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

QUESTIONS PRESENTED

The State obtained Charles Don Flores's conviction based primarily on a mid-trial, in-court "identification," made for the first time thirteen months after the crime as he sat at the defense table. Flores did not match this witness's *initial* descriptions of the perpetrators in any respect, a fact kept from the defense for nearly two decades. Her "identification" was made after the police had subjected her to "forensic hypnosis" and then shown her a highly suggestive photo line-up featuring Flores from which she failed to pick him out. She then saw his photo repeatedly in the news. After years during which Flores had no counsel, and after his execution was stayed to pursue a claim narrowly focused on the issue of "forensic hypnosis," Flores unearthed considerable evidence related to this eleventh-hour "identification" and of extensive police and prosecutorial misconduct that had long been suppressed. When he submitted a subsequent state habeas application delineating the vast support for his *Brady*, false testimony, and actual innocence claims, the state court arbitrarily concluded that all of his new claims were barred on procedural grounds and refused to consider their merits—even though the evidence had been unavailable when Flores initiated his previous habeas proceeding.

The Questions Presented are:

1. Is the right to due process violated when a death-sentenced individual is barred from developing substantial habeas claims by the arbitrary application of state procedural law?

2. Is the fact that the State successfully suppressed *Brady* material for two decades a legitimate basis for denying a habeas applicant, who is actually innocent, the right to be heard?

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

(in chronological order)

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).

Flores v. Texas, No. 01-8685, 2002 U.S. LEXIS 3119 (Apr. 29, 2002) (certiorari denied in direct appeal).

Ex parte Flores, No. WR-64,654-01, 2006 Tex. Crim. App. Unpub. LEXIS 744 (Tex. Crim. App. Sept. 20, 2006) (unpublished) (initial state habeas proceeding).

Flores v. Texas, 552 U.S. 884 (2007) (pro se) (certiorari denied in initial state habeas proceeding).

Flores v. Stephens, No. 3:07-CV-0413-M, 2014 U.S. Dist. LEXIS 97028 (N.D. Tex. July 17, 2014) (denying certificate of appealability).

Flores v. Stephens, 794 F.3d 494 (5th Cir. 2015) (affirming denial of certificate of appealability).

Flores v. Stephens, No. 15-6611, 2016 U.S. LEXIS 913 (Jan. 25, 2016) (certiorari denied in initial federal habeas proceeding).

Ex parte Flores, No. WR-64,654-02, 2016 Tex. Crim. App. Unpub. LEXIS 1151 (Tex. Crim. App. May 27, 2016) (unpublished) (granting stay of execution and remanding hypnosis claim in subsequent state habeas proceeding); 2020 Tex. Crim. App. Unpub. LEXIS 215 (Tex. Crim. App. May 6, 2020) (unpublished) (denying relief).

Ex parte Flores, No. WR-64,654-03, 2021 Tex. Crim. App. Unpub. LEXIS 535 (Tex. Crim. App. Oct. 6, 2021) (unpublished) (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 ("CCA").

OPINIONS BELOW

The CCA's unpublished opinion, *Ex parte Flores*, WR-64,654-03 (Tex. Crim. App. Oct. 6, 2021), is in Appendix A. The subsequent state habeas application whose merits were not considered is in Appendix B.

JURISDICTION

The CCA's opinion issued on October 6, 2021. On December 11, 2021, the Honorable Justice Alito granted an application extending the deadline to file a petition for a writ of certiorari to March 4, 2022. 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 and 11.073; due to their length, they are reproduced in Appendix C.

INTRODUCTION

Before sunrise on January 29, 1998, two "white males" were seen exiting a multi-colored Volkswagen Bug outside a home in Farmers Branch, a town in an area between Dallas and Fort Worth. Later that morning, the elderly Bill Black came home to find his wife, Betty Black, shot dead along with the family's dog.

Later that same day, the driver of the distinctive Volkswagen was identified as Richard Childs, a white male with long, wavy hair. Childs, it turns out, was known to law enforcement in the area, including two of the departments that took the lead in investigating the Black murder. In June of 1997, Childs had been released from the Dallas County jail on a very low bond following a possession-with-intent-to-deliver charge. In mid-December of 1997, Childs had been picked up by Irving police for some unknown reason, who transferred him to the Dallas County jail because of outstanding warrants, but he was thereafter immediately released. In early January 1998, Irving police were called about a note Childs had left on a woman's vandalized car accusing her of theft and threatening to come after her; but police made no effort to arrest Childs, alluding to some mysterious "history" with the department hinted at in a long-suppressed police record. A few days after that, Childs' drug case was called, but he failed to appear in court.

Later that same month, January 1998, Mrs. Black was shot. The murder occurred during an attempted robbery that Childs had orchestrated with his latest girlfriend, Jackie Roberts, the estranged wife of Mrs. Black's son, Gary Black, then in prison for selling drugs. Jackie was convinced that $80,000 "was hidden in the

walls, behind the medicine cabinet" in one of the Blacks' bathrooms. She also believed she was entitled to the "dirty money" as a person who had helped her husband obtain it through drug sales before his incarceration.

Childs met Jackie at the end of 1997 about a month before Mrs. Black's murder. Childs, who had some undisclosed connection with Jackie's first husband and friend, Doug Roberts, had suddenly appeared in their circle in Farmers Branch where they both lived, near the Blacks. Childs started showing up at the house across the street from Jackie's, giving away free drugs. While hanging out with Jackie and company, Childs saw some "cop show" depicting a crime in which potatoes had allegedly been used as "silencers." During this time, he was frequently seen carrying a cheap .380, the same caliber pistol later identified as the source of the bullet that killed Mrs. Black. He and Jackie were also frequently heard discussing Gary's "dirty money" and seen tooling round in Childs' Volkswagen.

Aside from watching cop shows and dealing drugs, Childs, Jackie, and her friends went into "business" together, a profession that involved breaking into cars and stealing stereos. Some of that activity may have been fueled by rumors that, in addition to stashing money in the walls of his parents' house, Gary Black had hidden significant proceeds from his drug sales in some of his many cars.

Charles Flores, a large Hispanic male with short, shaved hair, was known among his friends as "Fat Charlie." He did not run with Jackie's crowd in Farmers Branch. He did not even know that this group existed—except that he did know Childs, who had once lived with a girlfriend across the street from Flores's parents'

house in Irving, Texas. After a gap of several years, toward the end of 1997 about a month before Mrs. Black's murder, Childs had suddenly reappeared in Flores's world and asked if he could sell drugs for him. Flores was then buying a small volume of drugs and selling to his friends at the Big Tex trailer park in Irving, where he lived with his girlfriend and her daughters while working for his father's roofing company. Flores saw that Childs had become an emaciated, poorly groomed, intravenous drug-user and felt sorry for him.

