Murder.**

As discussed extensively above, the state's evidence of Mr. Foster's guilt as a "party" to Ms. Pal's murder has always been based on inference and speculation and, at

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equally qualified expert who would have directly testified to the plausibility of Conklin's version of events."); *United States. v. Barnette*, 211 F.3d 803, 825 (4th Cir. 2004) ("[C]ross examination is poor substitution for a live expert witness.")

Here, for example, Mr. Foster's trial attorneys were unprepared to cross-examine Dr. Peerwani or Detective McCaskill about the "spatter patterns" on the automobile tire or fallen leaves as discussed in Mr. Rini's report. Likewise, they were unprepared to confront the state's witnesses regarding the "passive bloodstain pattern" from Pal's cheek to her chin.

times, downright obfuscation.[18] The prosecution was also able to slip by Mr. Foster's trial attorneys its theory on "blood splatter," correctly know as "blood spatter," in order to argue that Mr. Foster must have been a party to Ward's killing of Ms. Pal. That theory has now been debunked. All of this sleight-of-hand is in contrast to the actual killer's four statements that, while sometimes inconsistent, consistently used the first person "I" when describing having committed the murder and his two statements that unequivocally state that Mr. Foster was *not* involved in the murder in any way. Moreover, all the physical evidence (the gun and the bloody clothing) belonged to Ward.

In light of this evidence, and the emphasis placed on the blood spatter "evidence", trial counsel's failure to investigate this area, or to retain an expert on an issue so pivotal to the state's case, was constitutionally ineffective. *See generally Wiggins v.* Smith, 539 U.S. 510 (2003). Given the pivotal nature of the "two people moved the body" theory relied upon by the state, the testimony of an expert such as Gary Rini could have made an enormous difference. Rini would have refuted the state's theory, as well as the speculation of the state's witnesses who did not possess any training in blood spatter analysis and were simply speculating during their trial testimony.[19] Had trial counsel

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[18] *See e.g.* note 17, *surpa.* (State falsely arguing that the items found in Mr. Foster's cooler were soaking in "bleach.")

[19] Judge Cochran, concurring in the CCA's dismissal of Mr. Foster's subsequent state application, opined that Mr. Rini's report simply produced a "battle of the experts." *Ex Parte Foster*, No. WR 65,799-02 (Tex. Crim. App. Dec. 30, 2010) (Cochran, J., concurring). That is plainly not the case. Mr. Rini is the only qualified bloods spatter expert known to have done a full review of the blood spatter evidence in this case. In contrast, the state's trial witnesses were never qualified as, and do not appear to have been, "experts" in blood spatter.

obtained the services of such an expert, and presented his or her testimony at trial, there is at least a reasonable probability that the result of Mr. Foster's trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Indeed, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by [trial counsel] errors than one with overwhelming record support." *Id.* at 696. [20]

4. State Habeas Counsel was Ineffective in Failing to Raise this Issue in Mr. Ward's Initial State Habeas Proceedings.

Counsel appointed to represent Mr. Foster in his state habeas proceedings failed to investigate, uncover, or present any of the exculpatory evidence outlined above, or raise it as ineffective assistance of trial counsel. Given the transparently feeble nature of the state's trial case against Mr. Foster, Ward's confessions exculpating Mr. Foster, and Mr. Foster's consistent assertions of innocence, habeas counsel's failure to investigate his innocence – and how trial counsel's ineffectiveness contributed to the guilty conviction – was unforgiveable, let alone ineffective.

