No. 21-7335
CAPITAL CASE

IN THE
Supreme Court of the United States

CHARLES DON FLORES,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

A Texas jury found Charles Don Flores guilty of capital murder and answered the statutory special issues in a manner requiring the trial court to sentence him to death. The Texas Court of Criminal Appeals (TCCA) affirmed Flores's conviction and sentence on direct appeal and denied his initial application for state habeas relief. This Court denied his petitions for writ of certiorari in both matters. The federal district court, Fifth Circuit, and this Court denied relief on Flores's federal habeas claims. Flores filed a second state habeas application that was fully litigated with a live hearing in the convicting court, a decision by the TCCA, and a petition for certiorari filed and rejected in this Court. In 2021, Flores filed his third state habeas application, which the TCCA dismissed for failing to satisfy the procedural requirements of Article 11.071, Section 5 of the Texas Code of Criminal Procedure. In his petition for certiorari review of the TCCA's dismissal order, Flores's presents two overlapping questions for this Court's consideration:

(1) In dismissing Flores's third state habeas application, did the TCCA arbitrarily apply an otherwise independent and adequate state-law procedural bar and thereby violate Flores's right to due process?

(2) In dismissing Flores's third state habeas application, did the TCCA improperly apply a state-law procedural bar on claims that could have been, but were not, raised in a previous application, when Flores asserted he is actually innocent and did not raise the claims earlier because the State suppressed alleged *Brady* material?

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BRIEF IN OPPOSITION

Petitioner Charles Don Flores was found guilty of capital murder and sentenced to death for the murder of Elizabeth Black during a burglary or robbery. In his third state habeas application, Flores raised ten claims, including actual innocence, suppression of evidence, and false testimony. The TCCA determined Flores's claims did not satisfy the statutory framework to excuse procedural default under Texas's abuse-of-the-writ bar. Flores now seeks certiorari review of the TCCA's dismissal, but his petition implicates nothing more than the state court's application of state procedural rules for collateral review of death sentences. Flores couches his first question presented—that the TCCA arbitrarily dismissed his third state habeas application—as a due process violation, but he is effectively complaining the TCCA misapplied the state procedural rule to his facts. In his second question presented, Flores partially attributes his failure to overcome the state procedural bar to the State's alleged suppression of *Brady* evidence. Again, Flores is merely complaining the TCCA misapplied the state procedural rule and got the facts wrong. Misapplication of a state procedural rule is not a matter for this Court. The state court's disposition, which relied upon an adequate and independent state-law ground, forecloses certiorari review. Nothing Flores presents warrants this Court's attention.

STATEMENT OF THE CASE

I. The Capital Murder Trial

A. The capital murder of Betty Black

Elizabeth ("Betty") Black lived with her husband, William ("Bill") Francis Black, in Farmers Branch, a suburb of Dallas, Texas. (RR34: 47-51).[1] On January 29, 1998, Mr. Black left for work at approximately 6:30 a.m. (RR34: 61-62). He returned three hours later to discover his wife lying dead beneath the dining room table. (RR34: 63-65). An autopsy revealed Mrs. Black died from a gunshot to the chest. (RR36: 140, 143; SX 82). Officers found a .380 caliber spent bullet on the floor near her body and a .380 caliber shell casing on the garage floor.[2] (RR35: 222, 226-27, 235-36, 255-57; SX 49-50).

The Blacks' Doberman, Santana, sustained a single gunshot. (RR34: 247; RR35: 216; RR36: 145-47). Although no bullet or casing was recovered, a hole in the carpet, defect in the concrete slab, and other forensic evidence showed the dog was shot in the dining room, walked into the living room, and died. (RR35: 240, 250-55, 270-71, 274-78; RR36: 155-56; SX 52B).

Potato fragments littered the dining room floor, table, walls, and ceiling; a hallway wall; a door; and the garage floor—indicating the shooters had placed potatoes on the barrels of their guns as "silencers." (RR35: 199, 206-07, 220-21, 226-27, 230-32, 242-44; SX 47-48). Patterns of blood and potato spatter along with the location of the body, bullet, shell casing, and carpet defect revealed different gunshots killed Mrs. Black and the dog. (RR35: 237-45, 253-54, 275-77; SX 52B). The

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[1] The State will refer to the volumes of the reporter's record from the trial as "RR." The State will refer to exhibits admitted at trial as "SX" for State's exhibits and "DX" for defendant's exhibits.

[2] An interior door led from the garage into the dining room. (RR35: 237).

dog's injuries and the size of her entrance wound suggested she was killed with a higher caliber weapon than the .380 gun used to kill Mrs. Black. (RR36: 147-50).

The intruders had knocked holes in the walls of two bathrooms and removed the sink and medicine cabinet in the master bathroom. (RR35: 201-02, 209-10). The master bathroom sink (now on the floor) had a whole potato in it. (RR35: 202, 210, 225, 232-33; SX 43, 48A). Other rooms were not disturbed, and there were no signs of forced entry or a struggle. (RR35: 202, 211-12; SX 18A).

B. Events precipitating the murder

Mrs. Black's murder did not occur in a vacuum: it emanated from a drug deal gone wrong (although Mrs. Black was not a participant and had no knowledge of the drug deal) and transpired because a large amount of cash was rumored to be secreted in the Blacks' home. (RR34: 253-56; RR38: 61, 117-18). The Blacks' son, Gary, was a drug dealer incarcerated on drug charges. (RR34: 52). Gary and his common-law wife, Jackie Roberts, had two daughters. (RR34: 53, 100-01). Jackie and the girls lived a short distance from the Blacks' home, and Mrs. Black frequently cared for the girls. (RR34: 54-55, 105, 111).

The Blacks had approximately $39,000 in cash from Gary's illegal drug trade hidden in their master bedroom closet. (RR34: 68-69, 253; RR38: 137, 191). They wrote a $500 check to Jackie monthly. (RR34: 70-71, 116, 259). The money had been a source of dispute between Gary and Jackie, and Gary was threatening to reduce Jackie's allowance. (RR34: 117; RR38: 137-39, 160).

Jackie, who was on probation for possession of methamphetamine, became romantically involved with Richard Childs about three weeks before the murder. (RR34: 106-10; RR38: 115). Childs, a drug dealer, habitually carried a .380 semiautomatic pistol in the back of his waistband. (RR34: 265-66; RR35: 63; RR38: 141, 174). Childs drove an old Volkswagen with dark tinted windows that was conspicuously painted multiple colors, including pink and purple. (RR34: 230-32; RR35: 64; RR36: 247). Jackie told Childs about Gary's money. (RR38: 136-37).

Childs and Flores were associates; like Childs, Flores used and sold drugs. (RR34: 82-83; RR35: 62; RR36: 225, 247; RR37: 80-81). Flores was also known to own and carry several different firearms, including a .380. (RR34: 81-82; RR36: 221-22, 224, 246, 250; RR37: 77-78, 92).

Flores lived with his girlfriend, Myra Wait, and her three children.[3] (RR34: 78-79; RR36: 249). Early on the morning of the murder, Flores and Childs spent three or four hours at Flores's home using methamphetamine and marijuana with Myra's brother, Jonathan Wait, and Wait's cousin, Jamie Dodge. (RR34: 82-86, 98-99; RR36: 250-52, 257). Childs and Flores left in Childs's Volkswagen at approximately 3:00 a.m. (RR34: 85; RR36: 258). They picked up Jackie, who had never met Flores. (RR34: 118-20). Jackie had arranged for her friend, Terry Plunk, to sell Childs and Flores a quarter pound of methamphetamine for $3,900. (RR34: 115, 117-18).

The trio left the Volkswagen at Jackie's house and drove Jackie's El Camino to an apartment in Dallas, where they met Plunk. (RR34: 121-23). During the

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[3] Myra and Flores reportedly were married a few days after the offense. (RR37: 95-96).

transaction, Flores weighed the drugs on a portable digital scale and declared the quantity was a quarter-ounce short. (RR34: 127-28, 176-77, 214). Plunk made up the alleged shortage. (RR34: 128-29, 214). Jackie, Childs, and Flores drove to Flores's home with the drugs. (RR34: 134-35). Flores re-weighed the methamphetamine and again accused Plunk of shortchanging him, insisting the deal was for a half pound instead of a quarter pound. (RR34: 137-39). Flores ranted about being shorted, threatened Jackie at gunpoint with a two-barreled handgun, and asked how much Plunk would pay for her head. (RR34: 138-40). Childs attempted to calm Flores down, and Jackie telephoned Plunk to ask if he would cover the claimed shortage. (RR34: 140-41, 216-18). Plunk refused. (RR34: 216-17). Flores continued demanding reimbursement in the form of additional drugs or money. (RR34: 150, 152). Jackie agreed to pay Flores $3,900 from the money at the Blacks' home, but she told Flores she needed a day to get it. (RR34: 150; RR38: 153). Childs told Flores he knew the money existed. (RR34: 150-51).