Jackie did not know about Flores, and Flores did not know about Jackie. But in the middle of the night, after January 28 had rolled into January 29, 1998, Childs brought them together in a hastily orchestrated deal involving Flores's money and drugs supplied by Jackie's "connect." Flores, feeling that he had been shorted in the transaction, was dropped off back at his trailer in Irving while Jackie and Childs drove off in one of Gary Black's many cars, a brown El Camino. A couple of hours after that, Childs dropped Jackie and the El Camino off at her house in Farmers Branch. Thereafter, Childs was seen getting into his Volkswagen and driving off. Joined by some other "white male," Childs drove the short distance from Jackie's to the Blacks' house with a half-baked plan to rob the place by entering through the garage—the door to which was conveniently raised up enough to permit two adult males to crawl under it and thereby enter the house. The plan soon went south when they were seemingly startled by the appearance of the dog and Mrs. Black. Shots were fired (although only one bullet and one shell casing were ever found, both

associated with a .380 pistol that was never recovered; the blood-soaked carpet was ripped out, thrown in a dumpster, and rained on at the outset of the investigation).

When the police arrived, they found some odd potato fragments in the garage near a bullet casing and they found that the medicine cabinets had been ripped from the bathroom walls. Childs and his cohort, however, had not found the $39,000 in cash that was in fact hidden in the house.

Police canvassed the neighbors. Several people reported having seen a multi-colored Volkswagen Bug pull up in the Blacks' driveway. One neighbor said he recognized the Volkswagen, having seen it at Jackie's house nearby. Several neighbors said they had seen two men exit the Volkswagen and enter the garage. The men were described as white. The morning of the crime, the next-door neighbor, Jill Barganier, told police that she had seen two "white males with long hair" who looked "similar." ***That information, like much of the information conveyed above, was not disclosed for two decades.***

Before Flores learned about the botched robbery, Childs called and asked if he could leave his multi-colored Bug outside of Flores's trailer while Childs took care of other "business." That business involved destroying evidence and meeting alone with Jackie for hours at his grandmother's house as undercover narcotics officers looked on, but did not intervene. Police arrested Childs two days after the murder only when he tried to escape in a borrowed truck wearing a borrowed hat.

After a few days in custody, law enforcement, with whom Childs seemed to be on excellent terms, joked with him and reassured him that they knew he was a "good

guy," unlike "bad cat Charlie" who was rumored to be with "the Mexican Mafia." There was in fact no "Mexican Mafia" connection; Flores's parents were hardworking, third-generation Texans affiliated with the Church of Christ. But Childs understood his role. In a partially recorded custodial interview, Childs responded to leading questions suggesting that Flores had not only been with him during the break-in at the Blacks' house, but Flores had been the one armed with a .380 and had shot Mrs. Black. Police *told* Childs that *he* had a "bigger gun," a .44 magnum revolver that had been found in the closet of his grandmother's house after his arrest. Additionally, it was suggested to Childs that *he* had shot the dog. Childs, strung out and often incoherent, had trouble keeping the details straight. But he played along: minimizing his role and obscuring the identity of his actual partner in crime while implicating "bad cat Charlie Flores" instead.

Upon learning that he had been unwittingly harboring a vehicle associated with a murder that Childs seemed to have committed, Flores panicked. Although he consistently denied being involved in Mrs. Black's murder or present at the scene, his conduct after learning from the radio that he was wanted for this crime cemented the perception that he fit the role of "bad cat." The problem was, aside from the extraneous acts that Flores committed *after* he found out he was being accused of this murder and fled, the State had no physical evidence linking Flores to the crime scene: no fingerprints, no DNA, no firearm, no fibers. It came out *during* trial that a fresh wad of green gum, captured in a crime-scene photo lying near the slain dog, had yielded a DNA profile that *excluded* Flores, Childs, and the Blacks; no further

attempt to find the male whose DNA profile matched the profile extracted from the gum was pursued, however.

All of the reputedly inculpatory circumstantial evidence used against Flores at trial was developed well after his arrest—and most did not materialize until his trial was already underway.

The only seemingly credible piece of inculpatory evidence emerged thirteen months after-the-fact when Flores was identified for the first time, mid-trial, as one of the two men seen getting out of Childs' Volkswagen. Barganier, the victim's next-door neighbor, identified Flores, but only *after* she saw Flores in court sitting at the defense table. At the time of the crime, Barganier had failed to pick Flores out of a highly suggestive photo lineup featuring a recent mugshot that the Farmers Branch PD had obtained from the Irving PD soon after Childs was taken into custody. Barganier had failed to identify Flores at a time far closer to the observation in question perhaps because, the day of the crime, she had told police that she had seen two "white males" with "long, wavy hair" who looked "similar." Yet Flores was an obese Hispanic male with very short, shaved hair who looked nothing like Childs.

Between the day of the crime and her appearance in court, Barganier underwent a "forensic hypnosis" session conducted by a police officer at the police station during which she was urged to "remember more." The officer asked leading questions about whether either man had "short, shaved hair" despite her repeated statements that both driver and passenger had "long, wavy hair." After the hypnosis session failed to produce the desired results, Barganier was repeatedly exposed to

pictures of Flores, both at the police station and in the news. Finally, thirteen months later, when she appeared at the courthouse to testify for the State during Flores's death-penalty trial, Barganier declared herself "more than 100 percent certain" that Flores was the second person she had seen exiting Childs' Volkswagen.

In addition to Barganier's eleventh-hour, in-court identification, the State turned, mid-trial, to a friend in the Dallas County crime lab to enable the State to make good on a promise made to the jury during Opening Statements: that it could prove that Childs had been armed with a "bigger gun" and thus Flores must have used the smaller .380 to shoot Mrs. Black. The "bigger gun" the State had in mind was the .44 magnum revolver, which had been found in a closet at Childs' grandmother's house after his arrest and then, at some point, had migrated to the DA's Office without a record establishing a chain of custody. During trial, one of the prosecutors took the gun to his friend, Charles Linch, who worked in the Dallas crime lab. Linch was asked to look for "potatoes" in the barrel of the gun. Linch then came to court the very next morning to testify that he had, magically, found just what the DA's Office was hoping for: potato starch in the barrel of the revolver. This evidence obtained mid-trial was used to support the State's argument that Childs had used a "bigger gun" with a potato "silencer" at the crime scene to shoot the dog, thus the jury should infer that Flores had used the smaller .380 to shoot Mrs. Black.