On its face, the state habeas petition – *see* Appendix 6 - may mislead a lay reader into thinking it had substance and heft. On closer, informed examination, the misconception cannot stand. Two of the claims raised (claims 5 and 6) had already been raised on direct appeal – and were thus not cognizeable in habeas. *See Ex Parte Gardner*, 959 S.W.2d 189 (Tex. Crim. App. 1998). Two of the claims (claims 2 and 4) are "boilerplate"

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[20] The dissenting opinion below notes that "I am inclined to agree with Applicant, at least on the basis of his pleading, that his trial counsel provided ineffective assistance of counsel in this regard. *Ex Parte Foster*, No. WR 65,799-02, slip op. at 1, fn. 1 (Tex. Crim. App. Dec. 30, 2010) (Price, J., dissenting).

challenges to the Texas death penalty statute. The ineffective assistance of counsel claim (claim 1) that is raised concerns the ineffectiveness of counsel at the punishment phase of the trial, consists primarily of lengthy quotes from outdated case law, and includes only a perfunctory summary of the evidence gathered in post-conviction investigation that was not presented at trial. At no point is there a substantive discussion of the meaning and import of that evidence, or how it could have affected the jury's sentencing decision.

The innocence "claim" (claim 3) asserted by original state habeas counsel – comprising five pages total – starts with a two page discussion of the legal standard focuses on the CCA's 1994 decision in *Ex parte Holmes*, 885 S.W.2d 389 (Tex. Cr. App. 1994) –failing altogether to discuss their pivotal decision in *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Cr. App. 1996) decided two years after *Holmes* (and nine years before Mr. Foster's habeas was filed), which significantly revised and amended *Holmes*. This section was furthermore apparently cut and pasted – without appropriate adaptation - from a pleading in another case, as it only refers to *Holmes*' applicability to Article 11.07 (vs. 11.071) applications, which governs non-capital habeas petitions.

The remaining three pages of the innocence "claim" is captioned "direct appeal argument," and merely adopts the sufficiency of the evidence arguments raised (and rejected) on direct appeal. Such a claim, of course, is not cognizeable in habeas proceedings. At no point does state habeas counsel discuss any extra-record evidence, assumedly because he failed to perform any extra record investigation into Mr. Foster's

innocence.[21] In short, the state habeas petition is patently inadequate on its face, and makes crystal clear that no investigation into Mr. Foster's innocence was ever undertaken.

B. The Inadequacies of State Habeas Counsel's Performance Precluded Mr. Foster from Gaining Full Merits Review by any Court of his Claims of Innocence and Ineffective Assistance of Counsel.

In the wake of the dismal performance of appointed state habeas counsel, Mr. Foster requested and received a new attorney – the undersigned - in federal court. Federal counsel identified and attempted to investigate and raise the claims that trial counsel were ineffective in failing to fully present to the jury a detailed confession by Mr. Foster's co-defendant, and in failing to secure a blood spatter expert to draw into question a pivotal fact in the prosecution's extraordinarily weak case. The state repeatedly objected to Mr. Foster's requests for funds to investigate unexhausted claims, arguing that Mr. Foster was restricted to the limited claims raised in the state habeas proceedings, and any subsequent attempt to raise them in the state courts would be procedurally barred. *See Foster v. Quarterman*, No. 4:07-cv-00210-Y, Docket entries # 18 (Opposition to Request for Discovery) and # 22 (Opposition to Request for Funds), attached as Appendices 11 and 12. The federal district court denied all of Mr. Foster's requests for assistance and granted only the most minimal funding for investigation.

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[21] Mr. Foster was adamant that he did not want appointed state habeas counsel to represent him in federal court. He expressed these sentiments in a letter to the clerk of the federal district court, detailing the fact that state habeas counsel had refused to investigate the case, failed to keep him informed, and failed to let him review the petition before it was filed. *See* Appendix 2 (Letter of March 26, 2007).

Federal counsel nonetheless raised claims of innocence and ineffective assistance of counsel in the habeas corpus petition filed in federal court. Because they had not been raised by ineffective state habeas counsel, they were not exhausted. However, there was no state remedy available to Mr. Foster through which he could then raise the claims. Texas prohibits successive state habeas applications based on claims that could have been but were not raised in the first state habeas application. Tex. Code Crim. Proc., Art. 11.071 § 5(a)(1).[22] While the Texas post-conviction habeas statute provides that "[a death-sentenced] applicant shall be represented by competent counsel....", Art. 11.071, § 2(a), the CCA interprets this provision as *not* requiring that habeas counsel provide effective assistance. *Ex parte Graves*, 70 S.W.3d 103 (Tex.Crim.App. 2002).[23]

Thus, original habeas counsel's ineffectiveness cannot be considered a "new fact" sufficient to clear the threshold of Art. 11.071 s.5.

