



**IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS**

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**NO. WR-59,662-02**

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**EX PARTE RIGOBERTO AVILA**

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**ON APPLICATION FOR WRIT OF HABEAS CORPUS  
CAUSE NO. 2000D01342 IN THE 41<sup>ST</sup> JUDICIAL DISTRICT COURT  
EL PASO COUNTY**

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*Per curiam.*

**ORDER**

This is a subsequent post-conviction application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.<sup>1</sup>

In May 2001, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted under Article 37.071, and the trial court, accordingly,

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<sup>1</sup> Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

set punishment at death. Art. 37.071, § 2(g). This Court affirmed applicant's conviction and sentence on direct appeal. *Avila v. State*, No. AP-74,142 (Tex. Crim. App. July 2, 2003) (not designated for publication).

Applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court on May 19, 2003. This Court denied relief. *Ex parte Avila*, No. WR-59,662-01 (Tex. Crim. App. Sept. 29, 2004) (not designated for publication). Applicant then petitioned for a federal writ of habeas corpus, which was ultimately denied. *Avila v. Quarterman*, 499 F. Supp. 2d 713, 775 (W.D. Tex. 2007), *affirmed in part and reversed in part, certificate of appealability denied*, 560 F.3d 299 (5th Cir. 2009).

Applicant then filed this subsequent habeas application in the convicting court on September 6, 2013. In compliance with Article 11.071, § 5(b)(1), the convicting court forwarded this application to this Court.

Applicant alleges that this subsequent application should be considered on the merits. He argues that the factual or legal basis for his claims was unavailable on the date he filed the previous application. Art. 11.071, § 5(a). He also argues that Article 11.073 creates an avenue for relief for individuals convicted of crimes based on outdated science.

To satisfy Article 11.071, § 5(a), the legal or factual basis must have been unavailable as to all previous applications. We have held that Article 11.073 provides a new legal basis for habeas relief in the small number of cases where an applicant can show by a preponderance of the evidence that he would not have been convicted if the newly available

scientific evidence had been presented at trial. *Ex parte Robbins*, No. WR-73,484-02, slip op. at 16, \_\_ S.W.3d \_\_ (Tex. Crim. App. November 26, 2014), *reh'g denied*, \_\_ S.W.3d \_\_ (Tex. Crim. App. Jan. 27, 2016). “An applicant also must establish that the facts he alleges are at least minimally sufficient to bring him within the ambit” of Article 11.073. *Id.* at 16-17.

Article 11.073 applies to relevant scientific evidence that was not available to be offered by the defendant at trial, or that contradicts scientific evidence relied on by the State at trial. Art. 11.073(a). In this case, applicant has provided affidavits from experts in the science of biomechanics and the report of a physicist indicating that, contrary to the State’s experts’ testimony at trial, the victim’s fatal injury was not necessarily caused by an adult’s intentional “stomp.” Thus, the applicant has alleged prima facie facts sufficient to invoke Article 11.073. Therefore the application satisfies the requirements of Article 11.071, Section 5(a), and the cause is remanded to the convicting court for consideration on the merits. *See* Art. 11.071, § 5(c); *Robbins*, slip op. at 17.

IT IS SO ORDERED THIS THE 9<sup>TH</sup> DAY OF MARCH, 2016.

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