NO. 511676-D

IN THE

TEXAS COURT OF CRIMINAL APPEALS,

AUSTIN TEXAS

&

IN THE 174TH DISTRICT COURT OF

HARRIS COUNTY, TEXAS

EX PARTE PRESTON HUGHES, III,
Applicant

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 11.071 SECTION 5
AND MEMORANDUM IN SUPPORT

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EVIDENTIARY HEARING REQUESTED

Table of contents

Index of Authorities

Cases — Page

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Pursuant to **TEX. CODE CRIM. PROC. ANN. ART. 1107.1** Sec. 5, **PRESTON HUGHES, III,** Applicant, by and through his attorney of record, **PATRICK F. McCANN,** files this, his application and brief in support.

STATEMENT OF JURISDICTION

Applicant is being illegally confined and restrained of his liberty by the State of Texas on death row at the Polunsky Unit of the Texas Department of Criminal Justice Correctional Institutions Division in Livingston, Texas. Applicant is being confined following judgment entered by the 174th District Court of Harris County Texas on September 28, 1989. A copy of the judgment is attached as **Appendix A**. Currently Applicant is scheduled to be executed on November 15th, 2012 after 6pm. An evidentiary hearing is requested.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Applicant was convicted of capital murder for the 1988 killing of two people. The jury found both special issues true and sentenced him to death. On June 23, 1993, the Court of Criminal Appeals affirmed the conviction. *Hughes v. State*, 878 S.W.2d 142 (Tex. Crim. App. 1993). A petition for writ of certiorari was denied on June 6, 1994. *Hughes v. Texas*, 517 U.S. 1152. Applicant filed his first writ of habeas corpus in the Court of Criminal Appeals that was denied on September 13, 2011. *Ex parte Hughes*, No. 45,876-01 (Tex. Crim. App. Sept. 13, 2000)(unpublished order). In 2001, a subsequent writ was filed and dismissed pursuant to TEX. CODE CRIM. PROC. art. 11.071, Sec 5(a). *Ex parte Hughes*, No. 45,876-02 (Tex. Crim. App. Nov. 14, 2001)(unpublished order).

Applicant filed a petition for federal habeas relief and a Certificate of Appealability ("COA") was granted in part, but ultimately relief was denied on June 5,

2008. *Hughes v. Quarterman*, 530 F.3d 336 (5th Cir. 2008). In a published opinion, the Fifth Circuit concluded that Applicant's claims were time-barred without considering the issues now presented. A subsequent writ was filed in this Honorable Court and denied with written opinion and concurring opinion on August 29th, 2012.

GROUND FOR HABEAS RELIEF

1. **APPLICANT'S CONVICTION AND DEATH SENTENCE WERE OBTAINED THROUGH PERJURY AND AS SUCH HIS CONVICTION AND DEATH SENTENCE VIOLATES DUE PROCESS AND MERIT RELIEF. *EX PARTE CHABOT*, 300 S.W.3D 768 (2009). THE OFFICERS LIED UNDER OATH ABOUT THE "DYING DECLARATION" OF MS. CHARLES, ONE OF THE TWO DECEASED, AS SHOWN BY AN EXPERT'S AFFIDAVIT ATTACHED.**
2. **APPLICANT'S CONVICTION AND DEATH SENTENCE WERE OBTAINED BY EVIDENCE PLACED BEFORE THE JURY ON THE BASIS OF PERJURED TESTIMONY AND FALSIFIED RECORDS, THUS VIOLATING HIS RIGHTS TO A FAIR TRIAL, DUE PROCESS AND AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE 6TH, 14TH, AND 8TH AMENDMENTS.**
3. **THE ENTIRE TRIAL AND THE APPELLATE REVIEW OF MR. HUGHES' CONFESSION DEPENDED UPON THE CREDIBILITY FINDING OF THE OFFICERS BY THE TRIAL COURT WHICH ADMITTED HIS STATEMENTS. AS THEY ARE NOW REVEALED TO BE UNTRUTHFUL, THE ORIGINAL ADMISSION OF HIS STATEMENTS, THE ONLY EVIDENCE THAT ACTUALLY CONNECTED HIM TO THE EVENT, MUST NOW BE REVIEWED ON THE BASIS OF THIS NEW EVIDENCE, AS HIS RIGHTS TO BE FREE FROM COERCION IN THE STATEMENT WAS CLEARLY VIOLATED.**
4. **THE APPLICANT FAILED TO RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL OR ON HIS FIRST APPEAL OR INITIAL HABEAS AS THESE MATTERS COULD HAVE BEEN DISCOVERED, BUT WERE NOT. UNDER STRICKLAND V. WASHINGTON, EVITTS V. LUCY, AND THE RECENT CASES OF MARTINEZ V. RYAN AND MAPLES IN THE SUPREME COURT'S LAST TERM, THESE MATTERS CAN AND SHOULD HAVE BEEN RAISED BY HIS LAWYERS, BUT WERE NOT.**