The failure of state habeas counsel to raise an available claim in state habeas was thus – as in Mr. Foster's case – treated as a procedural default in federal court. *See Foster v. Quarterman*, 2008 WL 5083078 (N.D. Tex.), slip op. at 13-14. *See also, e.g.,*

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[22] Under the Texas statute, claims could have been raised previously if the factual and legal bases of the claim were available on the date the first habeas application was filed. *Id.*

[23] Mr. Graves was himself raising a claim of ineffective assistance of counsel. Ironically, Mr. Graves has since been completely exonerated, and is a free man. *See* Pamela Colloff, *Free at Last*, TEXAS MONTHLY November 2010. Reading the CCA's opinion in *Ex parte Graves*, his innocence would have seemed inconceivable. Luckily for Mr. Graves, subsequent counsel were able to uncover Brady violations – claims that *could* be considered in successive habeas petitions, and which ultimately gained him a new trial. The district attorney responsible for re-prosecuting the case, in declining to do so, stated "[t]here's not a single thing that says Anthony Graves was involved in this case . . . .there is *nothing*." Pamela Colloff, *Innocence Found*, TEXAS MONTHLY January 2011.

Ogan v. Cockrell, 297 F.3d 349, 358 n.6 (5th Cir.), *cert. denied*, 537 U.S. 1040 (2002); *Martinez v. Johnson*, 255 F.3d 229, 241 (5th Cir. 2001), *cert. denied sub nom.*, *Martinez v. Cockrell*, 534 U.S. 1163 (2002).

Nor could the procedural default be overcome in federal court, because of this Court's decisions in *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Coleman v. Thompson*, 501 U.S. 722 (1991). *Giarratano* held that there is no constitutional right to counsel in capital post-conviction proceedings. *Coleman* reaffirmed *Giarratano* and held specifically that ineffective assistance of post-conviction counsel cannot satisfy the "cause" requirement for avoiding the preclusive effect of a procedural default in state post-conviction proceedings, because there is no right to counsel in post-conviction proceedings and ineffective assistance can be "cause" only if the prisoner had a constitutionally-protected right to counsel in the proceeding in which the default occurred.

Thereafter, when Foster's counsel were able to secure the *pro bono* assistance of a blood spatter expert and present the more-fully-developed claim to this Court, his claim was dismissed because it could have (by competent appointed counsel), but had not been (because counsel appointed was incompetent) raised in his original state habeas application. Moreover, his assertion of innocence did not, according to the majority of the CCA, meet the heightened standard required for a showing of innocence that would permit Mr. Foster to clear the Section 5 hurdle. Unable to get past Art. 11.071, s.5, Mr. Foster's claim of ineffective assistance of counsel for failing to present the blood spatter

evidence that would have helped to reveal the absurdity of the state's case, and make clear Mr. Foster's innocence, was not heard.

Thus, because of the incompetence of originally appointed state habeas counsel, Mr. Foster has never obtained substantive review of his nonetheless substantially meritorious claims. As a result, in the constellation of the facts and circumstances of this case, his constitutional rights to equal protection, due process, and access to courts were violated.

C. *Murray v. Giarratano* Invites Consideration of this Issue.

Giarratano was an action under 42 U.S.C. § 1983 by death row inmates in Virginia complaining that, without the right to appointed counsel, they were deprived of meaningful access to the courts to pursue state post-conviction proceedings. Giarratano won in the district court, *Giarratano v. Murray*, 668 F.Supp. 511 (E.D.Va. 1986), and in the *en banc* Fourth Circuit, which held that death row inmates were entitled to counsel, because "only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights could provide death row inmates the meaningful access to the courts guaranteed by the Constitution." *Giarratano v. Murray*, 847 F.2d 1118, 1120 (4th Cir. 1988) (en banc).