After Flores was tried, convicted, and sentenced to death, Childs received the benefit of an undisclosed deal that had been in process well before Flores's trial (during which Childs was not asked to testify). Through the deal, all of Childs'

outstanding cases in multiple jurisdictions, including the capital murder charge, were repackaged; he was reindicted only for non-capital murder, pled guilty to shooting Mrs. Black, and was sentenced to 35 years. He served only 15 years of his sentence and was released on parole around the time the State of Texas set a date to execute Flores in 2016.

After Flores's execution date was stayed due to questions about the use of "forensic hypnosis" in the case, a great deal of information surfaced for the first time—including long suppressed handwritten notes from the lead detective indicating that Jackie had admitted to telling Childs about "dirty money" hidden behind the Blacks' medicine cabinets and that Childs had confessed to shooting Mrs. Black. Also, decades after Flores's trial, Childs' heavily redacted parole records showed that his early release from prison had been urged by his father, a former police officer with the Irving PD (whose files documenting its history with Childs and its role in developing evidence to implicate Flores have still not been disclosed).

After narrowly avoiding execution and thereafter uncovering copious favorable evidence that had long been suppressed, Flores filed a subsequent state habeas application. The application raised multiple claims, including a *Brady* claim describing evidence of a corrupt investigation and wanton prosecutorial misconduct that had enabled a wrongful conviction. However, Texas's criminal court of first and last resort for such matters, the CCA, refused to consider the merits of any claim in Flores's 826-page habeas application. *See* AppA & AppB.

This petition asks the Court to consider whether the refusal to consider the merits of claims based on newly discovered, long-suppressed evidence favorable to the defense is a violation of the right to due process.

STATEMENT OF THE CASE

I. BASIC PROCEDURAL AND FACTUAL BACKGROUND

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

When voir dire began in the Flores trial, ***no*** discovery had been produced to the defense. 2RR88-89. While potential jurors were filling out questionnaires, the State produced, for the first time, a small volume of discovery. At that time, lead prosecutor ADA Jason January claimed that he had just provided "anything exculpatory" and then later stated "I'm going to look through and see if there's anything exculpatory. If there is, I'll give it to you and then no later than cross-examination I'll give it to you." 2RR88-90. He then promised to disclose several categories of material—if they existed; but he failed to do so. For instance, ADA January later represented to the court that he did not have any evidence of "confessions involving the Defendant," when, by that date, the State had a statement (prepared by law enforcement) that the State relied on heavily at trial as proof that Flores had "confessed" to his friend Homero Garcia. This statement had been

[1] A key to the record citations is in AppB at App024.

obtained on May 18, 1998 while Garcia was in FBI custody and was told that a gun he had been caught with, in violation of the terms of his probation, was the weapon that had been used to kill Mrs. Black (which was untrue). But ADA January denied having any relevant statements as of January 19, 1999, which was eight months *after* the State had acquired Garcia's statement from the FBI. 3RR4.

As for deals—including with co-defendant Childs and his co-conspirator Jackie Roberts—ADA January insisted "there hadn't been any deal with either at this point." 3RR25. ADA January then asserted that there "wasn't enough evidence to indict [Jackie] as a coconspirator so there's not really a deal[.]" *Id.* The court ordered: "If any deals are made, make them known to the Defense." *Id*. However, ADA January made no such disclosures.

On February 10, 1999—with five jurors already seated and the presentation of evidence set to begin in a month—the defense filed a motion to compel discovery. Thereafter, on March 12, 1999—during the brief window between the end of voir dire and the beginning of the presentation of evidence—ADA January sent a "Fax Transmittal Form" to defense counsel upon which January had scribbled "exculp. ev." and purported that he had spoken that day with "William (Waylon) Dunivan" and "[h]e said Δ told him that Δ didn't do it." The witness's name was misspelled; and defense counsel did not follow up.

By trial, Flores's parents, Lily and Caterino Flores, had been indicted for allegedly "hindering the apprehension of a fugitive," *i.e.*, their son; and ADA January had made multiple attempts to indict Flores's girlfriend and alibi witness, Myra Wait,

for the same. Unbeknownst to the defense, ADA January also had several witnesses testify before the Grand Jury convened in the case pending against co-defendant Childs. Those transcripts, containing significant impeachment evidence, were not produced to the defense.

By Opening Statements, the State had no physical evidence linking Flores to Mrs. Black's murder. The State also had no eyewitnesses (other than the co-defendant Childs, who did not testify and, unbeknownst to the defense, had already been promised a deal).

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

The State subpoenaed Jill Barganier, the Blacks' next-door neighbor, to appear at trial. After seeing Flores in the courtroom at the defense table, she told the prosecutors that she could *now* identify him as the passenger she had seen exiting Childs' Volkswagen Bug before dawn the day Mrs. Black was murdered. 36RR85-86, 92. Later that morning, when Barganier started to testify, defense counsel asked to excuse the jury and formally objected to her testifying about the identification—which she was making for the first time thirteen months after the crime. The objection was based on the fact that Barganier had been put through a hypnosis session conducted by law enforcement. The prosecution argued that the hypnosis session had made no

difference but agreed to move on to another witness until they could have a hearing on the issue in the morning. 35RR161.

After the hearing on the hypnosis issue, the court overruled the defense's objection. The State then continued with its presentation, putting on Charles Linch as a trace-evidence expert. Linch claimed to have found potato fiber inside a .44 magnum revolver (which had been recovered from Childs' grandmother's house after his arrest); Linch did his testing the day before he testified. 36RR208. The State also presented Homero Garcia, who had signed a statement during a custodial interview with the FBI, after being awake "for four days." The Statement represented that Flores had told Garcia that Flores had "shot the dog." 36RR229, 221. The State ended that day by calling Barganier. She testified that Flores was the passenger she had seen get out of the Volkswagen and pointed him out in court. 36RR283. She testified "I thought we made eye contact. They knew someone was there watching them," which made her "real nervous." 36RR285. She repeated "I saw him look at me, and I thought he was watching me." 36RR286. Her testimony concluded with an assurance "I'm positive" when asked again if Flores was the man she had seen and added that her certainty was "[o]ver 100 percent. He's the man I saw that morning." 36RR294. The State devoted the next day to the presentation of extraneous offenses Flores had committed while trying to avoid apprehension. 37RR.

