No. _________

(CAPITAL CASE)

IN THE

Supreme Court of the United States

CHARLES DON FLORES,

Petitioner,

v.

TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Capital Case

QUESTION PRESENTED

Charles Don Flores was convicted and sentenced to death for the shooting death of Betty Black based on a mid-trial identification made by a witness who had been subjected to "investigative hypnosis" by police officers involved in the underlying investigation. This witness initially described perpetrators who looked nothing like Flores. Soon after the crime, the witness failed to pick a recent picture of him out of a photo lineup under circumstances that the current consensus in eyewitness-memory science views as highly probative of *innocence.*

The brazen manipulation of a key witness was just one component of a host of long-concealed misconduct by state actors, designed to push responsibility for a crime perpetrated by the son of a local police officer, heavily involved in narcotics, onto Flores, an unconnected drug-user living in a trailer. After Flores's conviction, the police officer's son confessed to being the shooter, obtained a secretly negotiated plea deal, served a fraction of his sentence, and was paroled the same year Flores was scheduled to be executed.

Flores has always maintained his innocence.

Well after his ineffectual initial appeals were exhausted, Flores obtained counsel who began unearthing copious evidence supporting claims for habeas relief under both federal constitutional and state law—of junk science, false testimony, official misconduct, and, most critically, actual innocence. To get back into court, he relied on state-created procedural vehicles expressly designed to permit development of the factual basis for such claims. *See* Tex. Code of Crim. Proc., art. 11.071 § 5(a)(2) & art. 11.073. Yet Texas's highest criminal court, the sole arbiter of post-conviction relief in death-penalty cases, has dismissed those claims without considering the merits, an act that cannot be squared with the state law cited.

The unexplained, boilerplate invocation of a state procedural rule in a case of profound significance gives rise to the following Question Presented:

> Where a state has created liberty interests that give death-sentenced prisoners with credible claims of innocence vehicles for proving their innocence in subsequent habeas proceedings, is the federal right to due process violated when the putatively innocent is arbitrarily denied permission to exercise the right to prove his innocence?

PARTIES TO THE PROCEEDINGS BELOW

Both parties are identified in the case caption. Because neither party is a corporation, a corporate disclosure statement is not required.

LIST OF RELATED PROCEEDINGS

State v. Flores, Cause No. F98-02133 in the 195th Judicial District Court, Dallas County (1999) (trial).

Flores v. State, No. AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (direct appeal, not available on Westlaw or Lexis); No. 01-8685, 2002 U.S. LEXIS 3119 (Apr. 29, 2002) (denying certiorari).

Ex parte Flores, No. WR-64,654-01, 2006 WL 2706773 (Tex. Crim. App. Sept. 20, 2006) (initial state habeas proceeding); *Flores v. Texas*, 552 U.S. 884 (2007) (pro se) (denying certiorari).

Flores v. Stephens, No. 3:07-CV-0413-M, 2014 WL 3534989 (N.D. Tex. July 17, 2014) (denying certificate of appealability); *Flores v. Stephens*, 794 F.3d 494 (5th Cir. 2015) (affirming denial of certificate of appealability); *Flores v. Stephens*, 577 U.S. 1121 (Jan. 25, 2016) (denying certiorari).

Ex parte Flores, No. WR-64,654-02, 2016 WL 3141662 (Tex. Crim. App. May 27, 2016) (unpublished) (granting stay of execution and remanding hypnosis claim in subsequent state habeas proceeding); 2020 WL 2188757 (Tex. Crim. App. May 6, 2020) (denying relief).

Ex parte Flores, No. WR-64,654-03, 2021 WL 4566355 (Tex. Crim. App. Oct. 6, 2021) (unpublished) (refusing to consider habeas claims on the merits); *Flores v. Texas*, 142 S.Ct. 2818 (2022) (denying certiorari).

Ex parte Flores, No. WR-64,654-04, 2025 WL 2860250 (Tex. Crim. App. Oct. 9, 2025) (refusing to consider habeas claims on the merits).

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PETITION FOR A WRIT OF CERTIORARI

Charles Don Flores respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals (TCCA).

OPINIONS BELOW

The TCCA's unpublished opinion, *Ex parte Flores*, WR-64,654-04 (Tex. Crim. App. Oct. 9, 2025), is in the Appendix at App.1. The subsequent state habeas application at issue is in the Appendix at App.3-App.778.

JURISDICTION

The TCCA's opinion issued on October 9, 2025. On December 30, 2025, the Honorable Justice Alito granted an application extending the deadline to file a petition for a writ of certiorari to February 6, 2026. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution's Fourteenth Amendment provides in relevant part: "No state shall … deprive any person of life, liberty, or property, without due process of law[.]" The state statutes that govern the quest for habeas relief in this case are found in Texas Code of Criminal Procedure, Articles 11.071, § 5(a); due to their length, they are reproduced in the Appendix at App.787-App.801.

INTRODUCTION

Overwhelming evidence shows that Charles Don Flores is innocent and that his trial was irreparably tainted by junk science and official misconduct. His 1999 capital murder conviction turned on a mid-trial, in-court identification by a witness who had repeatedly described the perpetrator as looking nothing like Flores but was then subjected to "investigative hypnosis" and other suggestive procedures.

Texas created a vehicle for death-sentenced prisoners to assert their actual innocence in subsequent habeas proceedings: Article 11.071, § 5(a)(2) of the Texas Code of Criminal Procedure. Then, in 2013, Texas enacted Article 11.073, a law designed to allow people like Flores a less onerous way to establish their innocence by showing that since-discredited science contributed to their wrongful convictions. Then, in 2023, Texas expressly barred the use of testimony tainted by investigative hypnosis in criminal proceedings, a law inspired in part by Flores's own case. *See* TEX. CODE CRIM. PROC. art. 38.24.

Invoking these state laws, Flores submitted a mountain of evidence to the TCCA seeking the right to prove that he is in fact innocent of the crime for which Texas seeks to execute him. But the TCCA has repeatedly and arbitrarily barred these efforts without explanation, nullifying the state-created liberty interest upon which he seeks to rely. In this respect, Flores is not alone. In the 13 years since Texas adopted Article 11.073, the TCCA has not granted relief to a single death-sentenced prisoner who has invoked it.

Article 11.073 requires proof by only a preponderance of evidence that, had a jury heard about the change in scientific understanding, he would not have been convicted. Even a cursory look at the body of evidence Flores submitted shows that the TCCA is not honoring the backstop Texas lawmakers enacted to avoid executing the innocent. *See, e.g.*, App.156-App.778. The TCCA has thus rendered Flores's state-created right illusory, in violation of his federal right to due process under the Fourteenth Amendment.

This Court should grant certiorari to clarify that, in these narrow circumstances, where a state has created a liberty interest specifically to avoid executing the innocent, due process demands more than unexplained summary dismissal in response to a substantial threshold showing of actual innocence. This case and the question it presents are exceptionally important: whether

state law enacted to safeguard against executing the innocent, when rendered illusory in practice, offends the federal right to due process.

STATEMENT OF THE CASE[1]

I. The Underlying Crime and Investigation

Before dawn on January 29, 1998, Jill Barganier heard a noise, looked through her mini-blinds, and saw a "hippie" Volkswagen Bug pull into her neighbors' driveway. She saw two "white males" with "long hair" who looked "similar" get out of the car, open the Blacks' garage door, and go inside. This occurred when Mr. Black was routinely away from the house and Mrs. Black was routinely still asleep.

Police were called when Mr. Black came home and found his wife and the family dog shot dead and fixtures torn off the bathroom walls. Members of the narcotics unit were called in because the Blacks' adult son Gary was a known drug dealer, then in prison. Gary's estranged common-law wife, Jackie Roberts, with whom he had children, had been telling people that Gary had left a large amount of cash hidden in his parents' house and that she believed this money was rightfully hers. Jackie, herself an addict-dealer, had shared information about the hidden drug money with another addict-dealer with whom she had recently begun an affair: Richard Childs (a white male with long hair).