Childs, Flores, and Jackie drove to a nearby house where Childs and Flores acquired three firearms. (RR34: 143-45). Flores was armed with a "long, blue gun" and a handgun. (RR34: 144; RR38: 113). Childs also carried a handgun; of the two handguns, Childs's handgun was larger. (RR34: 144; RR38: 113). The trio made two other stops, at an apartment complex and gas station. (RR34: 145-49). Flores continued to threaten Jackie. (RR34: 145-49). The men dropped Jackie (and the El Camino) off at her home between approximately 6:35 and 7:15 a.m. and drove away in the Volkswagen. (RR34: 153, 238; RR35: 14-15, 21, 52). Doug Roberts was at

Jackie's house to take their son to school, and glimpsed Childs getting into the Volkswagen. (RR34: 233, 237-39). He was unable to see in the passenger side of the vehicle due to the dark tinted windows. (RR34: 232, 238).

Vanessa Stovall, another girlfriend of Childs's, testified that Childs and Flores arrived at Childs's grandmother's home at around 6:30 a.m. on the morning of the murder. (RR35: 70-71, 89). The three sat in the kitchen, and Flores and Stovall smoked methamphetamine. (RR35: 71-74, 90). Stovall saw Childs and Flores drive away in the Volkswagen between 6:45 and 7:00 a.m. (RR35: 75-76).

C. Childs and Flores are identified as suspects

Jill Barganier[4] lived next door to the Blacks. She testified that at about 6:45 a.m., she looked out her window and saw two men exit a pink and purple Volkswagen in the Blacks' driveway and walk toward the front door. (RR36: 280-84). She told her husband about the men. (RR36: 286). Ms. Barganier later reported what she had seen to the police, and she identified Childs as the driver from a photographic lineup. (RR36: 288-89). In the courtroom at trial, she positively identified Flores as the vehicle's passenger; she said he had turned to face her, and she thought they made eye contact. (RR36: 283, 285, 294).

Neighbors Michelle Babler and her son, Nathan Taylor, who lived across the street, testified they saw the Volkswagen at the Blacks' home at around 7:30 to 7:35 a.m. (RR35: 102-04, 138-39, 144, 149). Two men got out of the car. (RR35: 108, 139). While neither witness could positively identify either of the men, Babler testified at

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[4] Jill Barganier's name is misspelled in the trial record as "Bargainer."

trial that Flores and the passenger were similar in appearance. (RR35: 115-16). The driver of the Volkswagen "rolled" under the slightly open garage door. (RR35: 110, 141). The passenger entered, and the garage door was shut. (RR35: 110, 141-43). Babler was suspicious, but she saw another neighbor, Robert Barganier, and assumed he had also seen the men. (RR35: 110-11, 125). Mr. Barganier started to walk toward the Volkswagen, and then turned and got in his truck. (RR35: 111, 124). Since her neighbor seemed to dismiss these happenings, Babler thought everything was fine and drove away. (RR35: 110-11, 125-26).

Robert Barganier, Jill Barganier's husband, testified that his wife left the house at about 7:25 a.m., and he left within the next ten minutes. (RR35: 169-70). As he exited his house, he heard a loud, suspicious "thud." (RR35: 170, 188). He hollered for Mr. Black and checked the side and back of the Blacks' home but found nothing amiss. (RR35: 170-73). He was planning to knock on the Blacks' door when he noticed the Volkswagen in the driveway. (RR35: 174-75, 179, 191). He did not see any men. (RR35: 175). He had seen the Volkswagen previously at Jackie's home and assumed Jackie was dropping off her daughters. (RR35: 176-78). He went to his vehicle and left for work. (RR35: 181-82).

Later that morning, Jackie's mother told Doug Roberts that Mrs. Black had been murdered. (RR34: 240-41). That evening, Doug learned neighbors had seen a pink and purple Volkswagen in the Blacks' driveway. (RR34: 242-43; RR35: 21). Doug told Jackie her mother-in-law had been murdered and neighbors saw Childs's Volkswagen at the scene. (RR34: 162, 244; RR35: 23). When she learned Mrs. Black

was dead, Jackie became hysterical and collapsed. (RR34: 221, 244). Doug tried to convince Jackie to go immediately with him to the police, but Jackie feared possible retaliation or prosecution. (RR34: 163, 244, 284, 286-89; RR35: 22, 32). Doug dropped Jackie off at a motel and went to the police station. (RR34: 245-46). He reported Childs's possible involvement in the murder, and he had a second interview with police the next day. (RR34: 246; RR35: 36-37, 42-43; DX 2-3).[5]

Officers arrested Childs on January 31, 1998. (RR36: 177-79, 193). While under police surveillance, Childs had furtively worn a friend's hat and jacket and left his grandmother's home in the friend's vehicle. (RR36: 190-93; RR38: 196-98). He had clothing, a map, amphetamine, a partial box of the same brand of .380 ammunition found at the murder scene, and $400. (RR36: 179-83, 194; RR38: 197-98, 200). A search of his grandmother's residence uncovered a Smith & Wesson .44 Magnum revolver and other items. (RR36: 197-202; SX 53).[6] Trace-evidence examiner Charles Linch removed granular grey-black material from the grooves inside the .44 revolver barrel that microscopic examination indicated was raw plant material containing

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[5] On his way to the police station, Doug disposed of a map Jackie had drawn showing the area of her home and the Blacks' house, that had been discovered in a backpack in her car. (RR34: 245-46; RR35: 24-25, 28; RR38: 169-70). Jackie initially told police she drew the map for Childs. (RR34: 161; RR38: 134-35). She testified at trial, however, that she drew it for Doug's girlfriend, Elaine Dixon, who was babysitting her daughters. (RR34: 111, 159-61; RR38: 158; RR39: 16-18, 20-21).

[6] In a custodial interview, Childs inculpated himself and Flores in the offense. The interview was audio recorded, transcribed, and provided to Flores prior to trial. (RR47: SX R101). According to Childs, he shot the Blacks' dog once with a .44 Magnum revolver, and Flores shot Mrs. Black. Childs also confessed that he and Flores stuck potatoes on their gun barrels to muffle the sound of the gunfire. Childs admitted he owned several guns, including a .38, .380, and the.44 revolver seized from his grandmother's house. Childs told police he had the .44 revolver with him during the offense, but he appeared to deny using it (seemingly contradicting himself). The trial court admitted the .44 revolver into evidence. (RR36: 201-02; SX 53). Childs was charged with capital murder. Neither party called Childs as a witness at Flores's trial.

starch grains consistent with potato starch. (RR36: 211-13). Officers apprehended Jackie at Doug's apartment approximately four days after the murder. (RR34: 165-66, 246-47; RR35: 48-49). Jackie participated in police interviews in which she described the events of the early morning hours before Mrs. Black's murder. (RR34: 160-61, 167-68; RR38: 121-22, 153).

D. Flores's inculpatory statements and actions after the murder

The day after the murder, Flores admitted to a high school friend, Homero Garcia, that he and Childs had gone to a house to get some money and the whole deal had gone bad. (RR36: 217-18, 220, 237). Flores claimed he shot the dog and Childs killed the "old lady." (RR36: 220, 224, 229, 234).[7]

Two days after the murder, Flores, his girlfriend Myra Wait, and Myra's brother Jonathan Wait towed Childs's Volkswagen to a parking lot behind Flores's father's roofing business. (RR36: 261-64, 275). Flores spray-painted the Volkswagen black and removed the license plates. (RR36: 264-65). They then towed the vehicle onto the shoulder of a highway entrance ramp. (RR36: 266-67). Flores doused the Volkswagen with gasoline, lit a piece of paper, and threw it in the Volkswagen, which burst into flames. (RR36: 268).

Passing motorist James Jordan saw the vehicles on the side of the road and planned to pull over to assist when he saw Flores light the Volkswagen on fire, get in the driver's seat of Myra's vehicle, and speed away. (RR36: 268-69; RR37: 13-22).