In its Closing Arguments, the State downplayed the testimony of several of its own witnesses who had been caught in lies, instead highlighting Barganier's seemingly credible testimony. 39RR54, 55, 93, 106. Then, without obtaining Flores's

consent, defense counsel inexplicably conceded in the defense Closing Argument that Flores had been present at the scene. 39RR68-85. This concession was a concession of guilt to capital murder under the law of parties, one of the State's theories in the charge. Defense counsel also invited the jury to find his client "guilty of murder; find him guilty of whatever you want, but it's not capital murder." 39RR86. The jury returned a guilty verdict. 39RR113. The State's punishment-phase presentation began immediately afterwards.

The next day, during a break in the State's case, defense counsel stated outside the jury's presence that the defense had planned to call Flores's parents and Myra Wait as witnesses but were not going to do so because they were still either under indictment or threat of indictment. 40RR139-140.

On April 1, 1999, the defense rested without putting on *any* punishment-phase witnesses. 41RR25. Moments before the jury returned with its punishment-phase verdict, ADA January marked two exhibits and said: "The State would like to offer State's Exhibit R100 and R101, which are copies of some of the discovery given to Defense prior to trial." 41RR99. When asked if the defense objected, counsel made clear that he would need to review the material first. ADA January's response was: "Yeah, if the Defense has any objection to that, they don't have some of that, let us know. I'm representing to the Court that's what I gave them." *Id.* But before the defense had a chance to review the materials, the jury was brought in to announce its punishment verdict; Flores was then sentenced to death. 41RR100-102.

In 2016, a facially incomplete, "permanently" (and heavily) redacted set of materials from the Farmers Branch police file was produced to Flores for the first time. AppX57. This production, nearly two decades after trial, demonstrated that the materials that ADA January had characterized on the record as being "everything" that had been produced to the defense during trial was a small fraction of the materials that the Farmers Branch PD had gathered while investigating Betty Black's murder and included materials favorable to the defense.

Thereafter, Flores unearthed a vast amount of other evidence suggesting numerous undisclosed deals given to the State's highly incentivized trial witnesses. This discovery occurred after Flores's scheduled execution was stayed in the wake of a challenge, in a previous habeas application, to the "science" that the State had relied on at trial to justify allowing a hypnotized witness to testify. Flores was unsuccessful at convincing the Texas courts that the contemporary scientific understanding of memory roundly rejects the notion that police can use "forensic hypnosis" to retrieve reliable memories from witnesses urged to "imagine" themselves in a "magical movie theater" armed with a "magical remote control" that they can use to "remember more" about observations that had not been encoded in their memories to begin with. *See Ex parte Flores*, No. WR-64,654-02, 2020 Tex. Crim. App. Unpub. LEXIS 215 (Tex. Crim. App. May 6, 2020) (unpublished).[2]

[2] Despite developing a robust evidentiary record, Flores's challenge to the use of "forensic hypnosis" was denied in a two-page opinion without any explanation. In the 2021 legislative session, the Texas state legislature passed a bill that would have banned hypnotically induced testimony from the courtroom, inspired in part by the Flores case. The Governor vetoed the bill. *See, e.g.*, David Martin Davies*, How Texas*

During that unsuccessful litigation, Flores tried to bring to the habeas court's attention some of the evidence of police and prosecutorial misconduct that was being discovered, which undermined every aspect of the State's case against Flores. But the State expressly objected to the development of that evidence, arguing that it was "not relevant" to the narrow hypnosis claim that had been authorized for further factual development. In response to a renewed *Brady* motion, the State insisted that there was nothing more to disclose and then moved to strike most of the witnesses on Flores's witness list. The court granted the State's request, radically truncating the number of witnesses Flores was permitted to call. The State's objection to developing or presenting any of the *Brady* evidence in the previous habeas proceeding was sustained. App071-072.

II. HOW THE QUESTION PRESENTED WAS RAISED AND DECIDED BELOW

On February 3, 2021, while the State sought to set a new execution date, Flores filed an 826-page subsequent state habeas application raising ten new claims under both state law and the United States Constitution. *See* AppB. The application was supported by eleven volumes of evidentiary proffers.

Under Texas law, Article 11.071 of the Texas Code of Criminal Procedure prohibits any court from considering the merits of any claim in a subsequent habeas application filed in a death-penalty case unless the CCA first authorizes the claim for consideration. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a). More specifically: "If a

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almost banned forensic hypnosis, TEXAS PUBLIC RADIO (Dec. 15, 2021), https://www.tpr.org/news/2021-12-15/how-texas-almost-banned-forensic-hypnosis (last visited Feb. 27, 2022).

subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that" one of the following circumstances is satisfied:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

The statute further directs the district clerk of the county in which the subsequent application was filed to immediately transmit it to the CCA. *See id.* § 5(b). The trial court is prohibited from taking any action on the application until the CCA decides whether any of the statutory exceptions allowing for consideration of new claims was satisfied. *See id.* § 5(c).

Flores filed his first subsequent habeas application on May 19, 2016; thus, that was the date germane to assessing whether his new claims overcame the procedural bar in Texas Code of Criminal Procedure, art. 11.071, sec. 5(a). In the subsequent state habeas application that raised new claims of actual innocence and of rampant *Brady* violations and false testimony, Flores included briefing as to how each claim satisfied the threshold requirements of section 5(a) of Article 11.071. *See* App037-051.

His evidentiary proffers also included material that had plainly not been available when his previous habeas application had been filed, for instance:

- A declaration from a leading expert in the science of eyewitness identification explaining how new research, published in **2020**, established that a witness's failure to identify a suspect the first time the witness is presented with the suspect's image is *exculpatory*, not just neutral, and that an identification made after the memory has been contaminated by the first exposure is unreliable;

- A **2020** declaration from Charles Linch, the State's trace-evidence expert at trial, disavowing his own process as standardless and explaining that his testimony about finding "potato starch" in the barrel of the .44 magnum revolver was untethered to any science: "I doubt there is anyone on the planet who can say that potato residues (starch particles) can be found in a revolver barrel if a potato is jammed on the barrel and the gun is fired. . . . Inferences made by the State in 1999, which my testimony was used to support, have not been, to my knowledge, proven by science."; and

- Voluminous court documents and other records amounting to overwhelming circumstantial evidence of several undisclosed deals made with the State's witnesses in exchange for their testimony against Flores.