A few weeks before Mrs. Black was murdered, Childs had infiltrated Jackie's friend group, dispensing free drugs. Jackie had been seen riding with Childs in his multi-colored Volkswagen Bug. Around that same time, Childs had tracked down Charles Flores, whom Childs had met a few years before when living across the street from Flores's parents. Childs connected with Jackie in Farmers Branch and Flores in Irving; Flores and Jackie did not know each other.

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[1] Most citations to the trial and post-conviction records have been omitted. Quotation marks have, however, been retained to indicate direct quotes from a record source.

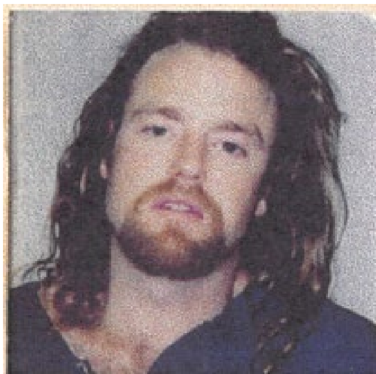
The day Mrs. Black was murdered, investigators with the Farmers Branch narcotics unit soon located $39,000 in cash hidden in the Blacks' house; they then immediately went looking for Childs before anyone had implicated him. Narcotics investigators knew Childs, because he had, seemingly, been working for them and other narcotics agents in the Dallas metroplex, as had his older brother. Childs' father was a local police officer who had long worked for the Irving police department, one of the law enforcement agencies that became involved in interrogating potential witnesses for the Black murder case.

While the narcotics investigators were inquiring about Childs' recent activities, other investigators canvassed the Blacks' neighborhood. They found witnesses who had seen "two white males, 25 years of age or older" getting out of a Volkswagen at the Blacks' house. Mrs. Barganier was the only person who had seen the men's faces. Police records refer to a statement she provided that day, but it disappeared from the police file.

The day after the murder, the *Dallas Morning News* ran a front-page story about the murder, describing Childs' multi-colored Volkswagen, which the police were looking for. As it turns out, the day of the murder, Childs had deposited his distinctive car outside the trailer where Flores was living and then left on a motorcycle. Flores had thought nothing of this, as he had no idea that Childs had just used that Volkswagen while perpetrating capital murder.

The next day, investigators realized that Childs, not just his car, had been seen at the Blacks' house the morning of the murder. Even though Mrs. Barganier was shown a photo lineup with an older photo of Childs, she picked him out of a photo six-pack:

Although narcotics officers knew where Childs was and had him under surveillance, they allowed him time to destroy evidence and interact with other suspects before taking him into custody—and then buried the fact that he was arrested with *an opened box of the exact brand of .380 ammunition that had been used to shoot Mrs. Black*. The next day, back at the Farmers Branch police station, Mrs. Barganier was shown another photographic lineup that included Childs' new mugshot. She again picked Childs out:



A few nights later, two detectives went to Mrs. Barganier's home and arranged for her to come to the police station the next morning to be "hypnotized" before making a composite sketch of the Volkswagen's passenger. By then, Flores had become the preferred suspect, despite the absence of any physical evidence linking him to the crime scene and despite no one describing anyone who looked like Flores at the scene. Flores was not a slim, white male with long hair. He was an overweight, Hispanic male, with short, shaved hair.

By then, investigators had obtained a recent photo of Flores. The same narcotics investigators who had been working with Childs began injecting Flores's name into interviews with key suspects—including Childs and Jackie. In a partially recorded custodial interview with Childs, which the jury never heard, these officers can be heard *telling* Childs to implicate Flores, as they all joked together and the officers described Flores in racist terms.

Meanwhile, after learning that Childs had been implicated in a murder, Flores clumsily sought to destroy the distinctive Volkswagen that Childs had abandoned outside of Flores's trailer. He also fled Texas after learning that police were looking to connect him to a crime he had not committed.

Mrs. Barganier would later testify that she was "just a wreck," "very nervous," and scared for "the safety of [her] children." She "couldn't stop shaking" and "felt responsible" for Mrs. Black's death because she "knew these men were there, and [she] dismissed it." She was highly motivated to help.

At trial, Mrs. Barganier claimed she had asked the police to put her under hypnosis to help her "do a good composite." It is unclear how she knew that hypnosis was something police officers did. The jury heard no details, but post-conviction evidence established that the lead detective enlisted a patrol officer who had collected evidence at the crime scene to do the hypnosis. This officer had never hypnotized anyone before (and never did so again). But he had received a certificate after taking a law enforcement hypnosis course two years earlier.

The morning of February 4, 1998, Mrs. Barganier arrived at the police station for the hypnosis session, which was videotaped by a detective involved in the investigation. During a short pre-hypnotic interview, Mrs. Barganier described looking out a window, seeing a

Volkswagen Bug and two men get out, noticing the driver's hair and that he was drinking out of a beer bottle, and remembering the passenger's hair as "basically the same as the driver's." App.157.

During the hypnosis session, Mrs. Barganier was invited to imagine many things, such as: her "very own special theater … decorated in any way [she] like[d]," an elevator ride, a "yellow button" to push an imaginary remote control, "magical letters" floating over the two men's heads, and a time-travel door she could walk through. The police-hypnotist instructed her that, when he reached the number zero, she "could just press the [imaginary] play button, this play button will take us to Thursday, January 29. It's a very important day of significance." He also instructed her to imagine "you're going to be seeing a documentary, you're going to be seeing a film of the events that occurred on that day, on that morning." And while she was imagining this documentary, he invited her to "pan" in on each man's face. App.157-App.177.

Mrs. Barganier again said of the passenger's hair that it "looked a lot like his friend's," which she described as "dark blonde" "long, wavy," and shoulder-length. App.168.

Throughout the hypnosis session, the police-hypnotist made numerous suggestive statements, during and immediately afterwards, *e.g.*:

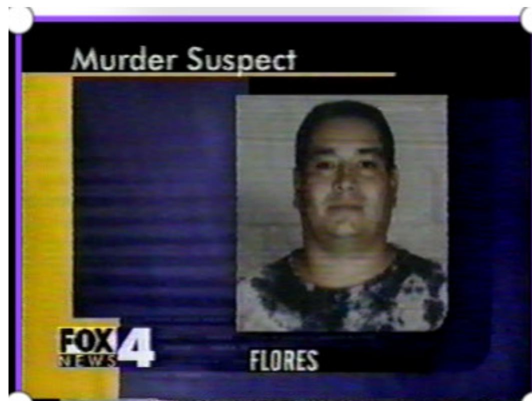
- "Is his hair short, is it shaved, is it neatly cut?" [asked about the ***driver*** whose hair she had repeatedly described as "dirty, long, and wavy"]
- "Does he have it neatly cut or is it trimmed?" [asked about the ***passenger*** whose hair she had just described as "A lot like his friend's" and "Dark, long."]
- "And as I said, you'll be able to recall more of these events as time goes on."

App.157-App.177. At the end, Mrs. Barganier asked: "Did I do ok?" "Did I help in any way?" App.175, App.177. Right afterwards, Mrs. Barganier used a computer to create a composite sketch of the passenger:

Despite Mrs. Barganier's previous descriptions to police and this sketch that looked nothing like Flores, right afterwards, law enforcement showed her a photo lineup featuring Hispanic males, all with short, shaved hair. The photo lineup included a recent picture of Flores in position 2:

Even with the suggestive nature of Flores's photo—in the center of the top line and the only one featuring bright clothing, a distinct background, and no white bar blocking part of the picture—***Mrs. Barganier did not pick him out***.