A divided Supreme Court reversed. Chief Justice Rehnquist, for a plurality, concluded that "the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases." *Murray v. Giarratano*, 492 U.S. at 10. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented, because "Virginia's procedure for collateral review of capital convictions and sentences [does not assure] its

indigent death row inmates an adequate opportunity to present their claims fairly." *Id.* at 32. Justice Kennedy wrote the critical opinion concurring in the judgment, but his views differed markedly from those of the plurality, because he saw the right of access to the courts as more determined by factual circumstances than by black letter rule:

> [T]he requirement of meaningful access can be satisfied in various ways.... While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief. I am not prepared to say that this scheme violates the Constitution.
>
> On the facts and record of this case, I concur in the judgment of the Court.

Id. at 14-15.

Thus, the pivotal decision in *Giarratano* did not adopt the rationale of *Pennsylvania v. Finley*. Rather, it recognized that condemned prisoners had a greater claim to a right to counsel than prisoners incarcerated for a period of time, but on the facts presented, held that Virginia satisfied that right.

D. *Coleman v. Thompson* also invites the inquiry that this issue deserves

Justice Kennedy's view that the facts concerning access to the courts were determinative of the post-conviction right to counsel for condemned prisoners was not discussed two years later in *Coleman*, the case of a condemned prisoner also from Virginia arguing that his state post-conviction counsel provided ineffective assistance and that this ineffectiveness should provide "cause" for the default that occurred in state post-conviction proceedings. A majority of the Court held:

> There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley,* 481 U.S. 551 (1987); *Murray v. Giarratano,* 492 U.S. 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.... Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must 'bear the risk of attorney error that results in a procedural default.'

Coleman, 501 U.S. at 752-53. That there was no discussion of the underlying access to courts issue in another case from Virginia just two years later is unremarkable. Nothing suggested that there had been any change in the facts concerning post-conviction representation in Virginia which were so critical to Justice Kennedy's pivotal decision in *Giarratano*.

Nevertheless, the Court did recognize that there could be a serious access to the courts problem for condemned prisoners whose post-conviction counsel's ineffectiveness prevented review of claims, such as ineffective assistance of trial counsel, that can only be presented the first time in a post-conviction proceeding:

> We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation. *Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings. For Coleman to prevail, therefore, there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction.

501 U.S. at 755. The Court decided that it did not need to address this issue in Mr. Coleman's case, because he did obtain post-conviction review in the trial court:

> We need not answer this question broadly, however, for one state court has addressed Coleman's claims: the state habeas trial court. The effectiveness of Coleman's counsel before that court is not at issue here. Coleman contends that it was the ineffectiveness of his counsel during the appeal from that determination that constitutes cause to excuse his default.

> We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.

Id.

The Court has never returned to this question. Mr. Foster's case calls for the Court to do so. In Texas, as in Virginia, state habeas corpus provides the first opportunity for a condemned prisoner to present claims – such as ineffective assistance of trial counsel - based on evidence outside the trial record. *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex.Crim.App. 1997). Unlike Roger Coleman's counsel, Mr. Foster's appointed state habeas counsel performed abysmally, and failed altogether to present viable claims of ineffective assistance of trial and innocence. As a result, as outlined above, Mr. Foster's state habeas attorney's ineffectiveness prevented him from having his claims reviewed at all.