On October 6, 2021, the CCA issued a two-page order finding as follows: "Having reviewed Applicant's application, we conclude that it does not satisfy the requirements of Article 11.071, section 5. Therefore, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised." App004. ***That sentence is the entirety of the CCA's analysis of the 826-page subsequent habeas application.***

On December 1, 2021, an application (21A19) was submitted to the Honorable Samuel A. Alito, Jr. for an extension of time to file a petition for a writ of certiorari to the CCA. The application was granted, permitting until March 4, 2022 to file. This petition follows.

REASONS TO GRANT THE PETITION

The State plainly violated *Brady* when it suppressed vast amounts of evidence signaling police and prosecutorial misconduct, which could have been used to dismantle the State's entire guilt-phase case against Flores. *See generally Brady v. Maryland*, 373 U.S. 83 (1963). But the issue presented here is not a matter of error correction because the merits were never considered. The issue is a distinct due process violation arising from the way Flores's *Brady,* false testimony, and actual innocence claims were summarily denied by the state's highest criminal court, ostensibly on procedural grounds. There was no procedural ground for denying merits review—unless a state may legitimately use its own *Brady* violations as a basis for barring the courthouse door.

The refusal to consider Flores's subsequent habeas application shows that Texas's criminal court of last resort has decided important questions of federal law in a way that conflicts with relevant decisions of this Court. That refusal also reflects an arbitrary application of state procedural law wholly inconsistent with the most strained notion of due process.

I. FLORES'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS BARRED FROM DEVELOPING SUBSTANTIAL HABEAS CLAIMS BY THE ARBITRARY APPLICATION OF STATE PROCEDURAL LAW.

A. When a State Creates a Process for Challenging the Constitutionality of a Conviction or Sentence in a State Post-Conviction Proceeding, Applicants Are Entitled to Due Process in Those Proceedings.

In refusing to consider the merits of Flores's claims based on an indefensible procedural-bar finding, the CCA violated Flores's right to due process.

Even if a state is not constitutionally required to entertain collateral challenges to criminal judgments in its own judicial forums, if it chooses to do so, as the State of Texas has done, the procedures it uses must comport with due process. Of course, "[a] criminal defendant proved guilty after a [presumably] fair trial does not have the same liberty interests as a free man," *Dist. Att'y's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009); but states are not free to disregard the "fundamental requisite of due process of law [that] is the opportunity to be heard." *Ford v. Wainwright*, 477 U.S. 399, 413 (1986). In other words, when a state authorizes its judiciary to act, that judiciary must "play fair" and afford due process to those who play by its rules. Otherwise, the game itself is a sham and those induced to play, based on false expectations of fairness, have a constitutional right to cry "foul."

This case is not just another example of a petitioner urging this Court to correct a misapprehension of its *Brady* jurisprudence. *See, e.g., Wearry v. Cain*, 577 U.S. 385 (2016) (*per curiam*) (reversing state post-conviction court's judgment upon finding that the prosecution's failure to disclose material evidence violated the applicant's due process rights).[3] The circumstances presented here are even more Kafkaesque. A state court arbitrarily applied the State's own procedural rules, refusing to consider federal-law claims involving serious prosecutorial misconduct by relying on the State's own misconduct to find the claims could have been raised sooner. The logic of

[3] *Wearry*, like this case, involved the State's suppression of evidence of deals witnesses obtained in exchange for testimony. Unlike this case, the petitioner in *Wearry* was at least afforded an evidentiary hearing on his *Brady* claim before it was improperly rejected on the merits; Flores was never granted a hearing of any kind on the claims at issue here.

this position is untenable. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) (rejecting the prospect of a rule "declaring 'prosecutor may hide, defendant must seek'" as "not tenable in a system constitutionally bound to accord defendants due process").

B. Flores's Subsequent Application Satisfied the Requirements for Merits Consideration under the Relevant State Procedural Rule; the Baseless Finding That His Claims Were Procedurally Barred Constitutes a Due Process Violation.

Under Texas state law, when an individual sentenced to death seeks to challenge the constitutionality of his confinement, he must do so pursuant to Article 11.071 of the Texas Code of Criminal Procedure. Current Texas law permits only one bite at the state habeas apple *unless* an applicant can satisfy one of three criteria delineated in Article 11.071, section 5(a). These criteria are:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

TEX. CODE CRIM. PROC. art. 11.071 § 5(a).

Flores relied primarily on subsection 5(a)(1), but also satisfied the other two alternative prongs by adducing affirmative evidence of his actual innocence. App037-051.

The CCA has interpreted subsection 5(a)(1) to mean that "the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications" *and* "the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). More specifically, the CCA has concluded that "[a] factual basis of a claim is 'unavailable' under Subsection (a)(1) 'if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date,' and reasonable diligence 'suggests at least some kind of inquiry has been made into the matter of the issue.'" *Ex parte Miles*, 359 S.W.3d 647, 663-64 (Tex. Crim. App. 2012) (quoting TEX. CODE CRIM. PROC. art. 11.07 § 4(c) and *Ex parte Lemke*, 13 S.W.3d 791, 794 (Tex. Crim. App. 2000), *overruled on other grounds by Ex parte Argent*, 393 S.W.3d 781 (Tex. Crim. App. 2013)).

Flores's claims in the subsequent habeas application rely on a previously unavailable factual basis such as:

- elements of a police file suppressed until 2016 pointing to significant witness-tampering and the suppressed identity of alternative perpetrators;
- advances in the field of eyewitness identification published in 2020 applied to facts only revealed in 2018 regarding Barganier's initial failure to identify Flores;
- the recantation of the State's trial expert in 2020, admitting to the baselessness of his "potato starch" testing and testimony;
- evidence of the coercion of Flores's alibi witness; and

- the discovery after 2016 of voluminous circumstantial evidence of undisclosed deals given to State's trial witnesses that was found only after Flores's execution was stayed in response to a previous habeas application.

The witnesses who received these undisclosed deals included Childs' accomplice, Jackie Roberts, Homero Garcia, who had been subjected to coercive tactics while in FBI custody, and several other drug addicts and dealers whom the State enlisted at trial to testify despite the absence of physical evidence linking Flores to Mrs. Black's death or the crime scene.

The new favorable evidence established that Flores's conviction relied on false testimony (which State actors helped manufacture) and that the State withheld impeachment evidence that could have been used in Flores's 1999 trial, in violation of his right to due process under federal law. Therefore, Flores's subsequent habeas application plainly met the requirements for merits consideration.