Over the next several months, before and after Flores's arrest, photos of him—a large Hispanic male with short, shaved hair—appeared in the news. *See, e.g.*:



No records in the police or prosecutor's files captured any further pre-trial interactions between Mrs. Barganier after that day she was hypnotized, created a composite sketch, and then failed to pick Flores out of a photographic lineup. But the prosecutors likely interviewed her at some point, as she was subpoenaed to appear at Flores's trial 13 months later.

II. The Prosecution

A few months after Mrs. Black's death, Flores was arrested and arraigned for capital murder in the Black case. Police never interviewed him; instead, they worked with the lead prosecutor to arrest his elderly parents, his girlfriend and alibi witness, and a host of his friends, trying to coerce incriminating statements from them to use against Flores. Voir dire began less than a year after the offense.

When voir dire began, no discovery had been produced to the defense. While potential jurors were filling out questionnaires, the State produced, for the first time, a small volume of discovery. Lead prosecutor Jason January promised to disclose several categories of material later; but he never did so. For instance, January never disclosed exceedingly favorable deals he secretly made with various witness, including: an individual who claimed Flores confessed to shooting the Blacks' dog; Childs, who confessed to shooting Mrs. Black; and Jackie, who confessed to having told Childs about the hidden drug money and the Blacks' morning routine.

By trial, January had indicted Flores's elderly parents for "hindering the apprehension of a fugitive," *i.e.*, their son. January also made multiple attempts to indict Flores's girlfriend and alibi witness for the same.[2] Unbeknownst to the defense, January arranged for several witnesses to testify before the grand jury in the case pending against Childs. Those transcripts, containing significant impeachment evidence, were not produced to Flores's counsel.

By Opening Statements, the State had no physical evidence linking Flores to Mrs. Black's murder—no fingerprints, ballistics, DNA, or fiber evidence. The State also had no eyewitness identification. But the lead prosecutor argued that Flores was not only present at the crime scene but had been the shooter (while knowing that Childs had shot Mrs. Black).

When the presentation of evidence began, it was uncontested that two men had entered the Blacks' house through the garage and torn up the bathroom walls in search of something (and failed to find the $39,000 hidden in the house). One of these men had shot Mrs. Black with a .380 pistol. It was also uncontested that one of these men was Childs, whom the jury never saw or heard from. Nor did they hear that he had confessed to being the shooter.

Mrs. Barganier appeared in court to testify for the State. After seeing Flores at the defense table, the only Hispanic in the courtroom, she told the prosecutors that she could *now* identify him as the passenger she had seen exiting Childs' Volkswagen Bug before dawn the morning Mrs. Black was murdered. Defense counsel objected, outside the jury's presence, suggesting that her in-court identification was tainted by the hypnosis session.

The trial judge expressed skepticism since Mrs. Barganier had known the defendant's name: "honestly you don't have to be a rocket scientist to pick out who is the Hispanic individual in the Courtroom. You agree with that, do you not?" Moreover, as Mrs. Barganier admitted years

[2] None of the family members and friends who concealed Jackie and Childs while they were on the lam was ever arrested for that conduct.

later, she had, by then, repeatedly seen his picture in the news. But Mrs. Barganier insisted that she was sure about the identification. January argued that (1) "the hypnosis had little or nothing to do with her in-Court identification at all" and (2) "if it had any effect, it certainly was proper under any of the *Zani* guidelines." January was referencing *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988), which governed the admissibility of testimony from hypnotized witnesses in Texas until the law changed in 2023, inspired by Flores's case.

January also insisted that there was evidence to corroborate Mrs. Barganier's 11th-hour identification, when, instead, there was only suppressed evidence that she had repeatedly described seeing someone who looked entirely unlike Flores.

The trial court overruled the defense's objection, and Mrs. Barganier was allowed to tell the jury a dramatic tale about "locking eyes" with the Volkswagen's passenger, something she had never said before.[3] Her direct exam ended as follows:

> Q. And in seeing this person here today in Court, can you tell the Court how sure you are that is him?
>
> A. 100 percent.

In the redirect examination, she doubled down, claiming to be "over 100 percent" sure.

The jury did not hear how Mrs. Barganier had gone from her initial description of a white male with long, dirty hair who looked similar to Childs to claiming to be "over 100 percent" sure she had seen Flores, an overweight Hispanic male with short, shaved hair who looked nothing like thin, intravenous drug-user Childs.

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[3] The video of the hypnosis session was not played in court. Thereafter, the recording that was supposed to be part of the official record on appeal "disappeared" from the Clerk's Record after being "checked out" by trial prosecutor Jason January. Counsel retained copies, but it is unclear if or when the TCCA obtained and/or reviewed the video. A digitized copy may be accessed here. A transcript of the hypnosis session is at App.157-App.177.

In its Closing Arguments, the State attempted to downplay the credibility issues with many of its witnesses, instead highlighting Barganier's testimony as compelling and credible. Defense counsel, flustered and "disgusted" by having Mrs. Barganier's identification "sprung on [them] out of left field," App.402, then seemed to throw in the towel.[4]

The jury returned a guilty verdict. The State's punishment presentation began immediately afterwards. When it was the defense's turn, counsel rested without putting on *any* punishment-phase witnesses.[5] Flores was sentenced to death.

III. The Initial Appeals

Counsel was appointed to pursue a direct appeal. The sufficiency of evidence supporting the conviction was challenged, but the TCCA affirmed. The TCCA's opinion includes a number of misstatements regarding the evidentiary record amassed at trial. App.753-App.759. But the TCCA was not alerted. The docket suggests an untimely motion for rehearing of some kind was filed, but the mandate issued the same day.

Flores's initial state habeas counsel spent most of his limited time on the case trying to withdraw—and the lawyer who was supposed to replace him never even picked up the record until he was held in contempt. The initial habeas application that was filed, after a rare extension in response to a desperate *pro se* request, consisted mostly of large block quotations from caselaw. No competent evidence was attached; the claims, as pled, were not cognizable in a habeas posture.

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[4] Trial counsel has recently explained "What I meant was, if they believed the State's theory, that Charles [Flores] was there with Richard Childs, there was still no evidence that anyone went into the Blacks' house planning to kill anybody. But I see how my words could be misconstrued as me conceding that Charles Flores was there—which was not something he ever conceded. In fact, Charles vehemently denied involvement. But I was thrown off by the hypnotized witness and the rest of it and was just trying to find some way he might be spared a capital conviction and thus the death penalty." App.402.

[5] According to the trial attorney's recent disclosures, "plainly [we] had gone into trial thinking there was a fighting chance because we had no plan for a punishment phase case. I look back on that and find it hard to believe we put on no witnesses to try to get a life sentence." App.404.

The State filed an Answer, attaching affidavits from the four principal lawyers involved in trying the case.[6] Nothing was served on Flores, who had been abandoned by his counsel. Service was made only on an attorney who never appeared or did any work on the case.

Flores did not even know that his trial attorneys had supposedly provided affidavits supporting the State until years later when he was appointed federal habeas counsel. At that time, he had no means to rebut the assertions in those affidavits. The convicting court and then the TCCA had long since denied relief without a hearing of any kind.

Thereafter, Flores was denied relief in federal court as well, with the State relying on long quotations from the TCCA's decision in the direct appeal purporting to describe the evidence of guilt that had been adduced at trial and also quoting the 2001 attorney affidavits, which had never been admitted into evidence or subjected to adversarial testing.