E. The Court should revisit *Giarratano* and *Coleman*

Upon reconsidering Justice Kennedy's concern in deciding *Giarratano* — whether the present system in a state like Texas adequately meets the need for assistance of counsel by condemned prisoners in state post-conviction proceedings — it is plain that the holdings of *Giarratano* and *Coleman* can no longer be sustained. Mr. Foster's case is a prime reason. Though he had counsel in state habeas, counsel's performance was patently ineffective. Given the default that this created, Mr. Foster was unable to obtain review of meritorious claims in federal habeas proceedings. And given the anti-successive petition provisions of Texas law, his attempt to return to state court to raise them was rejected.

Justice Kennedy's determinative concurring opinion in *Giarratano* did not countenance the wholesale loss of substantial constitutional claims such as these — without any court ever reviewing them — because no competent attorney was made available to represent a condemned person. There was no evidence in the *Giarratano* record that this had happened to anyone. And in *Coleman*, the Court recognized that there might need to be "an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction [such as the claim there, based on ineffective assistance of trial counsel]," 501 U.S. at 755, but found no need to address this exception further there.

In the nearly two decades since these decisions, much has changed and yet the law concerning the right to post-conviction counsel has not.

The lower federal courts have not taken the possible exception identified in *Coleman* seriously. All the circuits which have addressed this aspect of *Coleman* have said that the holding of *Coleman* is, simply, that there is no constitutional right to state postconviction counsel, and therefore, no "cause" in showing that claims were defaulted in the state courts by ineffective state post-conviction. They have swept aside the possible exception to this rule for claims that can only be brought for the first time in state post-conviction proceedings as meaningless *dicta*, as the Fourth Circuit did in *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997), *cert. denied*, 522 U.S. 1100 (1998):

> The *Coleman* Court did not adopt an exception to *Finley;* it merely rejected Coleman's argument that the Court should create such an exception on the facts presented. And, critically, the rule for which Mackall argues here is

> directly contrary to the explicit holding of *Finley* that no constitutional right to counsel exists in collateral review.

Accord Martinez v. Johnson, 255 F.3d 229, 240-241 (5th Cir. 2001), *cert. denied sub nom., Martinez v. Cockrell*, 534 U.S. 1163 (2002); *Hill v. Jones*, 81 F.3d 1015, 1025-56 (11th Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997); *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992).

The changes in federal habeas law since *Giarratano* and *Coleman* – primarily reflected in the Anti-Terrorism and Effective Death Penalty Act - have made even more compelling the need to revisit whether condemned state habeas petitioners are entitled to the effective assistance of counsel in raising every claim that can be raised for the first (and only) time in state habeas proceedings. Yet nothing has happened

Legal theories are readily available to support such a right: (1) a due process right to counsel to protect a condemned prisoner's life and liberty interests, which would require the provision of counsel who provide effective assistance under the familiar procedural due process test of *Mathews v. Eldridge*, 424 U.S. 319 (1976); (2) a right to counsel under the equal protection analysis of *Douglas v. California*, 372 U.S. 353 (1963); (3) a due process right to effective assistance of counsel in states which have created a right to counsel in state habeas proceedings, to prevent the arbitrary deprivation of that state-created right, *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); (4) a determination that the greater need for reliability in capital proceedings under the Eighth Amendment, *see, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), calls for the right to counsel in state habeas proceedings; or (5) the meaningful

access to courts principles that provided the constitutional vehicle for the lower courts decisions in *Giarratano*.[24]

In human terms, the effect of the *Giarratano-Coleman* rule is to countenance arbitrariness in the process of reviewing death sentences for constitutional error. Had Mr. Foster been provided effective state habeas counsel, his claims would have been reviewed by both state and federal courts. In short, review or non-review of Mr. Foster's claims was determined entirely by chance, and Mr. Foster was unlucky: he was provided a lawyer who had no idea what he was supposed to do to represent someone in a state habeas corpus proceeding. Had he been lucky, he would not be before this Court today. In 1972, Justice Stewart found the imposition of death sentences at that time to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman v. Georgia*. 408 U.S. 238, 309 (1972)(Stewart, J., concurring). This form of cruelty – whose sole distinguishing trait is arbitrariness – is reoccurring in state habeas proceedings today in Texas. This, itself, violates the Constitution – as does the unjust result displayed in Mr. Foster's case.