SUMMARY OF THE ARGUMENT

The officers lied. They lied about the "dying declaration" as shown by the affidavit of the attached expert. They lied about the signing of the consent form by the

Applicant, as shown by the property logs which clearly show his items from the apartment were checked into the property room ***three hours prior to his supposed signature on the consent form.*** They lied about the evidence being in his apartment at all, and appear to have outright planted some. The knife which was taken could not have been the murder weapon, though it was paraded as such before the jury. The eyeglasses seized had to have been planted, because if they were not on the body of the deceased, how would they ever have known that Ms. Charles wore eyeglasses in the first place? The statements were admitted at trial, and their admission sustained by the trial court, on the basis of the court making a credibility determination in the officers' favor. Nothing could be further from the reality of this case, and thus his statements must now be called into question on the basis of this new information. Last, his lawyers in trial, on appeal, and on initial habeas, all failed to conduct the investigation needed to defend Mr. Hughes, and thus rendered ineffective assistance of counsel which must now be the source of a procedural review by this Honorable Court. His lawyer failed to obtain a medical expert to review the autopsy findings, and failed to discover the discrepancies in the consent forms versus the property logs. His lawyer's appeal and on first habeas failed to discover this as well, this deprived him of effective assistance at every level and should merit relief.

ARGUMENT AND AUTHORITIES

A. THE STANDARD OF REVIEW

1. Abuse of the Writ – Article 11.071 Section 5

The United States Supreme Court's decisions and this Court's decisions delivered after Applicant filed his second application for writ of habeas corpus on October 26, 2001 permits this Court to review his claim, which is not subject to the abuse of the writ standard. Article 11.071 Section 5 authorizes consideration of claims raised on a subsequent application for post-conviction writ of habeas corpus in a death penalty case if the legal basis for the claim was unavailable when the previous application was filed. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1). A claim was previously "unavailable" if the legal basis of the claim "was not recognized by" or could not have been "reasonably formulated from" a decision of the Texas or Federal appellate courts when the original application was filed. *Id.* at § 5(d). Section 5 requires an applicant demonstrate that the legal basis for his claim was previously "unavailable" and to allege "specific facts" that, if established, would represent a constitutional violation. *Ex parte Hood*, 304 S.W.3d 397 (Tex. Crim. App. 2010), reh'g denied (Jan. 26, 2011); *Ex parte Staley*, 160 S.W.3d 56, 63-64 (Tex. Crim. App. 2005). Where an applicant satisfies these

threshold requirements, Section 5 requires the court to consider the merits of previously raised claims. Thus, this Court's first role is to determine whether as an initial matter, Applicant has satisfied the threshold required by Section 5.

The claims raised herein are based upon state misconduct, specifically perjury and the falsification of records in the initial trial case which have now come to light. State misconduct which is discovered can be the basis for a subsequent habeas application. See *Ex parte Chabot*, 300 S.W. 768 (2009). Deprivation of liberty may not be premised upon perjured or false testimony. *Ex parte Carmona*, 185 S.W.2d 492 (Tex. Crim. App. 2006); such a ruling is an extension of *Mooney v. Holohan*, 294 U.S. 103, where the Supreme Court ruled on what conduct by the state violates due process:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which, in truth, is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such 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." See *Mooney*, 294 U.S. at 112.

This conduct violates the Fourteenth Amendment, and is sufficient to establish cause for relief on a subsequent application.

B. Grounds for relief

1. Claim One: **APPLICANT'S CONVICTION AND DEATH SENTENCE WERE OBTAINED THROUGH PERJURY AND AS SUCH HIS CONVICTION AND DEATH SENTENCE VIOLATES DUE PROCESS AND MERIT RELIEF. *EX PARTE CHABOT*, 300 S.W.3D 768 (2009). THE OFFICERS LIED UNDER OATH ABOUT THE "DYING DECLARATION" OF MS. CHARLES, ONE OF THE TWO DECEASED, AS SHOWN BY AN EXPERT'S AFFIDAVIT ATTACHED.**

The officers testified at trial that when they arrived on the scene, Ms. Charles was badly wounded but conscious enough to speak. The sergeant who was on the scene stated she asked about her young cousin, Marcell Taylor, the other deceased in this tragic case. [RR. Vol 18 p.45] Interestingly patrolman Cook, who was actually the first person on the scene did not testify that the young girl spoke at all. Between the time that the first patrolman, officer Cook arrived to find both young people bleeding to death in a field near a Fuddruckers restaurant in West Houston and the time that this sergeant arrived on scene several minutes elapsed.