Flores showed the court below that he had repeatedly made requests for *Brady* material—including specific requests regarding the State's trial witnesses. Flores also showed that State's counsel, during his previous habeas proceeding, had thwarted Flores's efforts to develop evidence of the *Brady* violations he had unearthed.

Flores did not stop there. He submitted a huge quantum of new evidence to the CCA that no court had ever considered—new sworn expert reports, new sworn witness statements, and significant court records and fragments of a police file that has still not been fully disclosed and significant parts of which appear to have been destroyed, not just suppressed. Flores's voluminous evidentiary proffers included

hundreds of pages of materials that the State had never disclosed. He explained the Herculean efforts it had taken to uncover the misconduct—although no legal principle supports the proposition that such efforts are required or excuse the State's failure to disclose what it should have provided *sua sponte*. Unfortunately, *Brady* jurisprudence exists because the State's interests are embodied by fallible humans who do not always honor their obligation to seek justice, not just victory, and who are often loathe to expose the misconduct of their own colleagues, even when perpetrated years in the past. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (describing role of prosecutor as distinct from that "of an ordinary party to a controversy" "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

Flores's procurement of exculpatory and impeachment evidence far surpassed the bar imposed by state law to make "at least some kind of inquiry . . . into the matter of the issue." *Ex parte Miles*, 359 S.W.3d at 664 (finding procedural requirements for a subsequent application had been satisfied where the applicant had not received the relevant *Brady* material until after he submitted a Freedom of Information Act request ***after*** his previous habeas application had been filed).

That is, the finding that Flores was procedurally barred is contrary to the state court's own precedent.[4] Neither fact nor law justifies the state court's arbitrary decision.

[4] *See, e.g., Ex parte Fuller*, No. WR-16351-09, 2014 Tex. Crim. App. Unpub. LEXIS 332 (Tex. Crim. App. Apr. 2, 2014) (unpublished) (finding threshold requirement satisfied where material was not discoverable before initial application

Additionally, Flores more than satisfied the CCA's court-created second procedural requirement for bringing a subsequent habeas application**,** showing that "the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d at 421. Flores's subsequent habeas application included "specific facts" to support, *inter alia*, the following claims that his constitutional rights had been violated:

- Newly Available Evidence Establishes That Flores Is Actually Innocent of the Crime for Which He Was Convicted;
- Long-Suppressed Evidence, in Violation of *Brady v. Maryland*, Reveals a Pattern of Rampant Misconduct by Those Investigating and Prosecuting the Case against Flores That Was Material to His Conviction;
- Flores's Rights to a Fair Trial and to Due Process Were Violated by the State's Knowing Use of False Testimony at the Guilt-Phase of His Trial;
- Defense Counsel Improperly Overrode Flores's Sixth Amendment Right to Maintain That He Was Innocent of Betty Black's Murder, Resulting in a Structural Error under *McCoy v. Louisiana* That Requires a New Trial; and
- Flores's Due Process Right to a Fundamentally Fair Trial Was Violated by the State's Use of Testimony That Current Scientific Understanding Exposes as False.

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because the police had misplaced it); *Ex parte Uptergrove*, No. WR-49905-02, 2007 Tex. Crim. App. Unpub. LEXIS 958 (Tex. Crim. App. May 23, 2007) (unpublished) (finding threshold requirement satisfied where exculpatory eyewitness's name was not in the State's records for applicant to discover); *Ex parte Madding*, 70 S.W.3d 131, 133 n.4 (Tex. Crim. App. 2002) (finding procedural threshold satisfied considering "applicant's requests for records which were apparently unanswered"); *Ex parte Lemke*, 13 S.W.3d at 794 (finding threshold requirement satisfied where applicant requested information from attorney and was misinformed in response).

App593-850. These claims were supported by extensive, specific pleading and a Factual Background that itself spans 400 pages and was supported by numerous evidentiary proffers filed with the application. App093-492.

There was no basis for finding a procedural bar.

II. THAT THE STATE SUCCESSFULLY SUPPRESSED *BRADY* MATERIAL FOR TWO DECADES IS NOT A LEGITIMATE BASIS FOR DENYING A HABEAS APPLICANT WHO IS ACTUALLY INNOCENT THE RIGHT TO BE HEARD.

A. While States Can Impose Procedural Requirements, Those Requirements Cannot Become a Means to Evade Having the State's Own Misconduct Reviewed.

Flores easily satisfied the state procedural rules. But if the state court had followed this Court's *Brady* jurisprudence, the onus should have been on the State, not Flores. This Court has made it quite clear that ***the State*** has the obligation, irrespective of any discovery demand made by a criminal defendant, to disclose any material favorable to that individual. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 107 (1976); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). Therefore, the delay caused by the State's suppression of exculpatory and impeachment evidence, which gave rise to several of the new claims brought in Flores's subsequent habeas application, cannot fairly be laid at Flores's feet.

Yet the CCA below demanded something far more than "some kind of inquiry" from Flores. *Ex parte Miles*, 359 S.W.3d at 664. One can only surmise what the CCA expected because it did not offer any rationale in summarily announcing that all of Flores's new claims were deemed procedurally barred. *See* AppA. Seemingly, the CCA expected clairvoyance from Flores. He was somehow supposed to know of the suppressed evidence of police and prosecutorial misconduct—when all he knew was

that he, an indigent who had spent years without any representation, was sent to death row for a crime he did not commit.

The CCA's decision in this case cannot even be squared with the few published cases discussing procedural bars under section 5(a). *See, e.g.*, *Ex parte Sledge*, 391 S.W.3d 104, 107 n.11 (Tex. Crim. App. 2013) (finding claims in a non-capital subsequent habeas application procedurally barred because the applicant had been able to get non-*Brady* materials "within a period of a few days of his first attempts to do so," indicating that he would have been able to get the evidence before filing his initial application had he made *any* effort.). *Sledge* is easily distinguishable because Flores, unlike Sledge, took monumental efforts to uncover *Brady* materials that had been suppressed, which, under this Court's precedents, the State should have produced well before trial.

This Court has made it patently clear that it is reasonable for both trial counsel and habeas counsel to rely on the State to perform its duty to disclose all exculpatory and impeachment materials under *Brady*. *See Strickler v. Greene*, 527 U.S. 263, 284 (1999). In *Strickler*, this Court found that, despite the absence of a *Brady* motion, notes from a witness interview in police files should have been disclosed. Because the State had failed to disclose, this Court found that the petitioner had demonstrated good cause for failing to raise a *Brady* claim in an initial habeas application. *Id.* at 280-96. Therefore, a *Brady* violation that delays an applicant's ability to prove that a state actor gave false testimony and that delays access to exculpatory and

impeachment evidence cannot be a reasonable basis for refusing to consider the merits of a state habeas applicant's claims. Yet that is what happened below.