IV. Flores's Repeated Attempts to Access the State Courts to Prove His Innocence

A. First attempt to rely on Article 11.073

In 2016, when Flores was poised to be executed, Richard Childs was paroled (after serving a fraction of his sentence). Mere days before Flores's scheduled execution, the TCCA granted a stay and remanded a single claim: that, under Article 11.073, the 2013 changed-science law, he was entitled to a new trial because the State had relied on since-discredited science to put an unreliable, hypnotically induced identification before the jury, in violation of his constitutional rights. *Ex parte Flores*, WR-64,654-02, 2016 WL 3141662 (Tex. Crim. App. May 27, 2016). In a concurrence, Judge Newell noted: "I cannot imagine that the concerns regarding suggestive eyewitness identification evaporate when eyewitness testimony is enhanced through hypnotism…. [G]iven the subject matter, by granting a stay this Court acknowledges that whatever we do, we

[6] Flores's lead defense counsel has disavowed the affidavit the State attributed to him. App.404-App.405.

owe a clear explanation for our decision to the citizens of Texas." *Id.* (Newell, J., concurring). That "clear explanation" never came.

After Flores was appointed new counsel to litigate the hypnosis claim, counsel pursued long-missing discovery—and met with fierce resistance. When an evidentiary hearing on the hypnosis claim commenced, Flores's counsel apprised the court that they were uncovering *Brady* evidence they wished to develop in the hearing. But State's counsel objected, arguing that such evidence was not relevant to the hypnosis issue. Counsel for the State then moved to strike most of Flores's witness list, including members of the narcotics unit who had been involved in the murder investigation, Childs' accomplice Jackie Roberts, lead prosecutor Jason January, and lead trial counsel Bradley Lollar. The habeas judge granted the State's request, preventing Flores from developing or presenting any of the *Brady* evidence discovered after the remand.

Flores's hypnosis expert in the habeas proceeding was the preeminent authority on the relationship between hypnosis and memory, Dr. Steven Lynn.[7] Dr. Lynn testified that many psychologists in the 1970s and 1980s had believed that hypnosis could be used effectively as a memory-retrieval tool. But that belief was later undermined by laboratory studies conducted by scientists like Dr. Lynn. Dr. Lynn explained that nothing about the hypnosis session conducted on Mrs. Barganier would have produced reliable memory-retrieval but instead tampered with her memory and instilled a false sense that she could "remember more" later. He also opined that virtually everything attested to in the 1999 *Zani* hearing in Flores's case was inconsistent with contemporary scientific understanding of how human memory works.

[7] Dr. Lynn was a "distinguished professor" at the State University of New York at Binghamton, a higher rank than "full professor," awarded based on his significant contributions to the field of psychological science. He published extensively in the fields of hypnosis, pseudoscience, and psychology, served on several editorial boards for academic journals, and conducted numerous laboratory studies specifically on hypnosis and memory.

After the evidentiary hearing, both parties submitted proposed Findings of Fact and Conclusions of Law (Findings) to the habeas court to consider in making its recommendation to the TCCA, the ultimate arbiter. A year later, Flores received a copy of the habeas court's Findings; the court had adopted the State's proposal ***verbatim***. *See*, *by contrast,* App.201-App.351. Counsel for Flores filed lengthy objections to the Findings with the TCCA, who never ruled upon them.

The habeas court recommended that the TCCA deny Flores a new trial, finding his scientific evidence was "previously available" because Dr. Lynn had testified about some of his early research in an August 1999 civil trial in Wisconsin. Findings at 38. Yet Flores had been tried months earlier in March 1999. And he, an indigent defendant, along with appointed counsel, were blindsided by Mrs. Barganier's post-hypnosis claim that she was prepared to identify him mid-trial; and the *Zani* hearing was conducted on the fly the next morning with no opportunity for the defense to obtain an expert. In short, at trial, Flores was in no position to know of Dr. Lynn, who would testify for the first time a few months after Flores was sent to death row.

The Findings acknowledged that Dr. Lynn's testimony in the habeas proceeding profoundly contradicted the opinions presented in the 1999 *Zani* hearing. The Findings admitted, for instance, that Dr. Lynn had offered uncontroverted testimony that "'Barganier's testimony has since been conclusively determined as scientifically unsound,' and would not have been admissible today"; that "new studies have discredited the scientific community's understanding that hypnosis does not elicit false memories"; that "new studies have demonstrated the plasticity of hypnotically induced memories"; that "new studies show that hypnosis, even without leading questions, can create false memories"; that "new studies show hypnosis creates memories about highly emotional events that change over time"; that "hypnosis is not a reliable means of refreshing memory, and in this case …'the use of hypnosis and the testimony rendered in the Flores matter were so

fundamentally flawed" the dubiousness of Mrs. Barganier's in-court eyewitness identification was unmistakable. Findings at 14, 36. Yet the Findings relied on *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988) and its progeny as controlling law in Texas, which allowed post-hypnosis testimony. On that basis too, the habeas court recommended denying Flores a new trial.

Thereafter, the TCCA adopted the habeas court's Findings without qualification and issued an opinion denying relief on Flores's hypnosis claim without explanation. App.782-App.783.

Almost immediately thereafter, the State endeavored, but failed, to set an execution date. Thereafter, the District Attorney's Office released some pages from Childs' parole records and parts of former prosecutor January's personnel file. The latter does not reveal why his employment was suddenly terminated in late 2000, soon after formalizing a sweetheart plea deal with Childs in which he confessed to shooting Mrs. Black. Childs' parole records, however, revealed for the first time that he was the son of a police officer whose department had assisted with the Black murder investigation in multiple ways about which scant records have ever been produced.

Meanwhile, concerns about the Flores case inspired a state senator to pursue a change in Texas law over the course of two legislative sessions. *See Texas bans testimony based on police "investigative hypnosis" in criminal trials*, DALLAS MORNING NEWS (June 20, 2023).[8] The new law brought Texas in line with the majority of jurisdictions, which ban post-hypnotic testimony. *See* TEX. CODE. CRIM. PROC. art. 38.24 (eff. Sept. 1, 2023). In short, Texas law now recognizes that subjecting witnesses to investigative hypnosis is contrary to the contemporary scientific consensus regarding the nature of memory, as attested to in Flores's 2017 evidentiary hearing.

Flores ultimately urged the TCCA to reconsider its previous denial of Article 11.073 relief on the hypnosis junk-science claim because the Findings it had adopted had relied on *Zani*, law

[8] *Available at* https://www.dallasnews.com/news/politics/2023/06/30/texas-bans-evidence-based-on-police-investigative-hypnosis-in-criminal-trials/ (last visited Jan. 23, 2026). *See also* App.179-App.200.

that had been superseded. He also pointed to copious new evidence Flores had expressly been prevented from developing during the 2017 evidentiary hearing, which showed that Mrs. Barganier's unreliable identification had been material to his conviction. Moreover, he showed that the Findings, drafted by State's counsel and adopted wholesale by the courts, reflected long-standing, significant errors in the legal/factual sufficiency analysis first undertaken in the 2001 direct appeal decision, causing a long-standing misconception about this case. App.753-App.759.

In response, Flores received a "postcard notice" that "the applicant's suggestion for reconsideration has been denied without written order." App.779.

B. Second attempt to rely on Article 11.073 and prove innocence

Flores filed a second subsequent application for habeas corpus relief, which included two new "changed science" claims under Article 11.073, as well as claims of rampant *Brady* violations, false testimony, and actual innocence under Article 11.071, § 5(a). The 826-page subsequent habeas application was supported by eleven volumes of evidentiary proffers, including previously unavailable evidence. The latter included evidence of multiple, undisclosed promises of leniency made to prosecution witnesses that had been suppressed and had taken Flores's counsel monumental efforts to unearth. The voluminous new evidence established that, but-for the unreliable identification testimony from the hypnotized witness, Flores would not have been convicted.

The TCCA responded with a three-page order devoid of analysis, dismissing the entire application expressly "without reviewing the merits of the claims raised." App.784-App.786. Yet Flores was relying on evidence that, indisputably, had not been available when his previous application was filed in 2016 *and* he had pled an innocence claim.