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[7] Flores and Garcia traded guns: Flores gave Garcia a .380 in exchange for a .357. (RR36: 221-22; SX 64, 65). Flores told Garcia the .380 was not the gun used in the murder. (RR36: 228). Forensic examination later revealed this to be true. (RR36: 235).

Jordan followed, intending to obtain a license plate number and report the incident. (RR36: 269; RR37: 22). Flores evaded Jordan by speeding, running red lights, and driving aggressively. (RR36: 270-73; RR37: 27-39). Flores fired several gunshots out his driver's window at Jordan's car. (RR36: 269; RR37: 28, 30-31, 52). Authorities filed arson charges against Flores for burning the Volkswagen. (RR37: 69-70).

A short time later, Flores fled the country to avoid apprehension. Before leaving, he visited Jonathan Wait, Myra and Jonathan's father. (RR37: 82). Flores was driving a black, extended-cab pickup truck, license number 0820ZX, and had enough clothing and personal items for a vacation. (RR37: 83-84, 96). Flores told Wait he had gotten himself into a little trouble and needed to leave the country. (RR37: 84, 86). Wait knew authorities were searching for Flores. (RR37: 82). He showed Flores a newspaper article about the murder and said, "[Y]ou call this a little bit of trouble, killing a 64-year-old woman," to which Flores responded, "I only shot the dog." (RR37: 84-85, 94). Flores told Wait that he was not going to be "taken alive." (RR37: 86). Then he fled to Mexico.[8]

Although police did not know his true identity at the time, Flores was arrested on April 18, 1998 in Kyle, Texas while traveling from Mexico to Dallas. (RR37: 127, 130, 143-44). Following a report of a possible intoxicated driver, two Kyle police

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[8] The truck with license number 0820ZX, registered to Flores's father, re-entered the United States from Mexico on March 16, 1998 at Pharr, Texas. (RR37: 140-41). Caterino Flores executed a written statement on May 5, 1998, in which he said his son had told him that he was at the Blacks' house but only Childs went inside. Caterino allowed Flores to take his truck to Mexico and then reported it stolen. Caterino later delivered a Volvo to Flores in Mexico and picked up the truck. Caterino's statement was provided to Flores in pretrial discovery and admitted as a record-only exhibit at trial. (RR46: SX R5). Neither party called Caterino as a witness at trial.

officers stopped a blue Volvo. (RR37: 97-106). Flores, the vehicle's sole occupant, presented a social security card and identified himself as Juan Jojola.[9] (RR37: 109-10). After Flores failed a series of field sobriety tests, the officers initiated an arrest for Driving While Intoxicated (DWI). (RR37: 112-13, 116). Flores became violent, attempted to push the officers into highway traffic, and injured them. (RR37: 117-27). Flores bit a female officer in the arm. (RR37: 127). A sheriff's deputy stopped and helped handcuff Flores. (RR37: 123-24). Flores was transported to jail and charged with DWI and two counts of assault on a peace officer. (RR37: 125-27). Officers did not discover Flores's outstanding federal arrest warrant, and they released him on bond. (RR37: 111, 126-27, 134).

Federal Bureau of Investigation ("FBI") agents finally arrested Flores for Mrs. Black's murder on May 1, 1998. (RR37: 148, 168-69). Flores led them on a dangerous high-speed car chase, which ended with a head-on collision and foot race through a residential area. (RR37: 157-69). Flores struggled violently with agents to avoid arrest and had to be subdued by physical force. (RR37: 168-69). He suffered a broken kneecap from the collision. (RR37: 174). While being treated at Parkland Hospital several weeks later, Flores attempted to escape from custody by taking a deputy sheriff's gun and threatening to kill him. (RR37: 188-93, 208, 220-29). In the struggle, Flores sprayed the officer with mace and bit him on the wrist. (RR37: 194, 216-17, 230-31). Three or four people eventually subdued Flores. (RR37: 195, 217-19, 232).

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[9] Juan Jojola is Flores's brother. (RR40: 79-80).

E. Flores's trial theories and strategies

Flores moved to exclude Jill Barganier's in-court identification of him on the basis that she underwent hypnosis in early February 1998, about 14 months before trial (but after a hearing, the court held the identification was admissible). (RR36: 12-118). Flores further challenged Barganier's identification with evidence that the sunrise on January 29, 1998 was at 7:25 a.m., and thus the light was not sufficient at 6:45 a.m. for her to see the passenger in the neighbor's driveway. (RR38: 13, 15-19). The charge instructed the jurors that if they believed, based on the hypnosis session, that Barganier's in-court identification was a false memory, resulted from improper influence, or was untrustworthy, they must disregard it. (RR39: 32-33). Throughout trial, Flores worked to discredit Jackie Roberts. (RR34: 180, 249, 253, 255-56, 258-63, 286-91, 294; RR35: 15-16, 30-31, 33-34; RR36: 185-86; RR38: 24-28, 51-52, 55, 112-13, 117-18, 121-22, 131-37, 148-51, 166-72, 194-96, 205). He elicited testimony from Jackie that she believed half the money at the Blacks' house was rightfully hers and Mrs. Black told her immediately before the murder that Gary wanted to reduce Jackie's monthly allowance by half. (RR38: 137-40). Flores's counsel elicited testimony indicating Jackie was angry with Childs on the morning of January 29 because Childs had not returned (presumably from a burglary Jackie spearheaded) and that Jackie was not frightened of Charles Flores. (RR34: 279-80, 290; RR38: 45-46). The jury charge included an accomplice instruction as to Jackie, advising that the jury could not use Jackie's testimony to convict Flores unless it found her testimony was true, the testimony showed Flores was guilty, and other evidence

specifically connected Flores to the murder. (RR39: 33-34). Flores attacked Doug Roberts's credibility. (RR34: 249, 253, 291-94; RR35: 32-34, 37-38, 43-47, 56-57; RR38: 28, 31-32, 38-51, 53-55, 64-65, 192). He sought to emphasize the inconsistencies in Doug's and Jackie's testimony. (RR38: 24-55, 111-23, 131-51, 166-71). Flores established that: forensic evidence proved the .380 weapon he gave Homero Garcia was *not* the weapon used to kill Mrs. Black; the murder weapon was never recovered; and Childs always carried a .380 firearm. (RR34: 265-67; RR36: 231-37; RR38: 51, 88-90, 95, 174; DX 10). Flores also presented evidence Childs talked to his girlfriend Deborah Howard in January 1998 about $100,000 in hidden drug money, implying Childs was interested in the money.[10] (RR38: 176-81).

F. The jury charge

The trial court's charge instructed the jury it could find Flores guilty of capital murder in any one of three ways, as: (a) a principal (wherein Flores intentionally caused Black's death in the course of committing or attempting to commit robbery or burglary); (b) a party (wherein his co-defendant Richard Childs intentionally killed Black in the course of committing or attempting to commit robbery or burglary, and Flores—acting as a party with intent to promote or assist—solicited, encouraged, directed, aided, or attempted to aid Childs in the murder); or (c) a co-conspirator (wherein Flores and Childs entered into a conspiracy to commit robbery or burglary and, in carrying out the conspiracy, Childs intentionally killed Black, and Flores

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[10] The testimony was that Childs had asked, "What [would you] do if [you] knew where $100,000 [in drug money] was?" (RR38: 179-80).

should have anticipated Black's death would occur). (RR39: 35-37, 44-45). The jury also received instructions on the lesser-included offenses of murder and burglary. (RR39: 37-40, 46). Flores declined, as a matter of strategy, to include lesser-included-offense instructions on aggravated robbery or robbery. (RR39: 13).

G. The defense team's closing arguments

Flores's counsel argued the State had not proven Flores killed anyone. (RR39: 66). Counsel proffered that Flores's actions after January 31st were evidence not that he was guilty but that he did not want to go to prison for a murder he did not commit. (RR39: 67-68). Counsel offered a theory that Jackie Roberts believed the money at the Blacks' house was rightfully hers, planned the burglary, had Childs attempt to get the money for her, fabricated a story about events with Flores after the drug deal, and was angry at Childs that morning because he did not return. (RR39: 73-75, 82-83). Counsel argued the State had not proven Flores committed capital murder as a principal, party, or co-conspirator and that Flores would not have reasonably anticipated a murder would occur (including there was no evidence he knew Mrs. Black would be home). (RR39: 80-86). During these arguments, counsel conceded Flores was present in the home and participated in a burglary. Counsel argued Flores told Garcia no one was supposed to be home (RR39: 86). Counsel advocated for the jury to find Flores guilty of a lesser-included offense to capital murder. (RR39: 86).