The sergeant in charge on the scene testified that the reason they found their way to Mr. Hughes' apartment, which was part of the complex where Ms. Charles lived, was that when he arrived on the scene, many minutes later, that she was still conscious and speaking, and that she whispered with her dying breath that "Preston tried to rape me". [RR Vol 18 p.43]

These are lies, well thought out and frankly ingenious lies, but lies nonetheless. Perhaps the officer initially lied to protect a witness who was actually present, but their reasons do not matter. After all, there would certainly not be anyone to dispute their version of events, since Ms. Charles had expired. What better touch of useful in-court drama than a dying declaration?

However, medicine reveals their testimony for what it is. The attached affidavit of the former Chief Medical Examiner for Nueces County Texas, Dr. Robert Lloyd White, MD, board certified in forensic pathology, makes it clear that, given the extent of the wounds documented on Ms. Charles, and the fact that her loss of consciousness would have been almost instantaneous from loss of blood flow to her brain, there was no medical way there "dying declaration" could have happened. This is inconvenient for the officers, but the truth is the truth nonetheless. [See attached affidavit of Dr. White.]

The entire "dying declaration" these officers relayed to the jury was false; thus their use of it in court, and their subsequent use of it to justify their interview, detention, seizure, and interrogation of Mr. Hughes was all based upon a bogus falsehood. As such, under the Fourteenth Amendment, Mr. Hughes' rights to due process were violated as his entire trial was premised upon perjury. See *Ex parte Chabot*, id.

2. Claim Two: **APPLICANT'S CONVICTION AND DEATH SENTENCE WERE OBTAINED BY EVIDENCE PLACED BEFORE THE JURY ON THE BASIS OF PERJURED TESTIMONY AND FALSIFIED RECORDS, THUS VIOLATING HIS RIGHTS TO A FAIR TRIAL, DUE PROCESS AND AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE 6TH, 14TH, AND 8TH AMENDMENTS.**

The officers' lies did not stop at the testimony. They claimed during the suppression hearing that Mr. Hughes signed a "consent to search" form. Mr. Hughes disputed that in an earlier filing. That form shows his "signature" being witnessed at 0530 am on the morning after he was brought into the police interrogation room. However, the main logs of the police property

room show that the items taken from his apartment, from where he supposedly "voluntarily" accompanied the police officers downtown, were checked into their care at 0230, *three hours earlier*. Thus they apparently falsified records in their pursuit of Mr. Hughes.

This "voluntary consent" form was used, along with a credibility finding by the trial court, to admit several physical items before the jury, including a knife and some eyeglasses, all of which were used to implicate Mr. Hughes before the jury. The knife, per the autopsy report [see attached] could not have been the murder weapon as it did not conform to the likely weapon used [which was revealed at trial by testing] and because the autopsy report showed that the weapon used was double, not single edged. There was also no way to match any "blood" found on the knife to any species, let alone any specific person. See State's exhibit 20 and 21 in testimony of Mr. Bolding, Reporter's Record volume 19 page 440 to page 463.

The eyeglasses, which were supposedly found sticking up from the couch cushions, were planted by the police, though it is unclear exactly which one did it. See state's exhibit 15 for the eyeglasses. First, to use logic, if the officers who found the eyeglasses were the ones at the scene, how would they have known Ms. Charles wore such devices if they were not there at the scene to begin with? Second, if the officers who "discovered" these glasses were a follow up pair of investigators, the time logs of the property room give the lie to their testimony, as they do not mention the glasses, and in any case those items were checked in at 0230 that morning, meaning they were taken almost immediately from Hughes' apartment. The follow-up officers would also have had no knowledge of the deceased's use of eyewear since no mention was made of the next of kin being questioned by that time. The only logical explanation is that they were

taken from the scene, near the body of the deceased Ms. Charles, and transported to the apartment of Mr. Hughes to be "found".

The officers lied about their search, lied about consent, if they did not outright forge the name of Mr. Hughes on the documents, and lied about the physical items of evidence. These items were used before the jury. This cannot be permitted to sustain a conviction for capital murder and a sentence of death.