C. Third attempt to rely on Article 11.073 and prove innocence

After his previous attempt to prove his innocence was deemed procedurally barred, a new scientific consensus—about when eyewitness identifications are and are not reliable—solidified. Based on this new consensus and other previously unavailable evidence, Flores filed a third subsequent habeas application, again relying on Article 11.073 and again raising an actual innocence claim.

Flores's newest science includes a report from a leading expert in eyewitness memory, explaining the new consensus in the field and how that consensus, applied to long-suppressed facts about Mrs. Barganier's initial descriptions of someone who looked nothing like Flores, is "highly exculpatory." App.409. The new consensus holds that the most reliable test of a witness's memory is the *first* test conducted early in a police investigation. In Flores's case, within days of the crime, when contamination was minimized, Mrs. Barganier's memory was tested three different ways: by recall (she provided a description), by reproduction (she made a composite sketch), and by recognition (she looked at faces in a photo lineup, one of which was Flores's). The expert who helped forge the new scientific consensus, Dr. John Wixted, explained that the results of all three memory tests point "strongly in the direction of [Flores's] innocence." *Id.* "On the recall test, the witness described the offender as a white male with shoulder-length hair; on the reproduction test, she made a composite sketch of a white male with shoulder-length hair; and on the recognition test, she excluded Flores (a Hispanic male with short, shaved hair) by rejecting his photo array." *Id.*

Flores's new evidence also includes significant admissions from his appointed trial counsel, describing the trial-by-ambush circumstances in Dallas County during the era when Flores was prosecuted and material information that had been withheld from the defense. App.398-App.407. That evidence is supplemented by an analysis by an expert in wrongful convictions, from

a law enforcement perspective, identifying the overwhelming number of red flags in this case. App. 531-App.563. Those red flags go far beyond the stunning fact that officials buried the hypnotized eyewitness's initial descriptions of the perpetrators—showing that, when her memory was fresh, the very morning of the murder, she described having seen two white males with long, dirty hair who looked similar—a description utterly inconsistent with Flores's appearance. The evidence of misconduct includes proof that the lead trial prosecutor lied to both the judge and the jury about the circumstances of this eyewitness's failed attempt to pick a recent image of Flores out of a photo lineup, about the efforts to manipulate this witness in the wake of a uniquely improper hypnosis session, and about the multiple, undisclosed deals the prosecutor made with various highly compromised witnesses to try to implicate Flores in Mrs. Black's death—absent any DNA, fibers, ballistics, or latent prints placing him at the scene.

Just four months after he filed it, Flores's application was again dismissed without explanation and without consideration of the merits. App.1-App.2. The TCCA claimed to have "reviewed Applicant's application" and concluded "that it does not satisfy the requirements of Article 11.071, Section 5" and thus was dismissing "without reviewing the merits of the claims raised." *Id*. There is no indication, however, that the TCCA conducted the totality-of-evidence review *required* by Article 11.071, Section 5 in the innocence context—which would include the entire record developed in the post-conviction evidentiary hearing on the hypnosis claim, the eleven volumes of evidentiary proffers supporting the second 826-page habeas application, and all of the proffers attached to the most recent habeas application (App.156-App.778), which, collectively, support Flores's innocence claim.

REASONS TO GRANT THE PETITION

I. The TCCA Violated Flores's Federal Right to Due Process by Arbitrarily Barring Access to State-Created Vehicles to Prove His Innocence.

Once a right is established through state law, a deprivation of the right implicates federal procedural due process protection—a federal question repeatedly entertained by this Court. *See Skinner v. Switzer*, 562 U.S. 521 (2011); *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009); *Wilkinson v. Austin*, 545 U.S. 209 (2005); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). With Article 11.071, § 5(a)(2), Texas codified the "*Schlup* gateway," giving prisoners a right to prove their innocence in subsequent habeas proceedings. In adopting Article 11.073, Texas gave prisoners the right to establish that a wrongful conviction was obtained using subsequently discredited scientific evidence. In Flores's case and many others, the TCCA has nullified these state-created vehicles by gratuitously barring credibly innocent prisoners on death row from proving their innocence. This Court should grant certiorari to clarify that the constitutional guarantee of due process prohibits state courts employing arbitrary or irrational procedures to foreclose even making the case of innocence. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Since the "touchstone of due process is protection of the individual against arbitrary action of government[,]" *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), clarification is needed for this most dire circumstance: a death-sentenced prisoner fighting for the right to prove his innocence in court, as state law allows, based on a mass of evidence unavailable when he was tried.

A. Texas has expressly created avenues to process innocence claims in a subsequent habeas posture.

This Court has not definitively decided that a freestanding claim of actual innocence is a cognizable basis for federal habeas relief. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993) (referring to an "assumed right" "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and

warrant federal habeas relief if there were no state avenue open to process such a claim.”).[9] But soon after *Herrera*, a Texas death-penalty case, the TCCA concluded that incarceration or execution of the actually innocent violates the federal Constitution. *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

Recognizing that innocent people have been convicted and sentenced to death, the Texas Legislature has enacted two procedural vehicles to give death-sentenced prisoners with innocence claims a means to return to court after all mandatory appeals have been exhausted.

1. Section 5(a)(2) codified *Schlup*

The first vehicle that Texas created (and which Flores sought to utilize below) is Texas Code of Criminal Procedure, Article 11.071, § 5(a)(2). There, the TCCA is directed to authorize claims raised in a subsequent habeas application by a death-sentenced prisoner where “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.” TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(2). The TCCA has observed that Article 11.071, § 5(a)(2) “mirrors that for bringing successive writ applications in federal habeas review of state convictions” under *Schlup v. Delo*, 513 U.S. 298 (1995). *Ex parte Davis*, 947 S.W.2d 216, 237 (Tex. Crim. App. 1996); *see also Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008) (describing § 5(a)(2) as a “codification of the Supreme Court’s *Schlup v. Delo* standard”).

The TCCA has further noted that, in federal court, the *Schlup* exception to the general bar against subsequent habeas applications operates to “protect against the kind of miscarriage of

[9] This Court concluded that the facts of *Herrera* did not establish that he was actually innocent and thus denied relief on that basis. *Herrera*, 506 U.S. at 419. *See also House v. Bell*, 547 U.S. 518, 555 (2006) (assuming, without deciding, the existence of a freestanding innocence claim); *In re Davis*, 557 U.S. 952 (2009) (permitting freestanding innocence claim to move forward).

justice that would result from the execution of a person who is actually innocent." *Ex parte Brooks*, 219 S.W.3d 396, 400 (Tex. Crim. App. 2007). The exception "seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U.S. at 324. Under *Schlup*, once a prisoner makes a showing of innocence "so strong that a court cannot have confidence in the outcome of the trial" then, "unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Id.* at 316.

The *Schlup* gateway does not require proof-positive that the verdict would have been different (an impossible standard). The burden is to "establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536–37 (2006) (quoting *Schlup*, 513 U.S. at 327); *see also Reed*, 271 S.W.3d at 734 ("We must then decide how reasonable jurors who were properly instructed, 'would react to the overall, newly supplemented record.'") (quoting *House*, 547 U.S. at 538). To make the necessary showing, an applicant need only show that he likely would not have been convicted based upon the totality of now-available evidence. Once that showing is made, claims of constitutional error are supposed to be reviewed too. *Schlup*, 513 U.S. at 316

Importantly, § 5(a)(2) does not require that all evidence relied on could have been discovered sooner or impose any other quasi-laches requirement. Additionally, at the pleading stage, which § 5 addresses, Texas law does not require "clear and convincing" evidence but only evidentiary proffers that show "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." TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(2). As one member of the current

TCCA has acknowledged, the “preponderance” standard is supposed to be “easy.” *Ex parte Cobb*, 710 S.W.3d 747, 762 (Tex. Crim. App. 2025) (Yeary, J., concurring) (describing “the ‘preponderance of the evidence standard’” as “easy to meet”).