II. The State Objects to the Facts Flores Presents in his Petition

Flores asks this Court to accept as true facts that have never been established or recognized by any court, state or federal. His 826-page effort in the lower court to

re-write the events of this capital murder by chipping away at the credibility of his conviction on an event-by-event, witness-by-witness basis is really a challenge to the sufficiency of the evidence supporting his judgment and sentence. His description of the offense and events leading to it (Pet. at 2-10) conflicts with trial and post-conviction evidence. No evidence he presents, considered individually or collectively, proves he is innocent. Notably, some factual statements in the petition stem from Flores's first-person perspective and are outside of any record.[11] (*See also* Writ App. Ex. 4 (Flores's own declaration)). The State asks the Court to reject Flores's unsupported "facts" and consider its record-bound statement of the case instead.

III. Flores's Direct Appeal and Post-Conviction Proceedings

The TCCA affirmed Flores's conviction and sentence on direct appeal, and this Court denied his petition for writ of certiorari. *Flores v. State*, No. AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (not designated for publication); *Flores v. Texas*, 535 U.S. 1039 (2002). Flores filed original, supplemental, and pro se applications for writ of habeas corpus in the convicting court. In his original and supplemental applications, he raised complaints regarding the punishment-phase jury instructions, deprivation

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[11] *See* Pet. at 3-4 ("Flores did not know the group of friends Jackie Roberts ran around with, except he did know Childs, who had lived across the street from [his] parents."), 4 ("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 then selling them to his friends at the Big Tex trailer park in Irving ...."), 4 ("Flores saw that Childs had become an emaciated, poorly groomed, intravenous drug user and felt sorry for him."), 5 ("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.'"), 6 ("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.'").

of qualified and certified trial counsel, ineffective assistance of trial counsel (including for conceding his guilt for burglary during closing arguments and failing to call Myra Wait as an alibi witness), witness Jill Barganier's in-court identification, *Brady* violations, and prosecutorial misconduct. In his pro se pleadings, Flores raised 17 allegations of ineffective assistance of appellate and state habeas counsel.

The convicting court issued findings of fact and conclusions of law recommending relief be denied. The TCCA adopted the convicting court's findings and denied state habeas relief, and this Court denied Flores's petition for writ of certiorari. *Ex parte Flores*, No. WR-64,654-01, 2006 WL 2706773 (Tex. Crim. App. Sept. 20, 2006) (per curiam) (not designated for publication); *Flores v. Texas*, 552 U.S. 884 (2007).

Flores timely filed a skeletal federal habeas petition raising 45 potential claims, with the promise to file a final amended petition raising no new claims. *See Flores v. Stephens*, 794 F.3d 494, 500-01 (5th Cir. 2015). He filed his amended petition on March 24, 2008, alleging the mitigation jury instructions were constitutionally defective, the prosecutor failed to disclose impeachment evidence for trace-evidence expert Charles Linch, the trial court improperly admitted the hypnotically-enhanced eyewitness testimony of witness Jill Barganier, and appellate and state habeas counsel rendered ineffective assistance by not raising several *Batson*-related claims. *Id.* The federal magistrate judge recommended relief be denied. *Flores v. Thaler*, No. 3-07-CV-0413-M-BD, 2011 WL 11902115 (N.D. Tex. Mar. 3, 2011). The federal district court denied relief and declined to grant Flores a certificate of appealability.

Flores v. Stephens, No. 3:07-CV-0413-M, 2014 WL 3534989 (N.D. Tex. July 17, 2014). The Fifth Circuit followed suit, and this Court denied Flores's petition for writ of certiorari. *Flores*, 794 F.3d at 496, 506; *Flores v. Stephens*, 136 S. Ct. 981 (2016).

In 2015, the 195th Judicial District Court of Dallas County scheduled Flores's execution for June 2, 2016. On May 19, 2016, Flores filed his second state habeas application and a motion for stay of execution, raising four grounds for relief, including that new scientific knowledge discredited Jill Barganier's eyewitness identification. The TCCA stayed Flores's execution, held his eyewitness-identification claim satisfied the requirements of Article 11.071, Section 5 of the Texas Code of Criminal Procedure, and remanded the claim to the trial court for consideration on the merits. *Ex parte Flores*, No. WR-64,654-02, 2016 WL 3141662 (Tex. Crim. App. May 27, 2016) (per curiam) (not designated for publication). The trial court held an evidentiary hearing in October 2017 and entered findings of fact and conclusions of law recommending relief be denied. The TCCA adopted the trial court's findings and denied relief. *Ex parte Flores*, No. WR-64,654-02, 2020 WL 2188757 (Tex. Crim. App. May 6, 2020) (per curiam) (not designated for publication). This Court denied Flores's petition for writ of certiorari. *Flores v. Texas*, 141 S. Ct. 1272 (2021).

On February 3, 2021, Flores filed his third state habeas application, raising ten claims.[12] The TCCA dismissed the third state habeas application without

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[12] In his first claim, Flores alleged witness Jill Barganier's initial inability to identify him in a photo lineup was exculpatory, and a new scientific consensus in the field of eyewitness identification rendered her in-court identification unreliable. His second claim alleged the State's trace-evidence expert, Charles Linch, had disavowed his own testing and trial testimony as unreliable, and contemporary forensic lab standards showed his methodology and test results lacked basic scientific

reviewing the merits of the claims raised, concluding Flores did not satisfy the requirements of Article 11.071, Section 5. *Ex parte Flores*, No. WR-64,654-03, 2021 WL 4566355, at *2 (Tex. Crim. App. Oct. 6, 2021) (per curiam) (not designated for publication); *see* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c). The present petition followed. It is Flores's fifth petition for writ of certiorari in his case.

REASONS FOR DENYING THE PETITION

The questions Flores presents for review are unworthy of the Court's attention. This case only involves the state court's application of state procedural rules for collateral review of death sentences. It implicates no due process concerns.

I. The TCCA's Decision Rested Exclusively on State-Law Procedural Grounds

Flores's petition seeks review of the TCCA's order dismissing his third state habeas application as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071, Section 5. Because the TCCA's decision involved nothing more than a proper application of Texas's procedural rules governing subsequent habeas applications in death-penalty cases, it is unassailable on certiorari, and the Court lacks jurisdiction to grant review. Flores acknowledges the TCCA never reached the merits. Although he couches his claim as a due process violation, he is effectively

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competency. His third claim alleged newly available evidence established he is actually innocent. His fourth and fifth claims alleged the State suppressed *Brady* evidence material to his conviction and death sentence. His sixth, seventh, and eighth claims alleged the State presented false testimony at trial. His ninth claim alleged his trial counsel violated his Sixth Amendment right to maintain his innocence pursuant to *McCoy v. Louisiana,* 138 S. Ct. 1500 (2018). His tenth claim alleged the State violated his due process rights by presenting the alleged false scientific testimony described in claims one and two.

seeking error correction of an application of state procedural law. His petition falls far short—on jurisdictional grounds—of warranting review.

Article 11.071, Section 5 of the Texas Code of Criminal Procedure governs subsequent applications by state petitioners who have previously sought post-conviction relief. Section 5 prohibits a state court from considering the merits of or granting relief on a death-sentenced inmate's subsequent state habeas application unless the TCCA first determines that the application contains sufficient specific facts establishing that (1) the factual or legal basis for the claim was unavailable at the time a previous application was filed; (2) but for a violation of the Constitution, no rational juror could have found the applicant guilty; or (3) but for a violation of the Constitution, no rational juror would have voted in favor of a death sentence. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a). If the TCCA determines none of the three statutory requirements has been satisfied, it must issue an order dismissing the application as an abuse of the writ. *Id.* § 5(c).

Thus, Article 11.071, Section 5 makes it clear applicants are restricted to one habeas review, and subsequent writ applications are prohibited except in the delineated circumstances. *See id.* § 5(a). A factual basis for a claim was unavailable within the meaning of Section 5(a) if it "was not ascertainable through the exercise of reasonable diligence on or before" the date the prior application was filed. *Id.* § 5(e).