Although the *Brady* standard is well-established, the court below did not apply it. *Brady* holds "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. This Court later clarified that the duty to disclose such evidence applies even though there has been no request by the accused, *Agurs*, 427 U.S. at 107, and that the duty encompasses impeachment and exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; *see also Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Kyles*, 514 U.S. at 438. To comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437.

In principle, the CCA is quite familiar with the *Brady* standard. *See, e.g.*, *Ex parte Rodney Reed*, 271 S.W.3d 698, 726 (Tex. Crim. App. 2008) (noting that, "[t]o protect a criminal defendant's right to a fair trial, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the prosecution to disclose exculpatory and impeachment evidence to the defense that is material to

either guilt or punishment."). The CCA has previously acknowledged that the *Brady* "rule encompasses evidence unknown to the prosecution but known to law-enforcement officials and others working on their behalf." *Id.* (citing *Kyles*, 514 U.S. at 438). The CCA has also correctly outlined the necessary components of proving a *Brady* claim:

> an individual must show that (1) the evidence is favorable to the accused because it is exculpatory or impeaching; (2) the evidence was suppressed by the government or persons acting on the government's behalf, either inadvertently or willfully; and (3) the suppression of the evidence resulted in prejudice (*i.e.*, materiality).

Id. at 726-27; *accord Strickler*, 527 U.S. at 281-82.

Flores amassed significant "favorable" evidence, demonstrated that it had been suppressed by state actors, and developed extensive materiality arguments. App625-805. *If* the CCA believed that the 826-page application did not make a prima facie showing of a *Brady* claim, the CCA did not say so. *This* Court, however, has made clear "the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks*, 540 U.S. at 698 (quoting *Kyles*, 514 U.S. at 435). "[M]ateriality must be assessed collectively, not point by point." *Banks v. Thaler*, 583 F.3d 295, 328 (5th Cir. 2009) (citing *Kyles*, 514 U.S. at 436). The cumulative effect of the suppressed evidence in *this* case is such that it "reasonably . . . put[s] the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 419. Yet no substantive analysis was undertaken, let alone

the required comparison of the strength of the case taken to trial to how the trial would have looked different but for the suppressed evidence. *See Banks*, 540 U.S. 668.

The circumstantial case that the State took to trial against Flores was shockingly flimsy and fraught with contradictions. It was only "saved" by mid-trial developments that were the product of prosecutorial misconduct. Had the suppressed evidence been disclosed to the defense, it would have undercut the core components of the prosecution's case: (1) that Flores had been with Childs right before Childs drove his Volkswagen to the Blacks' house and entered through the garage on the morning of the murder; (2) that Barganier's identification of Flores as the Volkswagen's passenger was reliable; (3) that Flores had admitted to others that he had been present and shot the dog; and (4) that Childs had shot the dog with the .44 magnum revolver, and thus it was fair to assume that Flores had shot Mrs. Black with a .380 pistol (never recovered).

The State's case against Flores required believing the following: (1) testimony from a single witness, Jackie Roberts, that Flores was with her and Childs right before Childs drove to the Blacks' house in Childs' Volkswagen, yet Jackie was an accomplice to the crime who was given undisclosed leniency to work directly with the prosecutor in secret meetings to craft her testimony, which was ultimately contradicted by other witnesses;[5] (2) a single witness, Barganier, who testified after

[5] Jackie was arrested for conspiracy to commit capital murder while she was already on probation, but the State did not pursue an indictment; instead, it featured her as its star witness in the Flores trial. Additional evidence inculpating her and the specifics of the deal made with the lead prosecutor to avoid prosecution was never

a forensic hypnosis session that Flores was the person she had seen exiting the passenger side of the Volkswagen in the Blacks' driveway—an identification made for the first time thirteen months after-the-fact, upon seeing Flores in court at the defense table; (3) two highly compromised and incentivized witnesses, Homero Garcia and a career-informant Jonathan Wait,[6] who testified that Flores had "confessed" to them that he had been present but had only shot the Blacks' dog; and (4) testimony from trace-evidence expert Linch, whom the State recruited mid-trial to testify about finding potato starch in the barrel of a .44 magnum revolver, testing and testimony that he finally disavowed in 2020.

Each of these flimsy pillars supporting the State's guilt-phase case could have been toppled using suppressed evidence that was unavailable until *after* Flores's execution was stayed in 2016. Yet the CCA did not consider Flores's *Brady* claim, instead using the fact that the State had long suppressed evidence favorable to the accused to serve as a procedural bar to assessing his *Brady* and false testimony

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disclosed, but was instead discovered through independent investigation, including a belated admission from Jackie herself.

[6] No evidence exists that Wait disclosed this alleged "confession" to law enforcement pre-trial. On the stand, he offered up a farfetched tale about Flores stopping by his house, although Flores barely knew this man, to get a ride to an auto parts store before fleeing the country and, in the process, casually "confessed" to shooting the dog. The belatedly produced, partial police file shows that Wait was eagerly calling the Farmers Branch PD trying to be helpful by offering ideas about Flores's whereabouts before Flores was apprehended, seemingly in hopes of obtaining the reward money that was being offered; but there is no record indicating that Wait said anything, pre-trial, about Flores "confessing" to Wait.

claims—thereby violating his due process rights yet again. It is that insult added to injury that Flores urges this Court to address in granting certiorari.

B. This Case Presents a Worthy Vehicle for Addressing Significant Policy Concerns about the Integrity of Collateral Proceedings in Death-Penalty Cases in Light of a Pattern of Disregarding the Rule of Law.

Despite substantial claims that far exceed the threshold for authorization of further proceedings, the CCA dismissed Flores's subsequent application for a writ of habeas corpus without engaging with any facts. While a state court's gatekeeping of its own habeas apparatus does not necessarily implicate legal questions that would ordinarily concern this Court, this case is different because the CCA's conclusion is contrary to the facts and to the fair administration of justice. Moreover, the reliance on an indefensible procedural-bar finding is part of a larger pattern of depriving death-sentenced individuals of due process in habeas proceedings, a trend that definitely merits this Court's attention.