In short, determining whether § 5(a)(2) is satisfied in any Texas death-penalty appeal in which it is invoked should require the same analysis described in *Schlup*. Flores relied on § (5)(a)(2) below, as he was seeking permission to exercise the right to prove his innocence and violations of the U.S. Constitution that enabled his wrongful conviction. App.31-App.33; App.75-App.139. The TCCA did not acknowledge this fact. App.01-.App.02.[10]

2. Article 11.073 lowered the burden for innocence claims with a focus on changed forensic science.

In response to a series of scandals, exposés, and exonerations related to unreliable forensic science, in 2013 the Texas Legislature passed Senate Bill 344, later codified as Texas Code of Criminal Procedure Article 11.073, and amended it in 2015 to make it even more accessible. App.635-App.670 (Texas Defender Service, *An Unfulfilled Promise: Assessing the Efficacy of Article 11.073* (2024)). Article 11.073 is colloquially known as the “junk science law,” but, importantly, there is no burden to prove that trial testimony was “junk science.” Article 11.073 applies “to relevant scientific evidence that: (1) was not available to be offered by a convicted person at the convicted person’s trial; or (2) contradicts scientific evidence relied on by the state at trial.” TEX. CODE CRIM. PROC. art. 11.073(a). Death-sentenced prisoners must also comply with procedural requirements codified in Article 11.071, § 5. *See* subsection 1, above.

Article 11.073 was expressly enacted to make it easier for innocent people, convicted using problematic forensic evidence, to obtain relief from wrongful convictions. App.600. In one of the

[10] In most death-penalty cases in which the TCCA enters an order dismissing or authorizing claims in a subsequent application, it simply cites “Section 5a” or even “Section 5,” as occurred here.

death-penalty cases that spurred the Texas Legislature to act, the evidence of scientific "change" was no more than the opinion of a single medical examiner—who, based on the evolution of her own thinking, concluded that she would now characterize the manner of a child's death as "undetermined" instead of "homicide." *See Ex parte Robbins*, 560 S.W.3d 130, 131 (Tex. Crim. App. 2016) (*Robbins III*) (Alcala, J., concurring); *see also Ex parte Robbins,* 360 S.W.3d 446 (Tex. Crim. App. 2011) (*Robbins I*); *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) (*Robbins II*).

Before Article 11.073, there was no mechanism to address situations where scientific advancements and evolving expert opinions showed that the evidence used to obtain a conviction had been destabilized. Before Article 11.073, post-conviction relief for the innocent was only available to Texas prisoners who could prove a legal claim of actual innocence, which the TCCA describes as a "Herculean" evidentiary burden. *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).

In a recent statement regarding denial of certiorari in *McCrory v. Alabama*, 603 U.S. __ (2024), Justice Sotomayor acknowledged problems with "the adequacy of current postconviction remedies to correct a conviction secured by what we now know was faulty science." *Id.* at 1. Additionally, Justice Sotomayor noted that "[s]everal States"—*led by Texas*—"have already tackled this troubling problem through targeted postconviction statutes." *Id.*; *see also* n.5 & 11 (citing Texas's Article 11.073 and describing its trailblazing status). Justice Sotomayor was indeed correct that Texas was the first state to enact a specific procedural vehicle for prisoners to use to challenge wrongful convictions by showing changes in scientific understanding. However, to date,

no one sentenced to death in Texas has yet succeeded in using this new law to obtain a new trial—despite more than satisfying the procedural requirements delineated in state law.[11]

B. The TCCA is arbitrarily barring access to present new evidence of innocence.

In Texas death-penalty cases, the *only* entity with any authority to grant habeas relief is the TCCA. Moreover, with quests for habeas relief based on new evidence unearthed, or changes in law made, after a death-sentenced prisoner's mandatory appeals have been exhausted, only the TCCA can authorize moving from the pleading stage to further factual development in the trial court in hopes of eventually prevailing on the merits of any claim. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(b)(1) (requiring convicting court to forward any subsequent habeas applications filed on behalf of a death-sentenced prisoner to the TCCA for the threshold § 5(a) determination).

If the TCCA remands a claim in a subsequent habeas application, the habeas judge in the trial court is "Johnny on the spot" with respect to factfinding; but that court's ultimate recommendation is merely advisory. *Ex parte Simpson*, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004). Only the TCCA can grant relief and considers itself the "ultimate factfinder in habeas corpus proceedings." *Ex parte Reed*, 271 S.W.3d at 727. Even where, at the trial court level, the applicant, the State, and the habeas judge all agree that habeas relief in the form of a new trial is warranted, the TCCA can reject the post-conviction factfinding and/or a trial court's recommendation. *See, e.g.*, *Ex parte Escobar*, No. WR-81,574-02, 2022 WL 221497 (Tex. Crim. App. Jan. 26, 2022), *certiorari granted, judgment vacated*, *Escobar v. Texas*, 143 S.Ct. 557 (Mem) (2023) (TCCA denying habeas relief although all below agreed that conviction hinged on false and misleading DNA test results and other flawed forensic evidence); *Ex parte Horvath*, 721

[11] The denial of every Article 11.073 claim raised in Texas death-penalty cases, despite robust evidentiary support, is a pattern that has not changed since the Texas Defender Service published its report—even though this inexplicable statistic was the subject of legislative hearings in October 2024, focused on the glaring failure to award another credibly innocent death-row prisoner, Robert Roberson, relief, who was then facing imminent execution.

S.W.3d 248 (Tex. Crim. App. 2025) (TCCA denying relief in non-death-penalty Shaken Baby case where State's counsel and trial court had agreed that applicant should be granted a new trial under Article 11.073 in light of TCCA's recent decision in *Ex parte Roark*, another Shaken Baby case).

While Article 11.073 was intended to provide a vehicle for prisoners like Flores to obtain judicial review of their credible innocence claims, and although Article 11.073 expressly *reduced* the burden of proof necessary to prevail on the merits, the TCCA has denied relief to Flores, like *every other death-sentenced litigant who has invoked Article 11.073 over the past 13 years*. Moreover, he has been barred from even *presenting* the evidence of his innocence to a court.

In 2024 and again in 2025, Texas came perilously close to executing an individual whose robust innocence claims under Article 11.073 had been repeatedly barred by the TCCA without consideration of the merits, even where a member of this Court and many others had recognized that considerable evidence had been amassed to show he was likely innocent and that discredited science had been used to convict him. *See Roberson v. State*, 604 U.S. __, *8-*9 (2024) (Sotomayor, J., statement regarding denial of certiorari) (summarizing the case and observing "[f]ew cases more urgently call for such a remedy than one where the accused has made a serious showing of actual innocence, as Roberson has here.").

Several other Texas death-sentenced habeas applicants have recently presented issues to this Court involving arbitrary barriers imposed on efforts to prove innocence. *See, e.g.*, *Reed v. Goertz*, 24-1268 (asking this Court whether a state law enabling prisoners to access DNA testing to prove their innocence is a right that has been rendered illusory by the TCCA's construction of that law); *Wood v. Patton*, No. 25-6050 (asking this Court to assess whether the TCCA's "fifteen-year, twenty-three case unbroken string of denying DNA testing appeals creates a plausible claim that the state-created right is illusory in practice"); *Escobar v. Texas*, 23-934 (asking this Court,

after it had previously vacated the TCCA's judgment denying habeas relief, whether the TCCA, on remand, had erred in holding there was no due process violation despite the prosecution's use of admittedly false, misleading, and unreliable DNA evidence to secure a capital conviction). Flores's case is the latest example in a disturbing pattern demonstrating that the TCCA is violating death-sentenced prisoners' due process rights by denying them any meaningful opportunity to prove their innocence as state law allows.