After setting out a brief procedural history of the case and reciting the claims presented, the TCCA's order dismissing Flores's application states: "Having reviewed [Flores'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." *Ex parte Flores*, 2021 WL 4566355, at *2 (citing Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c)). The TCCA's dismissal order reflects its regular and strict application of the Section 5 bar, which constitutes an independent and adequate state-law ground for the court's disposition of Flores's claims. *See Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) ("This court has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.").

This Court has consistently held it will not review a federal claim decided by a state court if the state court's decision rests on a state-law ground that is independent of the merits of the federal claim and an adequate basis for the court's decision. *Foster v. Chatman,* 136 S. Ct. 1737, 1745 (2016); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies whether the state-law ground is a substantive rule dispositive of the case or a procedural barrier to adjudication on the merits. *Walker v. Martin*, 562 U.S. 307, 315 (2011). In the context of direct review of a state-court judgment, the rule is jurisdictional. *Coleman*, 501 U.S. at 729.

Because the TCCA dismissed Flores's subsequent writ application after determining none of his claims met the requirements of Article 11.071, Section 5, the state court's disposition of the claims rested on a state procedural ground that was independent of any federal issues raised and adequate to support the judgment. *See Hughes*, 530 F.3d at 342. By explicitly stating it had not considered the merits of the

claims, the TCCA left no doubt as to the independent, state-law character of its dismissal. Although Flores characterizes the TCCA's denial in his case as a due process violation, he presents no valid justification to depart from the Court's long-standing rule against reviewing state-court dismissals resting on purely state-law grounds.

Flores appears to argue the TCCA's dismissal was arbitrary because (a) he alleged the State's suppression of exculpatory and impeachment evidence excused his delay, but the TCCA still found his claims, including actual innocence, failed to meet the Article 11.071, Section 5 procedural bar (Pet. at 20-21, 26); and (b) the conclusion his claims were procedurally barred was contrary to the lower court's own precedent (Pet. at 24, n.4, 26-27). But the lower court may have concluded Flores could have raised his claims earlier regardless of any alleged suppression of evidence or that he failed to allege any new facts. Flores attempts to show the TCCA's decision does not square with *Brady* jurisprudence or its own precedent (Pet. at 24-29), but his analysis fails to show arbitrariness.

Accordingly, an adequate and independent state law barred Flores's claims in state court and divests jurisdiction in this Court. But even if the Court has jurisdiction, there is no merit to Flores's claims that imposition of the state procedural bar in his case violated due process.

II. The TCCA Correctly Applied the State-Court Procedural Bar and There Was No Due Process Violation

Flores has sought certiorari review essentially because he disagrees with the TCCA's application of state procedural law—specifically, the Article 11.071, Section

5 bar on subsequent writ applications.[13] He argues that—on his facts—the TCCA's dismissal of his allegations of actual innocence, *Brady* violations, and use of false testimony violated his right to due process.

Flores disregards the obvious: in its Article 11.071, Section 5 review, the TCCA simply found the facts were previously available when he filed his second state habeas application in 2016 and/or his original application; the law was previously available; there was no suppression of *Brady* materials that prevented him from raising his claims in 2016; the alleged false testimony merely amounted to attacks on witness credibility or the sufficiency of the evidence; and he did not present any evidence—much less new evidence—affirmatively establishing his innocence. The TCCA's dismissal of Flores's claims was not arbitrary and raised no due process concerns. Flores's assertion of a due process violation is merely an attempt to repackage his state-law procedural complaint into a federal question.

A. The TCCA correctly concluded Flores's actual innocence claim was procedurally barred.

More than twenty years after his conviction, Flores—for the first time—raised an actual innocence claim. He asserted he is actually innocent of capital murder because: (1) new science in eyewitness identification showed witness Jill Barganier's inability to identify Flores in a pretrial photo lineup was exculpatory and discredited her in-court identification; (2) new science discredited the testing and trial testimony

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[13] Flores expends substantial effort in his petition convincing the Court that, contrary to the TCCA's decision, his third state habeas application satisfied Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure. *See* Pet. at 21-26, 32, 34, 36.

of expert Charles Linch, who tested trace evidence from co-defendant Richard Childs's .44 revolver; (3) Flores was with his girlfriend Myra Wait at the time of the murder; (4) without Jill Barganier's in-court identification and Linch's testimony, no credible evidence existed to support Flores's conviction; and (5) DNA testing on gum recovered from the Blacks' residence would identify the real killer. (*See* Writ Appl. at 569-600).

Despite these claims, the TCCA properly instituted the procedural bar because Flores failed to offer newly discovered evidence affirmatively establishing actual innocence. Flores has raised a *Herrera*[14] claim—a free-standing claim of innocence based on newly discovered evidence. (Writ Appl. at 569-600). To sustain a *Herrera* claim, an applicant must prove by clear and convincing evidence no reasonable juror would have convicted him considering the new evidence. *See Ex parte Tuley*, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996). The showing must overcome the presumption that the conviction is valid, and it must "unquestionably establish" an applicant's innocence. *Tuley*, 109 S.W.3d at 392. Newly discovered evidence that only "muddies the waters" and casts doubt on a conviction, such as multiple recantations and repudiations, is insufficient to prevail in a free-standing actual innocence claim because such evidence does not affirmatively establish factual innocence by clear and convincing evidence. *Ex parte Harleston,* 431 S.W.3d 67, 89 (Tex. Crim. App. 2014).

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[14] *See Herrera v. Collins,* 113 S. Ct. 853 (1993).

The TCCA correctly instituted the procedural bar because Flores offered no newly discovered evidence in the lower court that would affirmatively establish actual innocence. His challenges to Jill Barganier's in-court identification and Linch's trace-evidence testimony do not affirmatively establish factual innocence: they merely attack the credibility of the witnesses and sufficiency of the State's case. Furthermore, these "new science" claims were ascertainable through the exercise of reasonable diligence prior to the time Flores filed his May 19, 2016 state habeas application. Flores also offered no new evidence of an alibi or exculpatory DNA evidence.

Flores alleged in the lower court that a new scientific consensus since 2016 in the field of eyewitness identification revealed Jill Barganier's failure to identify him in a photo array (shortly after the offense) was exculpatory, and her inability to identify him in that first viewing rendered her later in-court identification unreliable. (*See* Pet. at 18). In support, Flores provided a declaration from eyewitness identification expert Dr. John Wixted, Ph.D. (Writ App. Ex. 72). Citing a 2020 paper he co-authored, Dr. Wixted alleged it was not until 2020 that the field of eyewitness identification recognized that the first attempt to make an eyewitness identification contaminates the witness's memory of the event. But the relevant portion of the 2020 paper reflects that all but one of the 22 cited studies were published before Flores filed his 2016 state habeas writ. *See* Gary Wells, Margaret Kovera, Amy Douglass, Neil Brewer, Christian Meissner & John Wixted, *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification*

Evidence, Law and Human Behavior, 44(1), 3-36 (Feb. 2020), http://dx.doi.org/10.1037/lhb0000359.

Flores has raised complaints challenging Barganier's in-court identification testimony in the trial court and at every step of his state and federal post-conviction litigation. Evidence Flores provided in his federal habeas proceeding included similar science and theories to what Dr. Wixted presented. Flores's expert R. Edward Geiselman, Ph.D., opined in a March 21, 2008 affidavit, like Dr. Wixted, that Barganier was inclined to recognize Flores in court due to her enhanced familiarity with him from viewing his photo in the photo array. *Flores v. Quarterman,* No. 3:07-CV-00413-M, Pet. for Writ of Habeas Corpus by a Person in State Custody, Docket Entry 37, Pet. Ex. 3 (March 24, 2008). Flores filed supplemental briefing in federal court in 2012, seeking leave to amend his federal petition to include an ineffective assistance of trial counsel claim alleging counsel failed to adequately contest Barganier's testimony on the basis it was hypnotically induced. *Flores*, 2014 WL 3534989, at *13-14. Flores submitted an August 3, 2007 affidavit from Dr. Geiselman in support, addressing not only the effect of the hypnosis session on Barganier's in-court identification but also that "there would have been a carry-over effect from her viewing the picture of Mr. Flores in the photo array. Such carry-over effects are well known within the field of eyewitness psychology." *Flores v. Thaler,* No. 3:07-CV-00413-M, Pet'r's Supplemental Briefing and Request for Oral Argument, Docket Entry 82, Pet. Ex. 6 (June 6, 2012). Having a new expert proffer a new opinion based on a known scientific concept with a slightly new twist or a newly published article

expanding on an old concept cannot overcome the Section 5 bar. The TCCA properly concluded both the underlying facts and the science forming the basis of this claim were ascertainable through the exercise of reasonable diligence before Flores filed his 2016 state habeas application.