II. THE CCA'S DISMISSAL OF MR. FOSTER'S PETITION PURSUANT TO ARTICLE 11.071 SECTION 5 DOES NOT DEPRIVE THIS COURT OF JURISDICTION.

A. The Independent and Adequate State Ground Legal Framework.

A federal court reviewing the lawfulness of a habeas petitioner's custody should not reach the merits of a federal constitutional claim where a previous state reviewing

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[24] *See generally* Freedman, "*Giarratano* Is a Scarecrow: the Right to Counsel in State Capital Postconviction Proceedings," 91 CORNELL L. REV. 1079, 1091-1101 (July, 2006)

court's decision relied upon an independent and adequate state law ground to deny relief. *Coleman v. Thompson*, 501 U.S. 722 (1991). While the independent and adequate state ground doctrine is jurisdictional for the Supreme Court in the context of direct review of state court judgments, in the habeas context, the doctrine is judicially created and "grounded in concerns of comity and federalism." *Id.* at 730. The doctrine serves to "ensure[] that the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Id.* at 732.

1. The *Long* Presumption.

To determine whether a state court's resolution of a claim is based on an independent and adequate state ground, a federal habeas court looks to the highest state reviewing court's decision disposing of the claim. To preclude federal review, a reviewing state court need only "clearly and expressly [indicate] that it is ... based on bona fide separate, adequate, and independent [state law] grounds." *Michigan v. Long*, 463 U.S. 1032, 41 (1983). However, if the state court decision is ambiguous about the ground of decision—federal or state law—then a presumption applies that federal law was the basis of disposal and the federal court must review the claim:

> When ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Long, 463 U.S. at 1040-41; *see also Harris v. Reed*, 489 U.S. 255, 257 (1989) (adopting *Long* presumption in habeas corpus context); *Coleman v. Thompson*, 501 U.S. 722, 733

(1991) (reaffirming the *Long* presumption where state court ground of decision interwoven with federal law or primarily relied on federal law).

2. State Procedural Rules that Depend upon a Predicate Federal Constitutional Understanding Are Not Independent.

When resolution of a state procedural law question depends upon a predicate federal constitutional understanding, the state-law prong of the court's holding is not independent of federal law, and a federal court may address the merits of the claim. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *Smith v. Texas*, 550 U.S. 297, 315 (2007) (a state court's predicate "error of federal law" in resolving a state procedural question does not preclude federal review); *Delaware v. Prouse*, 440 U.S. 648, 652-53 (1979) (state court decision is not based on an independent state ground where the resolution of a state law question involves an interpretation of what federal law requires to state a claim for relief). Under these circumstances, the federal court may review the claim because "[i]f the state court misapprehended federal law, '[i]t should be freed to decide . . . these suits according to its own local law,'" and not under a mistaken interpretation of federal law. *Prouse*, 440 U.S. at 653 (quoting *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950)). *See also Long*, 463 U.S. at 1042 (*Long* presumption foreshadowed by *Prouse*).

B. The State Court Decision in This Case Is Interwoven with Federal Law and Does Not Clearly and Expressly Indicate that It Is Based on an Independent State Law Ground.

The *Long* presumption applies to the CCA's decision in this case because (1) it is interwoven with federal law; and (2) it does not clearly and expressly indicate that it is based on an independent state law ground.

Federal law is deeply interwoven both in the plain text of Section 5 and in how the CCA has recently interpreted and applied it. The text of Sections 5(a)(2) and 5(a)(3), for example, both expressly invoke the federal question of whether a federal constitutional violation has been alleged. *See, e.g., Ex parte Blue*, 230 S.W.3d 151, 167-68 (Tex. Crim. App. 2007).