The court below did not explain its procedural bar finding, but, seemingly, it is based on the factually indefensible assumption that Flores should have discovered the suppressed exculpatory and impeachment evidence sooner (and most of which was never disclosed but was instead obtained through Flores's own considerable exertions). No rational adjudicator could have accepted this argument for the reasons outlined above. Therefore, it cannot fairly or accurately be deemed an independent, adequate state-law basis for refusing to review claims on the merits. *See generally, by contrast*, *Coleman v. Thompson*, 501 U.S. 722 (1991).

Unless one embraces the cynical notion that Texas's highest criminal court does not care whether a rational basis supports its decisions to forego considering the merits of constitutional challenges in death-penalty cases, the only explanation for the CCA's decision is that it undertook no analysis at all and merely assumed that all of the evidence Flores adduced to support his 2021 application must have been available in 2016 when his previous habeas application was filed. Yet some of the key evidence, on its face, did not even exist until 2020. Permitting states to do no more than provide the veneer of process raises serious concerns about the integrity of the entire collateral review apparatus, policy concerns that only this Court can address.

State courts should not be permitted to forego doing the most basic analysis assuming that the federal courts will eventually step in and clean up any legitimate problems later. For one thing, having to rely on the hope that a federal court might one day expose the untenable nature of the state court's procedural-bar finding is incompatible with current federal law. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (explaining that the AEDPA reflects the view that "state courts are the principal forum for asserting constitutional challenges to state convictions"). The obscure possibility of prevailing on the kind of due process argument raised here in a federal habeas proceeding would only mean that the habeas applicant would then be entitled to return to state court to restart the entire process, adding yet more layers

of delay, expense, and, potentially, no more than another round of pseudo-process in the quest for one fair hearing on the merits of important constitutional claims.[7]

If state courts merit deference in adjudicating claims of constitutional violations, then state courts should have to hold up their end of the bargain—providing at least a modicum of due process.

Flores was not afforded that basic due process. His meritorious *Brady,* false testimony, and actual innocence claims were never adjudicated by any court because the highest state court found a specious procedural bar. Does the Constitution permit that kind of charade—a State creating a process wherein the State can invoke procedural bars that are factually baseless? By granting certiorari, this Court can provide an urgently needed answer that clarifies death-penalty states' post-conviction due-process obligations, clarification that this Court has provided in the past in other contexts. *See, e.g., Panetti v. Quarterman*, 551 U.S. 930, 950-51 (2007) (finding state court's adjudication of a post-conviction prisoner's execution

[7] This circumstance may explain this Court's inclination to review more state courts decisions in the post-conviction setting. *See, e.g.*, *Andrus v.* Texas, 140 S.Ct. 1875 (2020) (deciding that CCA should have found counsel performed deficiently in multiple aspects and remanding for a proper assessment of the prejudice element of an ineffectiveness claim); *Wearry v. Cain*, 577 U.S. 385 (2016) (reversing state post-conviction court's judgment denying relief on *Brady* claim); *Hinton v. Alabama*, 571 U.S. 263 (2014) (deciding whether the Alabama post-conviction court correctly applied *Strickland v. Washington*); *Hall v. Florida*, 572 U.S. 701 (2014) (deciding whether the Florida post-conviction court correctly applied *Atkins*); *Missouri v. Frye*, 566 U.S. 134 (2012) (deciding whether the Missouri post-conviction court correctly applied *Strickland*); *Miller v. Alabama*, 567 U.S. 460 (2012) (deciding whether the Alabama post-conviction court correctly applied the Eighth Amendment); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (deciding whether the Kentucky post-conviction court correctly applied *Strickland*).

incompetency claim violated due process because state court's "violation of the procedural framework Texas has mandated for the adjudication of incompetency claims" undermined reliance on the State's "substantial leeway" to determine suitable process).

The CCA is the *only* court in Texas with any legal authority to decide whether claims of serious constitutional violations are even considered. Unfortunately, the CCA's approach in this case reflects a broader intransigence with respect to honoring constitutional mandates in death-penalty cases. This Court has previously recognized the need to respond to this troubling trend. For instance, in *Moore v. Texas*, 137 S.Ct. 1039, 1044 (2017) ("*Moore I*"), this Court vacated the CCA's denial of the petitioner's *Atkins* claim and remanded for further proceedings after holding that "several factors" the CCA had used as "indicators of intellectual disability" were "an invention of the CCA untied to any acknowledged source." In remanding the case, the Court prohibited use of these factors "to restrict qualification of an individual as intellectually disabled." *Id.* Yet two years later, this Court was compelled to take up the same case again because the CCA had pointedly defied this Court's directives. *See Moore v. Texas*, 139 S.Ct. 666, 670 (2019) ("Moore II") (reversing after finding "the [CCA]'s determination" "inconsistent with" *Moore I* and a repeat of "the analysis we previously found wanting").

The *Moore* cases are not, however, an anomaly. The CCA's failure to adhere to this Court's holdings was evident more recently when this Court remanded an ineffectiveness claim raised in a death-penalty case because the CCA's ruling left

unclear "whether [it] adequately conducted that weighty and record-intensive [prejudice] analysis in the first instance[.]" *Andrus v. Texas*, 140 S.Ct. 1875, 1887 (2020) (per curiam). Instead of following this Court's directives on remand, when *Andrus* returned to the CCA, a 5-4 majority defiantly ignored this Court's explicit directives about how to conduct a prejudice analysis and expressly rejected the numerous, significant instances of deficient performance this Court had identified that should have informed the prejudice analysis. *Compare id. with Ex parte Andrus*, 622 S.W.3d 892 (Tex. Crim. App. 2021). This patent disdain for this Court's precedents and the rule of law compelled that petitioner, as with Moore, to return to this Court seeking relief a second time in the same case. *See* Petition for Writ of Certiorari, *Andrus v. Texas*, No. 21-6001 (pending).

If there are any doubts about the existence of an entrenched pattern in Texas death-penalty cases of refusing to apply this Court's precedents and the relevant statutory scheme fairly, this case should resolve those doubts. No reasonable court could review the allegations raised in Flores's subsequent habeas application and determine that the right to further proceedings was procedurally barred. *See* AppB. Review should be granted because the CCA continues to undermine constitutional protections through its interpretation and application of Texas's habeas statute governing death-penalty cases.

When state courts create a post-conviction process, it must be adequate and fair enough to permit vindicating the important constitutional rights that habeas corpus is supposed to safeguard. That the State successfully suppressed *Brady*

material for two decades is a travesty, not a legitimate basis for denying Flores a right to be heard. Because a *Brady* violation may not function as a shield to block adjudication of meritorious federal claims without offending due process, this petition should be granted.

CONCLUSION

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

Respectfully submitted,

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