Flores alleged in the lower court that newly available scientific evidence showing trace-evidence analyst Charles Linch disavowed the testing he performed on Childs's .44 revolver was exculpatory. He relied on recent declarations from Linch and Janine Arvizu, a chemist and laboratory quality auditor; the Southwestern Institute of Forensic Sciences ("SWIFS") trace-evidence case file; and Linch's SWIFS personnel file. (Writ App. Exs. 64, 65, 67, 73, 74). At trial, Linch testified he microscopically examined residue he removed from inside the barrel of the .44 revolver and observed starch particles consistent with potato starch. (RR36: 211-13).

Flores exaggerates the strength and import of his new scientific evidence. He did not present any evidence in the lower court that the residue recovered from the gun barrel was not potato starch, and Linch did not state in his declaration that his potato-starch findings were inaccurate. *Cf. Ex parte Henderson*, 246 S.W.3d 690, 692 (Tex. Crim. App. 2007) (holding Henderson provided sufficient facts satisfying Article 11.071, Section 5(a) where, due to new scientific developments in understanding pediatric head trauma, the trial expert recanted his trial-time conclusive opinion it was impossible for a short-distance fall to cause the child's injury). The .44 revolver and trace-evidence slide have existed since the time of trial. In June 2016, Flores's expert Raul Guajardo examined the same trace evidence and also reported observing

starch particles on the slide, although he did not identify the type of starch. (*See* Writ App. Ex. 77). Guajardo examined the slide using polarized light microscopy, the same method Linch used in 1999. (*See* Writ App. Ex. 77; RR36: 212; RR48: SX R101). Arvizu did not examine the slide, but she opined that Linch's examination notes indicated he concluded the particles were more consistent with arrowroot starch than potato starch. (*See* Writ App. Ex. 73).

SWIFS is a government forensic-pathology and laboratory-science institution located in Dallas, Texas. It contains both the Office of the Medical Examiner and the Criminal Investigation Laboratory. Like other governmental agencies, SWIFS is subject to Texas's Public Information Act ("PIA"). *See* Tex. Gov't Code Ann. §§ 552.001-.376. Flores obtained the case file from SWIFS and Linch's personnel file through PIA requests in 2017; however, the PIA was an avenue available to Flores since before he filed his original state habeas application in 2000. Arvizu's and Linch's declarations were not time dependent and could have been obtained with reasonable diligence before May 2016. Flores raised other claims related to Linch's testimony in both his original state habeas and federal habeas proceedings. Flores did not allege a change in Linch's scientific knowledge since May 2016. Overall, Flores's evidence challenged various circumstances surrounding the testing and conditions related to SWIFS's lab operations compared to 1999 standards. All the challenges could have been raised prior to May 2016 with reasonable diligence, and nothing Flores offered

amounted to affirmative evidence of factual innocence.[15]

Other than his own bare assertion, Flores failed to present evidence he had an alibi when Mrs. Black was murdered. In the more than twenty years since his conviction, he has been unable to obtain a sworn affidavit or testimony from Myra Wait to establish an alibi. The evidence he tried to present in the lower court was not newly available. The issue of whether Myra Wait could truthfully provide an alibi was known prior to trial. In his original state habeas application and federal skeletal habeas petition, Flores raised ineffective assistance of trial counsel claims for failing to present Myra Wait as an alibi witness. Flores's own declaration (Writ App. Ex. 4), even if it were competent evidence to prove an alibi—which it is not, is not newly available since it was ascertainable since trial.[16]

Moreover, not only did Myra Wait make statements to police prior to trial inculpating Flores in the murder (*See* RR48: SX R101), but she also told his trial counsel she could not truthfully provide Flores with an alibi. And Flores admitted to counsel he was in the Blacks' home during the offense (and not with Myra). An

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[15] Flores included an allegation in the lower court that Linch's declaration, along with chain of custody records in the case, supports a "good faith" inference the particles Linch scraped from the interior grooves in the firearm barrel were "placed there after the chain of custody had been broken, likely at some point while the revolver was lying around the [District Attorney's] office." (Writ Appl. at 523-24, 573-74, 591, 641, 740-41, 751-53) (discussing "state actors" "fabricating the potato-starch evidence"). Even though his pleading in the lower court is verified by his current counsel, Flores offers only conjecture instead of specific, relevant, and credible evidence to support such a serious accusation of misconduct.

[16] Nor can Flores use historical records in his own possession or publicly available to bolster the credibility of his written declaration. (*See* Writ App. Ex. 13, 36, 44). Such records were ascertainable well before the date he filed his second state habeas application in 2016.

affidavit by trial counsel Brad Lollar submitted in the original state habeas proceeding reflected counsel had good reason not to call Myra as a witness:

> I did not call Myra Wait to alibi the defendant because he told me that he was, in fact, present at the home of the decedent and witnessed the co-defendant, Rick Childs, murder the decedent, and that at the time they were engaged in the burglary of the decedent. I could not sponsor testimony that I knew was perjurious. Moreover, Mr. Flores, [trial counsel] Mr. Parks and I agreed that the defense we would present was that the defendant was guilty of the burglary, but that the murder of Mrs. Black was an unanticipated independent action of the co-defendant. Mr. Flores told me that this was true.
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> ....
>
> Moreover, such testimony [concerning potatoes as silencers] merely confirmed what the defendant told us, that he and the codefendant had gone to the house to do the burglary and had armed themselves with potato-laden guns in order to shoot the Doberman dog they expected to find there.

Ex parte Flores, No. W98-02133-QN(A), Trial Court's Findings of Fact and Conclusions of Law, 33, 42 (April 12, 2006) (citing App. B at 2-3). Trial counsel Doug Parks's affidavit also reflected the reasoning behind the decision not to call Myra:

> Mr. Lollar and I met with Myra Wait in Mr. Lollar's office prior to trial. I recall we discussed alibi as a possible defense. It was clear that Ms. Wait was getting a lot of pressure from Mr. Flores' family, particularly his father. We spoke to Myra outside the presence of Mr. Flores' parents and she told us that she could not truthfully provide an alibi for Mr. Flores.

Id. at 73 (citing App. E at 1). Parks's affidavit also discussed two trial strategies: "Plan A," to rely on an alibi; or "Plan B," to admit Flores went to the Blacks' home intending to commit a burglary, but with no intent to kill anyone. *Id.* at 27 (citing App. E at 2). Flores submitted an exhibit in his original state habeas proceeding consisting of a June 8, 2000 letter from trial counsel Parks to habeas counsel Roy

Greenwood in which Parks stated: "[M]y notes [in the trial file] do plainly show that Flores intended to go with plan "B", which was to admit that he was at the scene but was not the shooter. I have a note in Mr. Flores['s] handwriting to that [effect]." *Id.* at 28 (citing Writ App. Ex. 7). The habeas court found trial counsel to be credible and accepted their affidavits and the contents of the letter as true. *Id.* at 28, 33-34, 42, 73.

After the murder, police officers collected a chewed wad of gum from the Blacks' living room floor, but nothing specifically indicated it was connected to the offense. (RR35: 272-74; SX 21, 22). The dog's body was in the living room between the coffee table and the couch, while the gum was recovered near the television. (RR35: 272; SX 21, 22). Forensic evidence and a blood trail indicated the dog was shot in the dining room but made her way into the living room and died. (RR35: 242-44; SX 21, 22, 31, 32). There was no evidence of a struggle in the living room, and the room was not ransacked, like the bathrooms. (*See* RR35: 274). DNA testing at the time of trial excluded both Flores and Childs from the profile found in the gum, and this information was presented to the jury. (RR35: 272, 274).

In 2021, Flores asked for the gum to be re-tested using current DNA technology, and the State agreed. As expected, the test results again excluded Flores and Childs.[17] There is no new evidence relating to the gum showing Flores is innocent. Testing at trial had already excluded Flores from the gum's DNA profile. The jury

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[17] Flores received a copy of the lab's 2021 DNA report and casefile. The testing resulted in an unknown male profile. At the time of trial and in 2021, several of the Blacks' grandchildren and neighbor children were excluded from the profile found in the gum. In May 2021, the lab uploaded the unknown profile into CODIS (the FBI's Combined DNA Index System) database. There has been no "hit" on the unknown profile to date.

heard Flores was excluded and convicted him anyway. Updated testing is not new evidence of innocence, and the existence of an unknown profile obtained from an item at the scene but not known to be connected to the crime does not affirmatively establish innocence.