C. The Texas Legislature has recognized that the TCCA is not applying Article 11.073 as intended.

On October 16, 2024, the Texas House Committee on Criminal Jurisprudence held a seven-hour hearing titled: "Criminal procedure related to capital punishment and new science writs under Article 11.073, Code of Criminal Procedure." The hearing was prompted by concern that, despite the Legislature's intent, Article 11.073 had not been providing a pathway for relief, particularly in death-penalty cases. The House Committee heard testimony that, to date, no death-sentenced prisoner has yet been granted relief based on Article 11.073 although this first-in-the-nation statute was enacted over a decade ago inspired by failures to grant relief in a death-penalty case.[12]

Several hearings followed, highlighting issues with the accuracy and reliability of the process that has led to death-sentenced applicants being repeatedly denied habeas relief. Thereafter, the House Committee issued a report, describing its investigation and findings.

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[12] The TCCA has made threshold findings that an Article 11.073 claim could be remanded to the trial court for further development, which it did in Flores's case in 2016. But neither Flores nor any other death-row applicant has ever been granted relief upon returning to the TCCA. Moreover, the TCCA has refused to even authorize a 11.073 claim for fact development after an applicant presented more evidence of yet more changes in the relevant science. The only exception is that the TCCA recently reconsidered the denial of a third attempt to rely on Article 11.073 in the case of Robert Roberson. But that fractured decision illustrates that a bare majority was willing only to remand a claim to address inconsistency in its own recent Article 11.073 opinions involving the exact same changed science. *See Ex parte Roberson*, -- S.W.3d --, 2025 WL 2858392 (per curiam) (Tex. Crim. App. 2025) (producing a total of 7 decisions). The TCCA did not authorize further factual development of Roberson's actual innocence claim.

App.577-App.633. The report identified multiple concerns supporting the bipartisan committee's strong belief that Article 11.073 is not being applied as intended in cases like this one:

- Concerns about proposed findings, drafted by counsel for the State, that do not fairly and accurately represent the post-conviction evidence, being "adopted almost verbatim" by habeas courts and thus "calculated to deny relief," not to truthfully reflect the habeas record. App.606.[13]

- Concerns that standards are not being applied the same in death-penalty v. non-death-penalty cases involving very similar fact patterns. App.607.[14]

- Concerns about giving too much deference to determinations made by juries that were misinformed, such that "a courtroom lie" can "become an unchallengeable truth, even when the jury plainly didn't get the whole story." App.610.[15]

- Concerns about overreliance on "procedural bars" to dismiss claims without considering the merits based on the "notion that the claim *could* have been raised earlier than it was" when the legislature's express intent with Article 11.073 was to "elevat[e] truth above finality." App.612.

All of these concerns, identified by Texas lawmakers responsible for Article 11.073's passage, are evident in Flores's efforts to exercise his right to prove his innocence before it is too late.

More than a decade ago, the Texas Legislature enacted Article 11.073, allowing challenges to convictions based on since disproven or incomplete science. That law passed with unanimous support of the Texas House because of the recognition that innocent people had been wrongfully convicted based on scientific evidence that later turned out to be wrong. The lawmakers' recent

[13] In this case, the habeas court signed Findings that were *identical* to the proposal drafted by State's counsel, omitting much of the evidence Flores had adduced, including *all* of the testimony of his eyewitness memory expert, Dr. Margaret Kovera, deeming it "irrelevant" in a proceeding entirely about the science of eyewitness memory. *But see, e.g.*, App.352-App.396.

[14] Flores's case hinges on the junk science of hypnosis and the new scientific consensus regarding when eyewitness identification is and is not reliable. But this case also involves layers of official misconduct similar to those found in other Dallas County cases tried in the same era, *e.g.,* in *Ex parte Spencer*, No. WR-69,994-02, 2024 WL 2167709 (Tex. Crim. App. May 15, 2024), involving suspect eyewitness identifications. Spencer has been granted relief based on the TCCA's conclusion that he was "improperly convicted based on false testimony and Brady violations"; yet Flores's claims based on similar misconduct, supported by substantial evidence, have never even been considered. *See* App.127-App.138.

[15] Flores's jury never heard how Mrs. Barganier initially described a perpetrator who looked nothing like Flores; the jury only heard her claim, 13 months after-the-fact, after being hypnotized by a police officer, that she was certain Flores was the person she had seen.

report reflects plain dismay that their law has not been applied as intended and has not been a pathway to relief—or even a new trial. App.600-App.633.

D. The TCCA's arbitrary gatekeeping violated Flores's right to due process.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution entitles those with liberty interests, like those embodied in Articles 11.071 § 5(a) and 11.073, a right to reasonable procedures to access those liberty interests. But Flores's multiple attempts to rely on Articles 11.071 § 5(a) and 11.073 to have an opportunity to prove his innocence have encountered gratuitous obstruction. The failure to apply the law as written, imposing a heightened burden contrary to the statute's plain language and to legislative intent, and the complete absence of explanation for a dismissal belied by the face of the filing the TCCA dismissed are circumstances that amount to a due process deprivation.

The right to due process in proceedings seeking to exercise a state-created liberty interest has been recognized by many courts, including this one. *See, e.g.*, *Osborne*, 557 U.S. at 68; *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). *See also Redd v. Guerrero*, 84 F.4th 874, 898 (9th Cir. 2023) (recognizing "[s]tate laws governing postconviction relief can … give rise to a liberty interest protected by federal due process"); *Howard v. City of Durham*, 68 F.4th 934, 947–48 (4th Cir. 2023) (holding North Carolina law created a liberty interest for plaintiffs to demonstrate innocence during post-conviction proceedings, which is "entitled to protection under the Due Process Clause"); *Armstrong v. Daily*, 786 F.3d 529, 551-52 (7th Cir. 2015) (allowing plaintiff's civil suit to proceed, in part, because actions by a "state actor" amounted to a "deprivation of [plaintiff's] liberty without due process of law"); *Morrison v. Peterson*, 809 F.3d 1059, 1064–65 (9th Cir. 2015) (holding, in a § 1983 challenge to California's postconviction DNA procedures, that the prisoner had a state law "liberty interest in demonstrating his innocence with new evidence

.... because California law provides a right to be released from custody pursuant to a writ of habeas corpus when there is no legal cause for imprisonment") (cleaned up); *Newton v. City of New York*, 779 F.3d 140, 151 (2d Cir. 2015) (finding government actor "prevented [the appellant] from vindicating his liberty interest in violation of his Fourteenth Amendment right to due process").

By enacting Articles 11.071 § 5(a) and 11.073, Texas recognized the importance of affording death-sentenced prisoners meaningful review of new claims after initial appeals have failed, but the TCCA is consistently disregarding that goal. *Cf. Stutson v. United States*, 516 U.S. 193, 196 (1996) (recognizing that "judicial efficiency and finality" must give way to a "certain solicitude for [the] rights" of criminal defendants). Despite amassing far more evidence than necessary to plead an Article 11.073 changed-science claim based on the new consensus in the field of eyewitness-memory assessment, Flores's substantial claims of official misconduct and actual innocence were dismissed in an arbitrary, rudderless process, barring him from being heard.

E. This case presents an excellent vehicle for addressing a narrow, but distinctly serious, constitutional infirmity.

This case is an excellent vehicle for clarifying the critical role the federal right to due process plays in cases where substantial evidence of innocence has been amassed, yet state procedural rules have been arbitrarily, even inexplicably, interpreted to prevent merits review, creating the intolerable risk of continuing to execute the innocent, contrary to the legislative intent reflected in state-created vehicles meant to mitigate against that prospect.[16]

[16] Considerable evidence shows that Texas has already executed numerous innocent people, including Carlos DeLuna, Ruben Cantu, David Spence, Claude Jones, Cameron Todd Willingham, Gary Graham, Lester Bower, Richard Masterson, Larry Swearingen, and Ivan Cantu. *See, e.g.*, https://deathpenaltyinfo.org/policy-issues/policy/innocence/executed-but-possibly-innocent (last visited Jan. 23, 2026). *See also* Juan Lozano, *Texas Black man exonerated nearly 70 years after execution in case marked by racial bias* (AP Jan. 23, 2026), *available at* www.yahoo.com/news/articles/texas-black-man-exonerated-nearly-212935498.html?fr=yhssrp_catchall (last visited Jan. 23, 2026).