On its face, Section 5(a)(1) does not reference or incorporate substantive federal constitutional law. However, the CCA recently made clear that the 5(a)(1) determination is necessarily intertwined with federal law. *See Ex parte Campbell*, 226 S.W.3d 418 (Tex. Crim. App. 2007) ("We have interpreted [the language of Section 5] to mean that, to satisfy Art. 11.071, § 5(a), ... the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence.").

Thus, an applicant who wishes to raise a second or subsequent challenge to his capital murder conviction or sentence of death under section 5 of article 11.071 must allege not only the factual conditions which, as a matter of Texas law, permit a second or subsequent filing, but he must also allege facts which, if true, would establish a violation

of the United States Constitution. *Id.*; *Ex parte Brooks*, 219 S.W.3d 396, 400 (Tex. Crim. App. 2007) ("While Article 11.071, section 5(a)(1) does not state that the application must include facts establishing that the applicant has a prima facie *Atkins* claim, it would be absurd to consider applications in which the applicant does not show that the previously unavailable legal basis applies to his claim.").

1. **The CCA Did Not Clearly and Expressly Indicate That Its Decision Dismissing Mr. Foster's Petition was Based on a State Law Procedural Component of Section 5.**

Mr. Foster's successive state habeas petition raised a claim of ineffective assistance of counsel for failing to present the testimony of a blood spatter expert, testimony that would have undermined a pivotal feature of the state's case. To bypass the s.5 threshold, Mr. Foster asserted that the ineffectiveness claim relied on a "new fact" – the affidavit from the blood spatter expert – under s.5(a)(1), and, alternatively, that he could meet the s.5(a)(2) showing of innocence necessary to obtain merits review of his ineffectiveness claim.

The CCA Order dismissing Mr. Foster's application does not rest on an independent and adequate state ground because (1) as explained, *supra*, the section of the state statute upon which the CCA's dismissal relied incorporates and is interwoven with federal constitutional law (the merits of petitioner's federal constitutional claim), raising the *Long* presumption; (2) the concurring opinion makes the clear the manner in which the CCA's Order in inextricably interwoven with federal law; See, *Ex parte Foster*, No. WR-65,799-02, Cochran, J., concurring, slip op. (Tex. Crim. App. Dec. 30, 2010) (citing and discussing *Strickland*, *Wiggins*, and *Rompilla*); Price, J., dissenting (noting

inclination to agree with Foster that his trial counsel were ineffective) and (3) the language of dismissal does not unambiguously declare its independence from federal law, leaving the *Long* presumption intact.

The CCA's decision is not independent of, but intertwined with federal law. *Id.*, 463 U.S. at 1040-1041, and this Court's jurisdiction is intact.

CONCLUSION

Thus, Mr. Foster, whose execution is less than a week away, will never have review of his claim of innocence, a claim that an effective state habeas lawyer would have raised and that, in all likelihood, would have gained him a new trial. Texas' provision of habeas counsel without requiring that counsel perform effectively has precluded condemned prisoners like Mr. Foster, who have the misfortune of being assigned counsel who perform ineffectively, from gaining review of viable constitutional claim. As a result, in these particular circumstances, in light of this Court's order of December 30, 2010, denying him the ability to litigate these claims, Mr. Foster has been denied access to the courts in violation of his rights under the Fourteenth Amendment to the United States Constitution. *See Murray v. Giarratano*, 492 U.S. 1, 14-15 (1989) (Kennedy, J., concurring).

Mr. Foster requests that this Court grant *certiorari* in order to review the important questions presented.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that I am counsel for Cleve Foster; that on January 10, 2011, I caused the foregoing **Petition for a Writ of *Certiorari* to the Texas Court of Criminal Appeals,** and accompanying Appendix, to be served by electronic delivery on counsel for the State, Laura Grant Turbin, Assistant Attorney General, Capital Litigation Division, P. O. Box 12548, Austin, Texas 75211 by delivery to Laura.turbin@oag.state.tx.us, and that all parties required to be served have been served.

/s/ F. Clinton Broden
F. Clinton Broden