Flores failed in the lower court to meet the burden of bringing his facts under a *Herrera* claim, and he failed to present new evidence of innocence. The TCCA's dismissal of Flores's actual innocence claim was not arbitrary, and Flores cannot show a due process violation.

B. The TCCA correctly concluded Flores's *Brady* claims were procedurally barred.

Flores alleged in the lower court that the State suppressed evidence material to his conviction and death sentence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) (*See* Writ Appl. at 601-91) and that the TCCA should have excused his delay in raising the claims in his third state habeas application due to the alleged suppression. He asserts here that *on his facts* the lower court's application of the procedural bar violates due process.

Flores asserted numerous discrete *Brady* violations in the lower court—on the State's count, approximately 40 pertaining to the guilt-innocence phase alone. These allegations were facially insufficient and failed to pass Section 5(a)'s muster because Flores presumed, without evidentiary support, that his trial team had no knowledge of the alleged suppressed evidence. To the contrary, some of Flores's *Brady* claims were grounded in issues discussed at trial or in discovery admitted for record-only

purposes.[18] The State clearly did not suppress information apparent from the trial record. Elsewhere, Flores left it for the TCCA to presume his trial team lacked information based on bare, conclusory allegations of suppression. He did not provide an affidavit from trial counsel or any other source asserting that his trial team was not aware of or did not receive particular information from the State. He did not describe any efforts to ascertain whether trial counsel had access to or knowledge of the alleged suppressed evidence. Without any evidence of suppression, Flores's claims rested on mere speculation. *See* Tex. Code Crim Proc. Ann. art. 11.071, § 5(a) (requiring "sufficient specific facts" establishing the claim and an exception to the subsequent writ bar). It was also fatal that most of Flores's *Brady* claims arose from alleged newly available evidence in the Farmers Branch Police Department (FBPD) case file, court records, or the SWIFS case file. Flores either received these materials or they were available to him with reasonable diligence prior to filing his 2016 second state habeas application. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1), (e).

Flores, through his prior federal habeas counsel Bruce Anton, obtained the FBPD case file before filing his second state habeas application in 2016. Anton made a PIA request for the FBPD case file on January 26, 2016. He received most of the file on March 28, 2016,[19] and a handful of additional pages on May 3, 2016. Flores

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[18] The trial record includes four record-only exhibits admitted to document discovery that the State provided to Flores prior to trial: State's Record Exhibits R1, R5, R100, and R101. *See* RR2: 88-89; RR41: 99; RR45; RR46; RR47; RR48. It is unclear whether these exhibits contain all discovery and disclosures the State provided to Flores. The State had also provided an exculpatory statement by Waylon Dunaway on March 12, 1999.

[19] The FBPD case file contains over 3300 pages.

admitted in the lower court that he obtained this case file in March 2016, before filing his second state habeas application in May 2016. (Writ Appl. at 22, 41-42, 44, 592; *see also* Pet. at 15 (admitting to receiving the FBPD case file in 2016)). Accordingly, the contents of the FBPD case file and any claims arising from it were available to Flores prior to filing his 2016 state habeas application, and the TCCA properly dismissed those claims as barred under Article 11.071, Section 5.

Furthermore, the SWIFS case file and court records (for several witnesses who had pending criminal cases during the investigation or trial of this capital murder) were discoverable with reasonable diligence prior to the time Flores filed his 2016 second state habeas application. Flores obtained the SWIFS case file through a PIA request in 2017, but he could have obtained it earlier in the same manner. The court records are public records, which Flores could have obtained as soon as the records existed, prior to or during his trial, or since.[20]

Flores relied on various other materials to support his *Brady* allegations, including: grand jury testimony by Jason Clark (Writ App. Ex. 12); Jackie Roberts's September 20, 2019 statement (Writ App. Ex. 18); an October 13, 2020 declaration by William Dunaway (a close friend of Flores's) (Writ App. Ex. 34); Charles Linch's October 13, 2020 declaration (Writ App. Ex. 74); grand jury testimony by Vanessa Stovall (Writ App. Ex. 56); jail correspondence from 1998 to 2000 (Writ App. Exs. 6,

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[20] Court records Flores relied on included: Richard Childs's records in cause numbers F97-16382-N, F98-21025-N, and other cases (Writ App. Ex. 3); Myra Wait's records in cause number F98-21103-I (Writ App. Ex. 13); Homero Garcia's records in cause number F98-31052-T (Writ App. Ex. 58); and Jackie Roberts's records in cause number F90-51130-T (Writ App. Ex. 11).

22); a May 3, 2016 affidavit by Justin Cody Prather (Writ App. Ex. 43); March 24, 2008 affidavits by Lily Flores and Carter Flores (Writ App. Exs. 29, 32); and miscellaneous records relating to Myra Wait (Writ App. Ex. 13) (including grand jury testimony of Detective John Creel, a June 13, 2003 letter allegedly from Myra to Flores's counsel Alex Calhoun, and a March 2008 email and affidavit by Flores's prior investigator J.D. Matthews).

Much of this evidence on its face showed Flores had the information before filing his second state habeas application in 2016. Furthermore, the record shows Flores received Vanessa Stovall's grand jury testimony at trial, and he provided no evidence to the lower court that the other grand jury testimony was suppressed. (Compare RR35: 58 (where trial counsel stated he received and read the 22 pages of Vanessa Stovall's grand jury testimony) with Writ App. Ex. 56 (Stovall's 22 pages of grand jury testimony)). Flores also failed to show the recently obtained statements from Jackie Roberts, Charles Linch, and William Dunaway were not ascertainable through the exercise of reasonable diligence before May 2016. The TCCA reasonably concluded these materials did not constitute a previously unavailable factual basis for Flores's *Brady* claims under the mandates of Article 11.071, Section 5(a)(1).

In asserting his *Brady* allegations, Flores often drew conclusions his evidence did not support. For example, Flores alleged the State made an undisclosed plea bargain agreement with Childs to reduce his charge from capital murder to murder in exchange for him *not* testifying at Flores's trial. (*See* Pet. at 8-9, 12; Writ Appl. at

669-70, 681).[21] Flores reached this conclusion primarily due to the fact Childs pleaded guilty to the lesser-included offense of murder, but he also relied on letters exchanged between Childs and his girlfriend Deborah Howard while Childs was incarcerated in the Dallas County jail. (*See* Writ App. Ex. 6). The letters do not reflect any evidence of an undisclosed plea deal on the capital murder charge; instead, they contain a reference to the court re-arraigning Childs for a second-degree felony on his other pending charge of possession with intent to deliver methamphetamine. (*See* Writ App. Ex. 3). The letters plainly do not support Flores's *Brady* claim.

For all of these reasons, the TCCA's dismissal of Flores's *Brady* claims was not arbitrary, and there was no due process violation.

C. The TCCA correctly concluded Flores's false-testimony claims were procedurally barred.

In the lower court, Flores alleged the State either knowingly or unknowingly induced or enabled 13 witnesses to give false testimony.[22] (Writ Appl. at 692-785). But his false-testimony claims were really attacks on the credibility of the witnesses and the sufficiency of the evidence to support the State's case. Flores's allegations primarily reflected his own belief that the testimony was not true. Where he offered evidence, he fell well short of the new-factual-basis requirement of Article 11.071,

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[21] Frankly, the State is not familiar with offers to reduce an offender's charge in exchange for the person *not* testifying. Also, Childs was in custody and subject to the court's subpoena power. Had either party subpoenaed him, he would have been required to appear.

[22] These witnesses were (1) Jackie Roberts, (2) Vanessa Stovall, (3) FBPD Officer Jerry Baker, (4) FBPD Officer Roen Serna, (5) Jill Barganier, (6) Michelle Babler, (7) Homero Garcia, (8) Jonathan Wait (Myra Wait's father), (9) James Jordan, (10) Jonathan Wait (Myra Wait's brother), (11) trace-evidence expert Charles Linch, (12) FBI Agent Michael Flinchbaugh, and (13) Charles Preston.