Any objective analysis of the evidence Flores has amassed over the course of his habeas proceedings eviscerates the State's entire case against him. He has not only undermined confidence in the conviction; he has presented persuasive evidence, grounded in contemporary science, that is affirmative support for an innocence finding building on the post-conviction record establishing the complete unreliability of testimony from a hypnotized witness (a record that was entirely ignored).[17] Flores's own case inspired a legislative ban on admitting the exact type of testimony that was used to secure his wrongful conviction, yet the TCCA has refused to allow him to use the new scientific consensus and other evidence to prove his innocence.

Whatever review the TCCA conducted in Flores's first 11.073 proceeding involved complete deference to trial court Findings that were drafted entirely by State's counsel. This Court has criticized the practice of courts adopting a party's proposed Findings wholesale as raising due process concerns. *See Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985); *see also Jefferson v. Upton*, 560 U.S. 284, 294 (2010) (suggesting rubberstamping might violate a habeas petitioner's right to an "adequate" "factfinding procedure" if a judge "adopts findings that contain internal evidence suggesting the judge may not have read them."); *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance,'" and rubberstamping violates due process by "delegat[ing] adjudicative functions" to an interested party.") (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972)).[18]

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[17] To survey this evidence is beyond the scope of a petition for certiorari. But if the Court requests the record, the scope and quality of the evidence supporting the application that the TCCA found procedurally barred will show that the requisite threshold analysis could not have been undertaken in good faith.

[18] The lower courts are split with respect to their treatment of rubberstamping. The Eleventh Circuit and Mississippi broadly defer to rubberstamped findings. *See In re Colony Square Co.*, 819 F.2d 272, 276-77 (11th Cir. 1987); *Bluewater Logistics, LLC v. Williford*, 55 S.3d 148, 155-56 (Miss. 2011). Other courts scrutinize rubberstamping closely and vacate findings lacking indicia that the trial court exercised independent judgment. *See In re Community Bank of Northern Virginia*, 418 F.3d 277, 300 (3d. Cir. 2005); *Ramey Construction Col, Inc. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464, 467 (10th Cir. 1980); *Chavarria v. Fleetwood Retail Corp.*,

But here, the wholesale adoption of one party's adversarial Findings now embodies an absurdity: the Findings depend on a characterization of Texas law that has been nullified by legislative change *inspired by this very case*. The Findings, which the TCCA adopted without amendment, include a lengthy section labeled "ADMISSIBILITY OF HYPNOTICALLY REFRESHED TESTIMONY IN TEXAS," discussing *Zani*, a case decided soon after *Rock v. Arkansas*, 483 U.S. 44 (1987), which had brought the then-novel practice of investigative hypnosis to this Court. *Rock* held that, although "hypnotically refreshed" testimony was "controversial," the dangers associated with it could be reduced by "procedural safeguards" that the Supreme Court left to the states to adopt. In *Zani*, the TCCA adopted so-called "procedural safeguards" that were to be assessed when the State sought to put a witness on the stand who had been subjected to investigative hypnosis. *Zani* followed a New Jersey case that, a decade *before* Flores's first 11.073 proceeding, had been *explicitly overruled* by New Jersey's highest court based on the evolution of scientific understanding, attested to by Dr. Lynn, which now recognizes the "inherent unreliability of hypnotically refreshed memory" and the inefficacy of any "guidelines" to control "the adverse impacts of hypnosis." *See State v. Moore*, 902 A.2d 1212, 1213, 1227 (N.J. 2006) (overruling *State v. Hurd*, 432 A.2d 86, 95-97 (N.J. 1981)).[19] In sum, *Moore* responded to the fact that "scientific understanding of the phenomenon and of the means to control the effects of hypnosis" was no longer "in its infancy." *Rock*, 483 U.S. at 61. A substantial body of scientific literature, developed since *Rock*, *Hurd*, and *Zani*, gave rise to the current consensus: that hypnosis is not conducive to producing accurate recall—***under any circumstances***.

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143 P.3d 717, 723 (N.M. 2006); *Clifford v. Klein*, 463 A.2d 709, 713 (Me. 1983). But this Court has been clear that rubberstamping is especially problematic in habeas cases when a prisoner's liberty or life is at stake. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

[19] State's counsel objected when Flores's counsel attempted to apprise the habeas court of *Moore* and to give the court a copy of this highly relevant case that reversed *Hurd* and, in the process, entirely gutted the basis for *Zani*. Both the habeas court and the TCCA then disregarded *Moore*.

But the TCCA refused to apply that new scientific consensus in Flores's case based, seemingly, on the indefensible notion that he, an indigent, should have anticipated in the middle of trial that the laboratory studies of Dr. Lynn, who had yet to ever testify in any case, would one day effect this sea change.

More recently, Flores returned to the TCCA, presenting, *inter alia*, evidence of a new consensus in the field of eyewitness memory more broadly, which yields affirmative evidence, not just of a flawed identification process, but highly probative of his *innocence*. The researcher whose work precipitated this paradigm shift, Dr. John Wixted, has explained the new consensus and applied it to the facts of this case. He attests that "the scientifically relevant eyewitness identification evidence" in this case "points *strongly* in the direction of [Flores's] innocence." App.409 (emphasis added).

Notably, the TCCA did not claim to have reviewed or considered the merits of any of the new claims or new evidence Flores submitted in 2021 and then in 2025 to support the second and third 11.073 applications. App.2 & App.786. Those applications were simply dismissed without explanation. Yet the TCCA's dismissal cannot be squared with the facts (none of which are mentioned) or the state law cited. The primary proof of arbitrariness is the complete *absence* of analysis in such a serious context. *See, e.g.*, *Florida v. Powell*, 559 U.S. 50, 56 (2010) (holding "important that ambiguous or obscure adjudications by the state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of the state action."); *Stutson*, 516 U.S. at 196 (holding that a state court's vague ruling can threaten a criminal defendant's "liberty and due process interests"). By depriving Flores of any substantive hook, he is also denied a chance to bring arguments to this Court regarding the merits of his federal-law claims. As a practical matter, petitions to this Court of boilerplate TCCA decisions must appear

less deserving of certiorari relative to other petitions where a court below expressly "decided an important question of federal law"—thereby compounding the due process violation. Supreme Court Rule 10 (b), (c). *See, e.g.*, *Glossip v. Oklahoma*, 604 U.S. 226 (2025) (recognizing from state court's opinion that it relied on state procedural rules whose application necessarily hinged on a preliminary assessment of the merits of federal claims, granting certiorari, and vacating conviction obtained by false testimony and suppressed impeachment evidence).

The merits of Flores's "changed science," official misconduct, and actual innocence claims have never received fair consideration despite state law expressly enacted to solve the kind of problem his case epitomizes. The Court should grant the petition to clarify how the unreasonable deprivation of a state-created liberty interest can violate the federal right to due process, particularly when the case involves a credible claim of innocence and a death sentence. This case is an ideal vehicle for this Court to clarify that, where a state has created a right to prove innocence and avoid "a constitutionally intolerable event" of executing the innocent, the credibly innocent habeas applicant is entitled to basic due process in the threshold determination of whether the applicant can get back into court to shoulder the full burden of proving his innocence. *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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