3. Claim Three: **THE ENTIRE TRIAL AND THE APPELLATE REVIEW OF MR. HUGHES' CONFESSION DEPENDED UPON THE CREDIBILITY FINDING OF THE OFFICERS BY THE TRIAL COURT WHICH ADMITTED HIS STATEMENTS. AS THEY ARE NOW REVEALED TO BE UNTRUTHFUL, THE ORIGINAL ADMISSION OF HIS STATEMENTS, THE ONLY EVIDENCE THAT ACTUALLY CONNECTED HIM TO THE EVENT, MUST NOW BE REVIEWED ON THE BASIS OF THIS NEW EVIDENCE, AS HIS RIGHTS TO BE FREE FROM COERCION IN THE STATEMENT WAS CLEARLY VIOLATED.**

In the trial, the trial judge, working through these muddy waters, admitted the evidence and the statements based in part on the credibility of the officers. [See Pre-trial suppression hearings, volumes 3 and 4] The Court of Criminal Appeals, in reviewing the case on direct review, upheld the admission based upon the judge's findings, and assessed any error as harmless due to the other evidence such as the now-exposed "dying declaration". [*Hughes v. State*, 878 S.W.2d 142 (Tex. Crim. App. 1993) The district court in its review also relied upon this very summary to determine that there was no harm in admitting the statements. [Memorandum and order, *Hughes v. Quarterman*] Likewise the Fifth Circuit, in denying him a certificate of appealability in a published decision, relied upon this "dying declaration" heavily in determining that the error in the argument and the admission of an overturned conviction in punishment were harmless. **All of these decisions were based upon the foundation of truthful**

testimony by the officers about this "dying declaration" and their efforts to conform with the law in obtaining the evidence into his case. That foundation has now been shown to have rested upon quicksand. This new medical and documentary evidence automatically calls into question every decision made by the reviewing courts in this case. It merits relief in the form of a stay and further proceedings consistent with this new information regarding the police misconduct. See *Ex parte Chabot, and Mooney*, id.

Claim Four: **THE APPLICANT FAILED TO RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL OR ON HIS FIRST APPEAL OR INITIAL HABEAS AS THESE MATTERS COULD HAVE BEEN DISCOVERED, BUT WERE NOT. UNDER STRICKLAND V. WASHINGTON, EVITTS V. LUCY, AND THE RECENT CASES OF MARTINEZ V. RYAN AND MAPLES IN THE SUPREME COURT'S LAST TERM, THESE MATTERS CAN AND SHOULD HAVE BEEN RAISED BY HIS LAWYERS, BUT WERE NOT.**

The Sixth Amendment guarantees effective trial representation by counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Under Texas law, a person may raise matters outside the record via motion for new trial; see Texas Rules of Appellate Procedure 21, formally Rule 30. This can be done via the appellate or trial attorney. A person is entitled to the effective assistance of counsel on appeal as well as at trial. See *Evitts v. Lucey*, 469 U.S. 387 (1985). Under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) decide last term by the Supreme Court, when an individual's first chance to raise an issue is forfeited by his attorney, their failure to provide effective assistance at habeas may provide a procedural gateway through which to avoid default.

Mr. Hughes' trial attorney, though he objected to the testimony of the medical examiner and did in fact file a motion to suppress, did not obtain his own expert, as he was entitled to do under *Ake v. Oklahoma* 470 U.S. 68 (1985) to dispute the contentions of the state or to dispute the contentions of the officers. Nor was this matter raised during a motion for new trial, which could have been filed by either the trial or appellate attorney. The original state habeas counsel is now deceased, but essentially filed a carbon copy of the direct appeal and conducted no investigation on his habeas whatsoever. [See initial application under Article 11.071] These issues were never raised at any point, though they could have been. Mr. Hughes should not have to bear the brunt of this burden now due to the failure of his prior attorneys. The Supreme Court has just now accepted review of a similar Texas case in *Haynes v. Texas* 132 S.Ct. 1108 (2012), wherein it agreed to decide the issue of what may be examined, at least in the punishment context due to a failure to allege ineffective assistance by a prior counsel. This Court should not hamstring Mr. Hughes now when it seems clear that he has a clear basis for outright fraud by the police in his case. His claims merit a stay until this matter can be further explored.

CONCLUSION AND PRAYER FOR RELIEF

Applicant is being illegally confined and has been sentenced to death without regard to the truth or to the constitutional safeguards designed to prevent the imprisonment of the accused based upon false or deliberately misleading testimony and evidence. In this case the officers lied from the beginning; they lied about the dying declaration, they lied about the consent to search, and it appears highly likely they lied about the circumstances surrounding Mr. Hughes statements. Mr. Hughes was ill-served

by his attorneys in prior proceedings as they failed to raise these matters at trial, on motion for new trial, or on initial habeas.

In view of the foregoing, Applicant PRESTON HUGHES respectfully requests that this Honorable Court:

1. Enter an order finding that Applicant's claim satisfies the requirements of TEX. CODE CRIM. PROC. art 11.071 § 5;

2. Grant relief from Applicant's unconstitutional conviction and sentence of death; and,

3. Grant any other relief, which the law and justice require in this matter.

Respectfully submitted,

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