Section 5. No witness provided a new affidavit recanting or withdrawing his testimony. One witness, expert Charles Linch, provided a new affidavit questioning the circumstances surrounding his trace-evidence examination, criticizing the lab he worked for, and suggesting additional testing. But the probative point of Linch's trial testimony was that trace evidence he removed from the barrel of Childs's .44 revolver was consistent with starch particles, specifically potato starch. In the lower court, Flores did not present any evidence the residue was not potato starch, and Linch did not say his finding was inaccurate. To the contrary, Flores's own forensic expert, Raul Guajardo, examined the same trace-evidence slide in 2016 and found starch particles. (Writ App. Ex. 77). And Flores offered no proof Linch's affidavit was not ascertainable prior to May 2016. Overall, Flores failed to provide sufficient, specific facts that the testimony of the 13 witnesses was false or the alleged evidence in support was not available prior to filing his last state habeas application in 2016. *See* Tex. Code Crim Proc. Ann. art. 11.071, § 5(a) (requiring "sufficient specific facts" establishing the claim and an exception to the subsequent writ bar).

For example, Flores alleged in the lower court that Jackie Roberts lied throughout her trial testimony by providing a false chronology of the early morning events before Mrs. Black's murder. But Jackie provided Flores with a new affidavit in 2019, and she did not recant any of her testimony. (*See* Writ App. Ex. 18). In the lower court, Flores extensively compared Jackie's testimony to her prior statements, Childs's and Doug Roberts's interviews with law enforcement, information in the FBPD case file, and other witnesses' statements or testimony. (Writ Appl. at 696-97,

700-01, 703, 705-09). He alleged someone influenced her testimony. (Writ Appl. at 704, 710-11). He attacked her because she hid from law enforcement for four days after the murder. (Writ Appl. at 707). He claimed her testimony was false because she and Childs left Flores at his trailer at 4:00 a.m. and he went to bed. (Writ Appl. at 710, citing Exs. 4, 13). He analyzed inconsistencies in her testimony. (Writ Appl. at 711-12). In short, Flores criticized Jackie's credibility—nothing more.

Flores likewise contended Jonathan Wait, Myra and Jonathan's father, testified falsely that Flores admitted to participating in the capital murder when he told Wait that he only shot the dog. (Writ Appl. at 739, 742). Flores challenged Wait's credibility on the basis he was "a prolific snitch" who had only met Flores a few times. (Writ Appl. at 739-40). He compared Wait's testimony to law enforcement interview notes and FBI reports with information that Wait, a former federal informant, was providing to the FBI about Flores's whereabouts. (Writ Appl. at 740). These are all arguments regarding credibility and not proof of false testimony.

James Jordan was the random motorist who intended to assist when he saw the Volkswagen on the side of the highway two days after the murder. Flores alleged Jordan testified falsely that Flores was the person shooting from the driver's window (as Flores, Myra Wait, and Myra's brother Jonathan Wait fled in Myra's vehicle). (Writ Appl. at 742-43, 746). In the lower court, Flores did not deny trying to destroy the Volkswagen: he only denied shooting at Jordan. (Writ Appl. at 747, *see* Writ App. Ex. 4). Jordan identified Flores in a photo lineup as the person who burned the Volkswagen, drove Myra's vehicle, and shot at him. Flores did not provide the lower

court with an affidavit from Jordan recanting his testimony. He compared Jordan's testimony to statements he made to police. (Writ Appl. at 745-46). He challenged the photo lineup identification by comparing Jordan's initial description of the person he saw burning the vehicle, contained in a police report, to Jordan's description a few days later in his written statement—that Jordan first said Flores had "long black hair" and later said Flores had dark hair down to his collar.[23] (Writ Appl. at 743-44, 745). Both descriptions were contained in discovery provided to defense counsel at the time of trial. (RR47: SX R100). Again, these are arguments about credibility and not proof of false testimony. *See Ex parte De La Cruz,* 466 S.W.3d 855, 866-67 (Tex. Crim. App. 2015) (discussing the types of evidence admitted in a habeas proceeding that demonstrate the falsity of evidence introduced at trial); *Ex parte Weinstein*, 421 S.W.3d 656, 666 (Tex. Crim. App. 2014) (concluding a witness's testimony that his mental illness had never caused him to hallucinate was false when medical records

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[23] Flores repeatedly contends he had short, shaved hair and Jill Barganier's description of him with "long hair" evidences his innocence. (*See* Pet. at 3, 5, 7; Writ Appl. at 4-5, 7, 10, 69-70, 125, 180, 209-10, 227-28, 256, 729-31, 780). An officer's typed investigative notes in the FBPD case file indicated that on the day of the capital murder, Barganier described the Volkswagen passenger as having "darker hair than the driver," "almost black," and "longer." A detective's undated handwritten notes (likely from a later date) indicated Barganier described the passenger as fat with "med hair" (while the driver had "long hair"). At the hearing on the admissibility of her in-court identification (14 months after the offense), Bargainer recalled telling the detective that the passenger had "dark hair, dark eyes, [and a] medium build." (RR36: 102). Flores's mugshot photo used in photo lineups shortly after the capital murder depicts him with short, shaved hair. Records indicated the photo may have been from an arrest five months before the offense, but the photo itself is not dated. (*See* Writ App. Ex. 35). To the State's knowledge, the trial and post-conviction records do not contain a photo of Flores taken near the date of the offense. James Jordan described the person he saw burning the Volkswagen and running to the driver's seat of Myra Wait's car as having "long black hair" (as described in an offense report) or "dark hair down to about his collar" (as described in a written statement). (RR47: SX R100). Although Flores admits to burning the vehicle, he contended in the lower court Jordan was describing Jonathan Wait, Myra's brother. (Writ Appl. at 152, 281-82). But Jonathan was not the person who lit the Volkswagen on fire and jumped into the driver's seat of Myra's car. (*See* RR36: 268-69, 271-72) (stating that in the chase after burning the Volkswagen, Flores drove Myra's vehicle, Jonathan was in the front passenger's seat, and Myra was in the back seat).

revealed that, prior to his testimony, he had frequently reported having auditory hallucinations).

In support of the 13 false-testimony claims, Flores primarily cited evidence in the trial record or information in the FBPD case file. Flores cited some evidence that he had in his possession before May 19, 2016, including Homero Garcia's April 24, 2003 Voluntary Statement (*See* Writ Appl. at 739; Writ App. Ex. 59) and Myra Wait-related records (*See* Writ Appl. at 710; Writ App. Ex. 13 (referencing a 2008 phone interview with Flores's investigator)). Flores cited other evidence that existed prior to May 2016 or that he could have obtained through the exercise of reasonable diligence, including Jackie Roberts's court records (*See* Writ Appl. at 711; Writ App. Ex. 18), Homero Garcia's court records (*See* Writ Appl. at 739; Writ App. Ex. 58), and excerpts from the SWIFS case file (*See* Writ Appl. at 751; Writ App. Ex. 19).

The only items Flores presented in support of his false-testimony claims dated after May 2016 were his own declaration (Writ Appl. at 701, 710, 737, 747, 765; Writ App. Ex. 4), Charles Linch's declaration (Writ Appl. at 749-50; Writ App. Ex. 74), expert Janine Arvizu's declaration (Writ Appl. at 752, 768; Writ App. Ex. 73), and Jackie Roberts's 2019 statement (Writ Appl. at 711; Writ App. Ex. 18). Flores certainly possessed the information in his own affidavit since trial. Nothing in Linch's or Arvizu's declarations indicated Flores could not have obtained them earlier with reasonable diligence, and Flores provided no proof why he did not obtain these or a similar expert's opinion before May 2016. Likewise, nothing on the face of Jackie Roberts's 2019 statement indicated Flores could not have obtained it prior to filing

his second state habeas application. Besides, the statement does not contain any evidence of false testimony.

Because none of the evidence Flores offered in support of his false-testimony claims provided a new factual basis under Article 11.071, Section 5(a)(1), and because Flores's evidence would have been available by exercising reasonable diligence before he filed his prior state habeas application, the TCCA correctly dismissed his claims as an abuse of the writ. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1), (e). The TCCA's dismissal of Flores's false-testimony claims was not arbitrary, and he cannot show a deprivation of due process.

CONCLUSION

Flores has presented no compelling reasons for this Court to grant review of the TCCA's dismissal of his subsequent state habeas application. Respondent respectfully asks this Court to deny Flores's petition.

Respectfully submitted,

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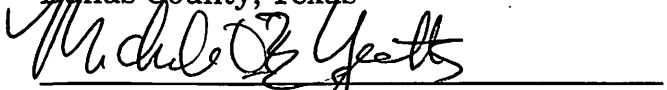

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